



# Federal Contracts: The Year In Review

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- Relatively quiet year –substantially
  - Final Rules to Replace Interim Rules
- The Storm
  - Sequestration—”The Fiscal Cliff”
  - Terminations for Convenience—fewer tasks orders/delivery orders
  - WARN Notices

# Sequestration 2014 – Where Are We?

- Shutdown status and current appropriations
- Sequestration will continue in 2014, estimated:
  - \$54.1 billion in defense
  - \$34.3 billion in non-defense
- DoD – Cuts will fall disproportionately on:
  - Procurement of goods and services
  - R&D

# National Defense Authorization Act of 2014

- Not as many procurement important issues as in previous years
- Section 1601, Periodic audits of contracting compliance by Inspector General of DOD
- Section 1611, Advancing small business growth in a new DFARS clause, specifically more information as to whether a prime contractor has attained percentages goals in the contract

# National Defense Authorization Act for Fiscal Year 2013

- Section 801 – new rules on pass through contracts – authority to contract directly with the Prime’s proposed subcontractors
- Section 832 – DCAA access to contractor’s internal audits
- Section 852 – expands FAPIIS to include information about parents, subsidiaries or successors

# National Defense Authorization Act for Fiscal Year 2013 (continued)

- Section 864 – allowable costs of contractor compensation
- Section 1641 – authorizes expansion of mentor-protégé program for “all small business concerns”
- Section 1697 – dollar limits for set-asides for women-owned small businesses have been removed in their entirety

# FAC 2005-72, 78 Fed. Reg. 80367, December 31, 2013

- This final rule amends the FAR to implement Section 743 of Division C of the Consolidated Appropriations Act 2010, which calls for certain agencies, not including DOD, to submit annual inventories of service contracts. The new reporting requirements will be in FAR Subpart 4.17.

# FAC 2005-72, 78 Fed. Reg. 80367, December 31, 2013 (continued)

- The FAC also amends the FAR to update and clarify the priority of sources of supplies and services for use by the government at FAR Subpart 8.0. The rule also includes a list of other existing federal contract vehicles to consider for agency use such as Government-Wide Acquisition Contracts (GWACS), Multi-Agency Contracts (MACS) and other procurement instruments intended for use by multiple agencies, including blanket purchase agreements under FSS contracts.



# FAC 2005-72, 78 Fed. Reg. 80367, December 31, 2013 (continued)

- Item III incorporates a long-standing rule but applies it to a new document, specifically an “End User License Agreement A, Term and Services,” in which contracting officers would bind the government without statutory authorization or other exception to an open-ended unrestricted indemnification clause. The rule reminds government officials and the public that such an agreement is unenforceable and non-binding against the government and government-authorized end users unless there is a statutory provision for the indemnification.

# Accelerated Payments to Small Business Subcontractors

- FAC 2005-71, November 25, 2013
- New Clause “Providing Accelerated Payments to Small Business Subcontractors,” FAR 52.232-40
- No specific time periods – just faster than normally required in contract or subcontract

# FAC 2005-69

“Contingency Operation” now includes responding to a major disaster or emergency

# FAC 2005-68

- Expands the application of the limit on the allowability of compensation costs to all contractor employees – not just the top five executives
- Applies to contracts with DoD, NASA, and Coast Guard
- For costs incurred after January 1, 2012 and contracts after December 31, 2011

# OFCCP's New Rules

- Now requires contractors to beef up efforts to hire Veterans and persons with disabilities
- Now applicants can self identify
- Contractors must try to hire disabled individuals so as to reach 7 percent of the employees in each job group

# Protests

- Nothing especially new and earth shaking
- Government must be consistent
- Government must document so as to explain how it reached its decision
  - *Caddell Construction Company*
  - *LINC Government Services*
  - *Grunley Construction Co., Inc.*

# Debarments

- Secret blacklist to debar contractors justified by national security concerns
  - *MG Altus Apache Co.*
  - *NCL Logistics Co.*
- ASBCA cannot review debarments
  - Henry Stranahan

# Design Build

- *Metcalf Construction*, 102 Fed. Cl. 334 (2011)
  - Contractor assumed the risk of incorrect information in the RFP
  - An overzealous government inspector who intentionally rejected acceptable work did not violate Covenant of Good Faith and Fair Dealing
  - CO allowed to withhold undisputed funds in exchange for a withdrawal of claims (both disputed and not)
- Reversed by Court of Appeals – February 2014
  - Trial Judge misinterpreted Requirement of Good Faith and Fair Dealing



# The Court of Appeals Reversed the CFC on February 11, 2014

- Specifically on the issue of good faith and fair dealing—commenting that the trial judge had read that rule far too narrowly
- Returning the rules on differing site conditions and design build to its previous requirements
- *Metcalf Construction Company v. U.S.*, 2014 WL 519596, 2014 U.S. App. LEXUS 2515 (Fed. Cir. February 11, 2014).

# Reprehensible Government Conduct Does Not Guarantee Relief

- *Eden Isle Marina, Inc. v. U.S.*, COFC No. 07-127 C, October 29, 2013

# Anti-Kickback Act

- *U. S. ex rel. Vavra, et al. v. Kellogg Brown & Root, Inc.*
- Contractor vicariously liable for double damages under the Anti-Kickback Act when the kickback is taken by its employee, even without the knowledge and against the express policy of the contractor

# Do You Have to Terminate for Convenience?

- No. Even if SBA rules a business is not small
  - *TrustComm, Inc.*, B-408456; B-408456.2, September 20, 2013.

# Bad Estimates and Bad Damages

- *The Ravens Group, Inc.*
- Government misrepresented the amount of service calls that would be handled in a month
- However, contractor must prove its damages with some precision and demonstrate that there is not a more reliable method for establishing damages

# Consideration Needed for Modification

- *Strand Hunt Construction, Inc.*
- Consideration is required for substantial modification
- That has been the rule consistently when the government wants to avoid a modification it has signed
- The Board ruled that the same rationale applies to modifications in which the contractor unwittingly gave up its rights – what is sauce for the goose is sauce for the gander

# If No Contract, then No Claim

- *Servicios y Obras Isetan S. L.*
  - Contractor allegedly furnished false documents to get contract
  - Government moves to dismiss because claims were never submitted to the Contracting Officer
  - Judges agree, but also point out that since the contract was obtained by fraud, it is *void ab initio* and therefore no claim could be allowed