

Forum on
GOVERNMENT PROCUREMENT LAW



June 15 – 17, 2016
Keswick Hall
Charlottesville, Virginia

Day 1 – Wednesday, June 15, 2016

Agenda

4:00 p.m. + Check-In
7:00 p.m. Welcome Reception & Dinner – Snooker and Keswick I / II

Day 2 – Thursday, June 16, 2016

7:30 a.m. Breakfast – Keswick I & Garden Room Discussion Leaders

Session 1 **Cyber Security**

9:00 a.m. **Rand Allen**
Wiley Rein
Washington

Keswick III Cyber threats, cyber security, cyber breaches, cyber intrusions, and cyber space all raise the specter of the unknown -- for companies, individuals and the Government. Regardless of this lack of knowledge, the Government continues to establish policies and regulations to address the defensive and offensive actions currently occurring in this realm. From mandatory Department of Defense reporting of cyber intrusions to export control mandates that alter the need for authorizations when dealing in the cyber world (e.g., in the cloud), industry faces a range of regulatory obligations that highlight additional liabilities, identify IT structural vulnerabilities and create a "reflexive" attitude towards addressing these needs as they arise.

Jon Burd
Wiley Rein
Washington

Giovanna Cinelli
Dentons US LLP
McLean

Please join us as we discuss these issues:

- Where were we before DFARS 252.204-7012?
- What does DFARS Case 2013-D018 (Network Penetration Reporting and Contracting for Cloud Services) mean?
- What does the new ITAR and EAR approach to the transfer of encrypted data mean from a regulatory and liability perspective?
- Is there a double standard between the Government and industry (e.g., breaches of Target and Neiman Marcus and breaches of OPM and the IRS)?
- Where are we going and who is leading the charge?
- How do US laws affect global activity under extraterritorial limitations?
- Where unintended consequences exist?

10:20 a.m. Refreshments

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Discussion Leaders

Session 2
10:40 a.m.

Commercial Item Pricing: *It's Everybody's Problem*

Rob Burton
Crowell & Moring LLP
Washington

There is a strong Government policy favoring use of commercial products and services rather than specially designed products and services to perform Government contracts. When the government buys commercial products and services, the relevant statutes and regulations generally require the government to pay the “market price” for that item and prohibit price negotiations based on the sellers’ estimated or actual costs. Products and services actually sold or offered to the “general public”.

The issues that give rise to disputes between contractors and the government include the following:

- What is a “commercial item”
 - Products and services “of a type” with those actually sold or offered commercially
 - What buyers qualify as the general public
 - Differing standards for commercial products and commercial services
 - Obsolete or out of production products (and services) that were once but are no longer sold commercially
- Is the price offered fair and reasonable
 - Evidence that the item is sold to the general public at the price offered
 - Evidence of the actual cost associated with making the product or providing the service
 - Most-favored customer requirements
 - Subcontractors that refuse to provide information demanded by the government

12:00 p.m. Luncheon – Keswick I & Garden Room

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Discussion Leaders

Session 3
1:30 p.m.

Labor Employment Compliance: *Perfect is the Enemy of Good*

Over the past few years, the U.S. Government contracting community has been beset by new requirements relating to the labor and employment practices of prime contractors and subcontractors alike. Acting through the issuance of executive orders, the Obama administration has promulgated new rules that have driven up the risks in this already-risky market sector.

Join us as we discuss:

- E.O. 13673, “Fair Pay and Safe Workplaces;”
- E.O. 13627, Combating Trafficking in Persons;”
- The challenges these new requirements pose for primes and subs;
- The need for a self-evaluation of your labor compliance record;
- How to deal with a reportable event; and
- The risks of non-compliance.

Tim Sullivan
Thompson Coburn LLP
Washington

2:50 p.m.

Refreshments

Session 4
3:10 p.m.

Getting Closure: *Problems and Opportunities in Resolving Issues With Uncle Sam*

The inability of the Government to resolve audit issues, settle indirect rates and raise and resolve alleged non-compliances in timely fashion; the impact on the contractor; the “claim timeline” and what it means for the contractor in light of the duty to proceed; program funding shortfalls and their impact on the ability to settle meritorious claims; The statute of limitations – what is it? When does it begin to run? When does it toll? How is it applied? The SOL sword/shield dichotomy.

Establishing the final price for a flexibly priced Government contract can be a seemingly interminable process. Final rates are often established only after years of audits conducted by auditors who, if the Government Accountability Office is to be believed, are often ill-trained to perform them. Contracting Officers, who purportedly have the final say on the allowability, allocability, and reasonableness of contractor costs, are often reluctant to disagree with DCAA, given DCAA’s open call for referrals to the agency Inspector Generals of Contracting Officers who reject DCAA audit recommendations.

John Chierichella
Sheppard Mullin
Richter & Hampton
Washington

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Discussion Leaders

Session 4

Cont'd

And all of this is compounded by budgetary constraints that incentivize the Government to squeeze every last dollar out of the contractors, whether in the form of cost disallowances, Cost Accounting Standards non-compliances, or simply refusing to resolve meritorious claims and forcing contractors into the disputes process to postpone the impact of the claims on current agency appropriations.

John Chierichella

This session will discuss this issue from a number of perspectives, *e.g.*:

- In your experience, are the trends in indirect rate settlement improving, or is DCAA still as notoriously delinquent as it has been in the past?
- Are Contracting Officers intimidated by the threat of an IG referral or other intra-agency factors?
- Is the statute of limitations a meaningful curb on delinquent audit-based Government claims?
 - What is the SOL?
 - When does it begin to run?
 - What is the trend in the case law?
 - What is needed to toll the SOL?
- Are you cognizant of the applicable SOL on your affirmative claims?
 - Does the Government stretch fact-finding and negotiations on REAs with the SOL in mind?
- Do you find a fair negotiated resolution of REAs and claims to be increasingly impossible?
 - Are budgetary constraints a factor in this trend?
 - What is the solution?

4:30 p.m. End of Day 2

7:00 p.m. Reception & Dinner – Snooker & Keswick I/II

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Day 3 – Friday, June 17, 2016

7:30 a.m. Breakfast – Keswick I & Garden Room Discussion Leaders

Session 5

9:00 a.m.

Keswick III

Supply Chain Headaches

Managing a nationwide supply chain is difficult enough. Managing an international supply chain for a customer that forces you; (1) to seek cost effective suppliers that will satisfy a complex web of international agreements that eliminate or loosen restrictions on foreign content; (2) to meet – and thus to understand – the idiosyncrasies of peculiar appropriations act restrictions relating to items such as specialty metals, fabrics, and hand tools; (3) to compel your suppliers to accept and comply with an array of federally-prescribed clauses, some of which bear no relationship whatever to the goods and/or services being acquired; (4) to monitor and, in some cases, certify to supplier compliance; and (5) to deal with Government claims of fraud or threats of debarment for downstream misconduct, is a permanent procurement migraine.

This session will focus on a number of these issues, *e.g.*:

- What processes and checks are needed to ensure compliance with the Buy America Act, the Trade Agreements Act, and the various appropriations act restrictions in proposal preparation?
 - What processes and checks are needed to protect you from False Claims allegations or possible debarment?
 - How can you adequately train your supply chain to understand and apply these requirements?
 - Do Government buyers understand them, in your experience?
- Are counterfeit parts a problem and how do you prevent them?
- Does the Government's structured flow down process really work?
 - At what tier do these requirements simply "wash out"?
 - How do you deal with foreign suppliers and socio-economic flow downs?
- The commercial item supplier
 - Does FAR 52.244-6 really work?
 - Do suppliers insist on limiting the flow downs in accordance with the clause?
- Do buyers/should buyers accept those limitations?

Burton D. Ford

*Lockheed Martin
Corporation
Atlanta*

Marcia Madsen

*Mayer Brown LLP
Washington*

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Discussion Leaders

10:20 a.m. Refreshments

Session 6

10:50 a.m.

Trends in Fraud and False Claims: *Is it still possible to just make a mistake?*

The aggressive posture of Federal enforcement authorities and financially motivated *qui tam* relators has promoted creative expansion of potential False Claims Act liability. Any Federal payment is at risk of challenge based on even tangential contractor error. Recent court decisions have crystalized debates over what conduct should and should not create exposure to the False Claims Act's harsh consequences, and some of these issues are now reaching the U.S. Supreme Court.

- Does every invoice constitute an implied certification of compliance with every applicable regulation, and is it thus rendered false by any compliance failure?
- What are the contractor's burdens when attempting to comply with ambiguous regulations and contract requirements?
- When is a regulation or contract term sufficiently "material" to a Federal payment decision so that it can be the foundation for a False Claims Act violation?
- When does information constitute "credible evidence" of a False Claims Act violation to require disclosure to Federal authorities, and what is the contractor's investigation obligation?
- How does the compounding risk of suspension and debarment affect the approach to False Claims Act investigation, defense and settlement?
- What are the practical implications of Congressional action to further escalate penalties under the False Claims Act?
- What are favored best practices for internal compliance systems?

Mark Colley
Arnold & Porter LLP
Washington

Mike Mason
Hogan Lovells LLP
Washington

12:00 p.m. Closing Luncheon – Fossett's

1:30 p.m. Departure
