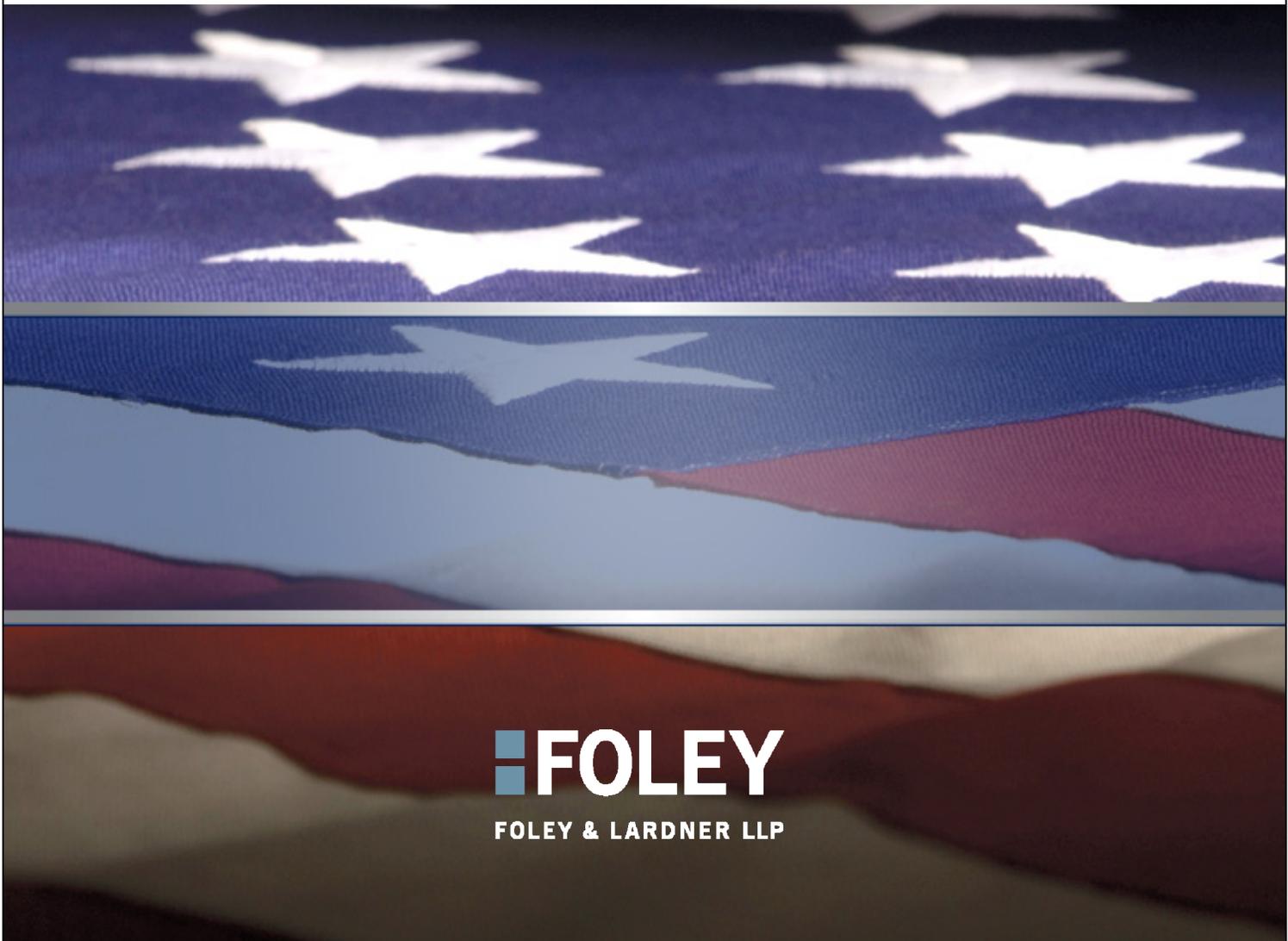




# Foley's 2011 Annual Update on Government Contracts



**FOLEY**  
FOLEY & LARDNER LLP





---

## Table of Contents

Seminar Topics	Tab 1
Federal Bid Protests	Tab 2
Becoming a Successful GSA Multiple Award Contractor	Tab 3
Compliance Potpourri	Tab 4
2011 Budget Control Act	Tab 5
Protecting and Preserving Intellectual Property Rights	Tab 6
U.S. Export Controls and Economic Sanctions Compliance	Tab 7
Safeguarding Unclassified DoD Information	Tab 8
U.S. Export Control Trends	Tab 9
FAPIIS	Tab 10
Most Common Misconceptions in Government Contracting	Tab 11
Glossary of Acronyms	Tab 12
Biographical Summaries	Tab 13



## Foley & Lardner LLP Annual Update on Government Contracts

October 11, 2011 – Schoolcraft College – Livonia, MI



October 20, 2011 – The Westin-Waltham – Boston, MA



October 25, 2011 – The Pfister Hotel– Milwaukee, WI



12:30 p.m. – 1:00 p.m. Registration

1:00 p.m. – 5:15 p.m. Seminar

Reception to Follow

### Seminar Topics

#### Federal Bid Protests

- Recent bid protest statistics
- Timeliness requirements
- Stopping performance during the protest
- Significant decisions of the Government Accountability Office (GAO), the U.S. Court of Federal Claims and the U.S. Court of Appeals for the Federal Circuit

#### Becoming a Successful GSA Multiple Award Contractor

- Opportunities available in GSA Contracting
- Completing the Commercial Sales Practice Chart
- Minimizing compliance risks
- Preparing for an audit

#### Protecting and Preserving Intellectual Property Rights

- Patent policy in government contracts
- Ownership and rights in technical data and computer software
- Protecting your rights
- Proposed changes in DoD

#### Export Controls

- What is an “export?”
- Where do I get a commodity jurisdiction ruling?
- When is a license required?
- Are there exemptions?
- Enforcement actions and trends

#### Additional Government Contracting Issues and Updates

- What happens to contractors if the government runs out of money?
- DoD’s proposed rule on safeguarding unclassified information
- The latest on the National Export Initiative
- Common Misconceptions in Government Contracting
- New developments in compliance
- Federal Awardee Performance and Integrity Information System (FAPIIS)





## Federal Bid Protests

David T. Ralston, Jr.  
Frank S. Murray  
October 2011



## Bid Protest Topics

- Why are bid protests filed?
- Where to file?
- Teaching Points from Protests
- Decision deadlines
- Timeliness issues
- How to get a stay of contract performance while protest is pending – and why it is needed
- Recent cases





## The Best Protest Guide There Is

- **Foley & Lardner 2011 Federal Protest Guide**
  - Written by David Ralston and Frank Murray
- **Provides detailed discussion of**
  - Protest jurisdiction & timeliness requirements
  - Stay of contract award/performance
  - Protest process
  - Available relief
  - Advantages/disadvantages of the forum
  - Common protest grounds
  - Available statistics



## Why File a Bid Protest?

- The agency violated a statute, regulation or provision of the solicitation
- When second in line for award - a protest is continuation of marketing efforts
  - Highlight advantages your proposal provides
  - Why it would have been selected in proper evaluation
- When the incumbent - protest allows continuation of prior contract while protest pending
- If sustained (or if agency delays in taking corrective action), can recover attorneys fees





## Where Are Bid Protests Filed?

- Three administrative fora for bid protests
  - Agency-level protests (Contracting Officer)
  - Government Accountability Office (GAO)
  - FAA’s Office of Dispute Resolution for Acquisition (ODRA) (FAA protests only)
  
- One judicial forum
  - U.S. Court of Federal Claims (COFC)



## Teaching Points from Protests

- Read the Solicitation – then read it again twice more
  - then call us with questions
- Read the Schedule (Part I) three times more
  - Sections B & C: Tells what agency wants!!
  - Section F: Tells when they want it!!
  - Section H: Special contract requirements!!
- Read Part III, Section J, Attachments – twice more – tells special issues/conditions
- Read Part IV, Instructions five times more
  - Section L: Identifies more special issues
  - Section M: Tells how the agency will pick the winner!!! This is not a secret!!!





## More Teaching Points

- Focus on provisions drafted by the agency
- Understand how the contract will work
- Understand what the agency thinks it wants
- Force agency to clarify confusing RFP language before submission of proposals
- Write proposals that respond to the RFP
- Write proposals that make sense



## More Teaching Points

- Don't assume incumbency = a win
- The program manager on the prior contract
  - IS NOT the SSA on the new one
  - May be gone by time of award
- Every procurement stands on its own
- The time to cure bad past performance evaluations
  - IS NOT during the new procurement
  - IS NOT during the bid protest





## More Teaching Points

- Brand name *or equal* means that you have to show equal
- In GSA FSS procurement, all items must be on FSS contract
- Check FedBizOps – it counts as notice
- Deliver proposals/bids timely – late is late



## More Teaching Points

- Always ask for a debrief – even when the winner
- In a protest - highlight best first
- Focus on procurement process more than result
- Never miss deadlines
- Consider ADR at GAO



## ★★★★★ Decision Deadlines at the Three Bid Protest Forums

- Agency: 35 days
- GAO: 100 days (averages around 80)
- COFC: No deadline, but decisions on injunction staying award or contract performance are typically issued within 10 to 30 days

## ★★★★★ Agency-level Protests

- Advantages:
  - Least formal/least costly forum
  - Agency may resolve issue without need for protest at GAO or COFC
  - Can preserve “solicitation defect” issues for challenge at GAO
- Disadvantages:
  - Relief unlikely – asking agency to reverse its own decision/admit mistakes
  - Waiting for agency protest decision affects timeliness of GAO protest and ability to obtain automatic stay of contract performance



## GAO Protests

- Forum of choice:
  - Get automatic stay of contract performance if protest timely filed
  - Get partial attorneys fees with win on merits

### COFC

- Why file here:
  - Second “bite at the apple” if GAO denies protest
  - Semi-appeal of GAO protest
  - Generally more lenient time deadline to file
  - But usually more expensive than GAO and legal fee recovery available only to small business



## Bid Protest Filing Time Requirements

- Teaching point: Prompt (really, really prompt) action on bid protests is a must
  - Call counsel as soon as learning of adverse procurement decision
  - Filing deadlines for automatic stay are different from agency/GAO deadlines
- Consult with counsel when preparing proposal if issues with the solicitation
  - Critical: failing to protest solicitation defects before proposal submission equals waiver





## Bid Protest Timeliness Rules

- Administrative filing deadlines:
  - Agency
    - Timeliness Rule - FAR 33.103
      - Solicitation/RFP/RFQ Defects
      - Ten calendar days of learning of basis of protest
  - GAO
    - Timeliness Rule - 4 C.F.R. § 21.2
    - 3 Different Standards for Timeliness at GAO
      - Solicitation/RFP/RFQ Defects
      - Protest at GAO Following Agency-Level Protest
      - All Other Protest Issues



## Protesting Solicitation Defects

- Solicitation/RFP/RFQ defects
  - FAR 33.103(e)/4 CFR § 21.2(a)(1)
  - Must file prior to due date for initial proposal/quote submission/bid opening
  - Alleged improprieties not in initial solicitation but subsequently incorporated into solicitation via amendment
    - Must be protested by next closing time for receipt of proposals after incorporation



★★★★★  
Common “Defective Solicitation”  
Protest Grounds

- RFP not detailed enough
- RFP too detailed, too restrictive (sets standards that are not needed)
- Many brand-name or equal issues
- Need more time to respond
- RFP is ambiguous (“patent ambiguity” vs. “latent ambiguity”)
- Small-business issues (failure to set aside, wrong size standard, HUBZone issues)

★★★★★  
Protesting Solicitation Defects

- Good rule of thumb whether issue is a “solicitation defect” that must be raised prior to closing date:
  - Is there a problem with acquisition even BEFORE proposal submission/contract award?
  - If yes, probably a “solicitation defect” issue that must be protested prior to closing date.

★★★★★  
GAO Timeliness Rules  
Non-“Solicitation Defect” Cases

- 4 CFR 21.2(a)(2)
- General rule: protests not based on defects apparent on the face of a solicitation are required to be filed within 10 days of when the protester became aware of the basis for the protest (unless the debriefing date is later)
- Typically comes up in situations where a proposal has been rejected after submission or award has been made to another offeror

★★★★★  
Common Protest Grounds That Don't Relate to  
Solicitation Defects

- Failure to follow evaluation criteria in solicitation
- Use of unstated evaluation criteria
- Improper past performance evaluation
- Lack of meaningful discussions
- Improper best value determination
- Unequal treatment
- Latent ambiguity in RFP



## GAO Timeliness Rules and Debriefings

- Impact of Debriefings
- Government is required to give briefing to offerors who request it – *in writing* – within 3 days of
  - notification of exclusion from competition (pre-award, FAR 15.505(a))
  - notification of award to a competing offeror (post-award, FAR 15.506(a))
- **MUST** be in writing and within 3 *calendar* days
  - Friday award = Monday written request



## GAO Timeliness Rules and Debriefings

- Timely debriefing requests = up to 10 days after debriefing to protest at GAO
- **BUT...** if stay of contract performance desired, **MUST, MUST, MUST** file the protest at GAO within **5 DAYS** of the post-award debriefing
- So - protest **TIMELY** at GAO may not be timely to stay contract performance



★★★★★  
GAO Timeliness Rules  
Non-“Solicitation Defect” Cases

- That means while you argue for contract:
  - awardee is performing, and
  - may not have much contract left even if you win the protest.
- So, if no stay of contract performance, relief available will be limited

★★★★★  
Obtaining Stay of Contract Performance

- To obtain **stay of contract performance**, protest at GAO/agency within latter of:
  - Ten (10) days of contract award, or
  - Five (5) days of the offered debriefing date, if the debriefing was required (*i.e.*, written request filed within 3 days)
- Must file in time to permit GAO to call agency with the notice of protest filing within the 10/5 day period.  
Untimely call = no stay
- At COFC, no automatic stay. Requires an injunction



## Timeliness of Protests at COFC

- COFC does not generally follow GAO's strict timeliness rules (i.e., no ten-day limit to file a protest)
  - Protest at COFC (not relating to solicitation defect) timely unless the protester's delay in filing is:
    - unreasonable and unexcused, and
    - prejudicial to the other party
  - Solicitation defects must be protested before proposal submission
- Delayed filing much beyond award will reduce odds that COFC enjoins contract performance



## Teaching points:

- Seek counsel advice early
  - before proposal submission for RFP defects
  - Alert counsel within hours of an adverse procurement decision
- Request a debriefing *in writing* within 3 *calendar days* of notice of adverse award decision
- Read “Foley Guide to Federal Bid Protests” for more information





## Interesting Cases from 2010-11

- Past performance beefs = claims, not protests
- GAO and COFC have jurisdiction again over most task/delivery order procurements
- Price realism means the bid has to make economic sense
- COFC conducts appellate review (just about) of GAO protest decisions
  - COFC will overturn an agency action based on “irrational” GAO decision
  - COFC will review agency corrective action decisions for rational basis





## Becoming a Successful GSA Multiple Award Schedule Contractor

Erin L. Toomey  
October 2011



### Overview

- Opportunities Available in Schedule Contracting
- Overview of Schedule Process
- Key Issues and Clauses
- Minimizing Compliance Risks
- Preparing for an Audit
- Recent Developments





## Opportunities Available in Schedule Contracting

- GSA Schedule Contracting Provides Government Agencies With the Ability to Purchase Commonly Used, Commercial Items/Services Easily and Inexpensively
- Currently 40 Different Schedules
- Over 11 Million Types of Products and Services Offered for Sale
- Over 15,000 Vendors
- Sales Exceed \$40 billion Annually
- GSA Schedule Contract is Essentially a “Hunting License”



3



## Opportunities Available in Schedule Contracting

- [00CORP](#) THE CONSOLIDATED SCHEDULE
- [03FAC](#) FACILITIES MAINTENANCE AND MANAGEMENT
- [23 V](#) AUTOMOTIVE SUPERSTORE
- [36](#) THE OFFICE, IMAGING AND DOCUMENT SOLUTION
- [48](#) TRANSPORTATION, DELIVERY AND RELOCATION SOLUTIONS
- [51 V](#) HARDWARE SUPERSTORE
- [520](#) FINANCIAL AND BUSINESS SOLUTIONS (FABS)
- [541](#) ADVERTISING & INTEGRATED MARKETING SOLUTIONS (AIMS)
- [56](#) BUILDINGS AND BUILDING MATERIALS/INDUSTRIAL SERVICES AND SUPPLIES
- [58 I](#) PROFESSIONAL AUDIO/VIDEO TELEMETRY/TRACKING, RECORDING/REPRODUCING AND SIGNAL DATA SOLUTIONS
- [599](#) TRAVEL SERVICES SOLUTIONS
- [621 I](#) PROFESSIONAL AND ALLIED HEALTHCARE STAFFING SERVICES
- [621 II](#) MEDICAL LABORATORY TESTING AND ANALYSIS SERVICES
- [65 I B](#) PHARMACEUTICALS AND DRUGS
- [65 II A](#) MEDICAL EQUIPMENT AND SUPPLIES
- [65 II C](#) DENTAL EQUIPMENT AND SUPPLIES
- [65 II F](#) PATIENT MOBILITY DEVICES
- [65 V A](#) X-RAY EQUIPMENT AND SUPPLIES
- [65 VII](#) INVITRO DIAGNOSTICS, REAGENTS, TEST KITS AND TEST SETS
- [66](#) SCIENTIFIC EQUIPMENT AND SERVICES



4



## Opportunities Available in Schedule Contracting

- [66 III](#) CLINICAL ANALYZERS, LABORATORY, COST-PER-TEST
- [67](#) PHOTOGRAPHIC EQUIPMENT - CAMERAS, PHOTOGRAPHIC PRINTERS AND RELATED SUPPLIES & SERVICES (DIGITAL AND FILM-BASED)
- [70](#) GENERAL PURPOSE COMMERCIAL INFORMATION TECHNOLOGY EQUIPMENT, SOFTWARE, AND SERVICES
- [71](#) FURNITURE
- [71 II K](#) COMPREHENSIVE FURNITURE MANAGEMENT SERVICES (CFMS)
- [72](#) FURNISHING AND FLOOR COVERINGS
- [73](#) FOOD SERVICE, HOSPITALITY, CLEANING EQUIPMENT AND SUPPLIES, CHEMICALS AND SERVICES
- [736](#) TEMPORARY ADMINISTRATIVE AND PROFESSIONAL STAFFING (TAPS)
- [738 II](#) LANGUAGE SERVICES
- [738 X](#) HUMAN RESOURCES & EQUAL EMPLOYMENT OPPORTUNITY SERVICES
- [75](#) OFFICE PRODUCTS/SUPPLIES AND SERVICES AND NEW PRODUCTS/TECHNOLOGY
- [751](#) LEASING OF AUTOMOBILES AND LIGHT TRUCKS
- [76](#) PUBLICATION MEDIA
- [78](#) SPORTS, PROMOTIONAL, OUTDOOR, RECREATION, TROPHIES AND SIGNS (SPORTS)
- [81 I B](#) SHIPPING, PACKAGING AND PACKING SUPPLIES
- [84](#) TOTAL SOLUTIONS FOR LAW ENFORCEMENT, SECURITY, FACILITIES MANAGEMENT, FIRE, RESCUE, CLOTHING, MARINE CRAFT AND EMERGENCY/DISASTER RESPONSE
- [871](#) PROFESSIONAL ENGINEERING SERVICES
- [874](#) MISSION ORIENTED BUSINESS INTEGRATED SERVICES (MOBIS)
- [874 V](#) LOGISTICS WORLDWIDE (LOGWORLD)
- [899](#) ENVIRONMENTAL SERVICES



5



## Overview of Schedule Process

- Research Schedules applicable to offered products ([www.gsa.gov](http://www.gsa.gov))
- Find current Solicitation on [www.fbo.gov](http://www.fbo.gov)
  - Solicitations are continuously updated (i.e., “Evergreen”)
  - Contain FAR and GSAM clauses (some in full text and some incorporated by reference)
- Prepare a Proposal
  - Each Solicitation is segmented into various Special Item Numbers (SINs)
  - Identify the applicable SIN for the offered products/services



6



## Overview of Schedule Process

- Complete the Commercial Sales Practices (CSP) Chart
  - GSA Solicitations and Contracts Include the CSP-1 Form, required to be completed by all offerors
  - Sets forth the contractor's pricing and discounting practices including identifying customers, prices, sales volumes, discounts, concessions, etc.
    - Identify price given to Most Favored Customer (or Category of Customers)
    - Make sure that the information and data provided is supported by appropriate documentation
    - Maintain clear and extensive descriptions of sales practices, and the bases for any particular concessions or discounts that were excluded from the CSP as not comparable or relevant
  - Used by GSA to evaluate and negotiate fair and reasonable prices based on contractor's pricing and discount practices with its best commercial customers
  - Provides the contractor with an opportunity to distinguish sales to certain customers or categories of customers and identify exceptions that would otherwise trigger the Price Reduction Clause
- Must be updated during contract term
- Not one size fits all and difficult to complete



7



## Overview of the Schedule Process

- Failure to accurately disclose information in CSP
  - 552.215-72 "Price Adjustment - Failure to Provide Accurate Information"
  - GSA may perform a Post-Award Audit to assess whether the contractor provided current, accurate and complete commercial sales information
  - GSA can reduce the price of the contract or terminate for default the contract if the contractor:
    - Fails to provide all required information
    - Provides outdated, inaccurate or incomplete information
    - Changes pricing and discounts made after submission but more than 14 days prior to completion of negotiations
- Inaccurate pricing presents significant liability
  - Failure to completely and accurately fill out the CSP-1 complicates the contractor's ability to comply with the Price Reduction Clause
  - Pricing questions and reviews often lead to expansions of the audit to other compliance areas
  - Could move from an audit to an investigation by the OIG or DoJ
  - Additional civil and, perhaps, criminal liability



8



## Overview of the Schedule Process

- After submission of the CSP-1, a GSA price negotiator will review the information and seek to obtain the contractor's "best price" given to the contractor's "most favored customer" (MFC)
  - In the commercial world, this also may be know as Most Favored Customer Pricing, or Lowest Provided or Guaranteed Pricing
  - MFC pricing is based on comparable terms and conditions among a contractor's best commercial customers
- If applicable, contractor should be prepared to identify why GSA should get less than the "best price"
  - Examples
    - Sales to MFC are subject to different terms and conditions than GSA sales (e.g., Different FOB terms, Freight inclusive/exclusive pricing, etc.)
    - Sales to MFC involve dealers or resellers, while sales to GSA are direct sales
- After negotiations with GSA have concluded, contractors should revise their CSP to reflect what was actually agreed upon with GSA



9



## Overview of the Schedule Process

- Pre-award process takes about 90-120 days
- Contract award following GSA evaluation / negotiation / acceptance of offer
  - Indefinite Delivery/Indefinite Quantity (IDIQ) Contract
  - Most have a base term of 5 years, with three 5-year option periods
  - Agencies issue Task or Delivery Orders
    - No Agency Publication Required
    - "Fair Opportunity to be Considered" Standard
    - Orders issued by individual agency Contracting Officers; GSA merely administers Schedule Program and the contract (published pricing, modifications, etc.)
    - Multiple programs authorize state and local governments to use GSA Schedules for select purchases
      - Cooperative Purchasing (Schedule 70 to purchase Information Technology supplies and services, and Schedule 84 to purchase supplies and services related to any aspect of law enforcement, security, facility management systems, fire, rescue, special purpose clothing, marine craft, and emergency/disaster response)
      - Disaster Recovery Purchasing (Presidentially-Declared Major Disasters or Acts of Terrorism)
      - Public Health Emergencies
      - 1122 Program (Counter-Drug, Emergency Response, and Homeland Security Activities)



10



## Overview of the Schedule Process

- Maximizing Sales Post-Award
  - Create and/or Foster the Relationship
  - Assist the Agency In Developing Its Needs
  - Demonstrate Return on Investment
  - Be Aware of Competition– Review GSAAdvantage!



11

©2011 Foley & Lardner LLP

11.8.008



## Key Issues and Clauses

- Price Reduction Clause (PRC)
  - 52.238-75, “Price Reductions”
  - Requires the contractor to notify the government if, during contract performance, it reduces its price list or otherwise provides an increased discount or other concession to the basis of award (BOA) customer
  - Designed to maintain the price/discount relationship negotiated at the time of award during subsequent contract performance
  - *E.g.*, Discount given to BOA Customer, Entity “X” at time of award = 15%
    - Post-award, discount to BOA increases to 20%
    - Contractor must disclose increase to GSA and offer government new, increased discount of 20%



12

©2011 Foley & Lardner LLP

11.8.008



## Key Issues and Clauses

- Price Reduction Clause (cont...)
  - Reduction extends from the same effective date and for the same time period as extended to the BOA customer
  - No price reduction for sales:
    - To commercial customers under FFP definite quantity contracts with specified delivery in excess of the Maximum Order Threshold specified in the contract
    - To Federal agencies
    - Made to State and local government entities when the order is placed under a Schedule contract (and the state and local government entity serves as the BoA)
    - Caused by an error in quotation or billing
  - Can always provide the government with a voluntary price reduction at any time under the contract



13

©2011 Foley & Lardner LLP

11/8/08



## Key Issues and Clauses

- Avoid triggering the Price Reduction clause:
  - Develop a strategy regarding the BOA customer
    - GSA will frequently push for “all commercial sales”
    - A narrow category of BOA customers is easier to administer and less likely to result in PRC violations
  - Make sure BOA customer is clearly identified in the Schedule contract
  - Implement adequate policies and procedures to ensure compliance
    - Approval required for certain sales
  - Educate all sales employees on the **government and commercial** side regarding what triggers the PRC
  - Implement internal controls to track sales and signal red flags when a sale may violate the PRC (e.g., additional discounts or other concessions)
  - Clearly document any additional discounts or concessions to the BOA and why they do not trigger the PRC (e.g., sale over the maximum order threshold, error, etc.)
  - Promptly notify the Contracting Officer of any price reduction, even if it is result of a quotation or billing error – Notice does not mean that the government will require a corresponding price reduction



14

©2011 Foley & Lardner LLP

11/8/08



## Key Issues and Clauses

- Economic Price Adjustment (EPA)
  - 552.216-70, “Economic Price Adjustment—FSS Multiple Award Schedule Contracts”
  - Contractors are permitted to request an increase in the price of goods/services on the Schedule to correspond with an increase in commercial list/catalog prices
    - After first 12 months
    - No more than 3 increases will be considered for each subsequent 12 month period
    - Must be requested prior to the last 60 days of the contract period
    - At least 30 days must lapse between requested increases
  - Aggregate increases over any 12 month period shall not exceed 5%
  - Government can negotiate a decreased price, or request that the item be removed from the Schedule
  - Contract should be bilaterally modified to reflect the price increases and the effective date of such increases



15

©2011 Foley & Lardner LLP

11/8/08



## Key Issues and Clauses

- Industrial Funding Fee (IFF)
  - 552.238-74, “Industrial Funding Fee and Sales Reporting”
  - Fee paid to GSA to cover GSA’s administrative and program costs of administering the Schedule
    - Incorporated into contractor’s price
    - IFF currently stands at .75%
    - Paid Quarterly based on the calendar quarter – Make sure you file timely
    - Reports submitted within 30 days after the completion of each reporting quarter
    - Payments submitted within 30 days after the completion of each calendar quarter
    - Failure to pay constitutes a debt and interest will accrue
  - When does an IFF audit occur?
    - Generally, annually or just prior to renewal (though, some contractors “never”)
    - Performed during Contractor Assistance Visits
    - If problems or inconsistencies are discovered, expect follow-up audits
  - What does the audit focus on?
    - Two main objectives: (1) To track all invoices for GSA orders and report Schedule sales correctly; and (2) correct calculation and payment of IFF to GSA
  - Consequences of non-compliance include termination for default and withholding/set-off of payments



16

©2011 Foley & Lardner LLP

11/8/08



## Key Issues and Clauses

- Trade Agreements Act (TAA)
  - FAR 52.225-5, “Trade Agreements”
  - Schedule contractors must certify that all end products under their contracts are mined, produced, manufactured, or “substantially transformed” in the US or other “designated country”
    - Substantial transformation occurs where:
      - Items are combined “into a new and different article of commerce with a name, character, or use distinct from that of the articles or articles from which it was transformed.” (Note: Mere assembly does not satisfy this test)
    - Designated countries = those that have reciprocal Trade Agreements with the U.S. (e.g., NAFTA, WTO Government Procurement Agreement Country). China is not eligible
    - To establish substantial transformation, extensive review of production processes and product costs are normally required
  - Contractor must indicate in its Trade Agreements Certificate if it intends to provide other than a U.S.-made or designated country end product



17



## Key Issues and Clauses

- Trade Agreements Act (cont...)
  - Active Enforcement yielding significant penalties
    - Termination for default
    - Civil and criminal penalties for false certifications
    - Suspension or debarment
  - Protective Measures:
    - Review internal sourcing and manufacturing data to ensure the end product is mined, produced, manufactured, or substantially transformed in the U.S. or other designated country
    - Flowdown TAA requirements to manufacturers / suppliers
    - Receive letters of supply from manufacturers / suppliers certifying that end products are TAA compliant
    - Require manufacturers / supplier to indemnify for TAA violations



18



## Key Issues and Clauses

- Penalties for Noncompliance
  - Potential penalties for failing to comply with Schedule contract's terms and conditions:
    - Price Adjustment
    - Termination for Default or Convenience
    - Suspension and Debarment
    - False Claims Act liability
    - False Statements Act liability
    - Other Fraud Statutes
    - Criminal Prosecution
  - Developing and implementing an effective compliance program is critically important to avoid these penalties



19



## Key Issues and Clauses

- Examples of Recent Enforcement Actions
  - Fastenal Company (January 2011)
    - During a post-award audit, GSA OIG learned that Fastenal knowingly failed to meet its contractual obligations to provide GSA with current, accurate, and complete information in its CSP.
    - Fastenal allegedly failed to comply with the PRC by improperly assessing delivery and sales tax charges on government sales.
    - Fastenal allegedly violated the TAA by knowingly selling products to the US that were manufactured in China.
    - Fastenal agreed to pay the government \$6.25M.
  - Hewlett Packard (August 2010)
    - Settled for \$55M after GSA alleged that its pricing disclosures were inaccurate.
  - NetApp Inc. (April 2009)
    - Former employee indicated the company knowingly failed to provide GSA with current, complete and accurate information in its CSP and knowingly made false statements to GSA about its sales practices and discounts.
    - NetApp agreed to pay the government \$128M.
    - Qui tam relator received \$19.2M as his share of the government's recovery.



20



## Preparing for an Audit

- 552.215-71, “Examination of Records by GSA (Multiple Award Schedule)”
  - GSA may perform an audit to determine compliance with CSP disclosures, PRC, and IFF payments for up to 3 years after final payment
  - Base award and options each considered as separate contracts for the purpose of applying this clause
- GSA OIG may decide to conduct an audit around the time a contractor submits or is planning to submit information supporting renewal of its contract
  - GSA will want to usually see 12 months of sales data to assess pricing disclosures
- Unfortunately, many contractors’ Schedule contract files are incomplete...



21



## Preparing for an Audit

- Contract files should contain the following key documents:
  - Documents Relating to Schedule contract
    - Original Proposal
    - Revised Proposal(s)
    - Disclosures of CSP data
    - Final Proposal Revision (FPR) memorializing negotiations
    - Contract award (signed) including final CSP
    - Contract Modifications
    - Key correspondence with the Contracting Officer
    - Commercial price lists
    - IFF reports and evidence of payment
    - Notes of discussions with Contracting Officer
  - Documents Relating to Task and Delivery Orders
    - RFQs
    - Quotes
    - Task and Delivery Orders
    - Purchase Orders
    - Invoices
    - Key correspondence regarding discounts and concessions
    - Memoranda to the file regarding basis for discounts and concessions



22



## Preparing for an Audit

- Auditors will review sample sets of relevant source documents to validate your compliance
  - Auditors will want to see non-GSA commercial sales to make sure GSA is getting the contractor's "best price"
  - Develop a record of BOA customer sales that the contractor is willing to share with the auditors
- Audit could expand to include the review of more broadly defined company pricing practices and compliance with other Schedule terms and conditions such as the TAA
- Provide yourself a sufficient amount of time to review your pricing and sales data prior to expiration of your contract (*i.e.*, at least 6 months)
  - Has anything changed with respect to your sales, pricing, or discounting practices that could impact your Schedule contract?
  - Take this opportunity to update these practices, especially if they have changed
  - Modify your CSP submission to remove any "emerging" or "existing" ambiguities that could cause difficulties in the future
- Then, if audited you will be prepared



23

©2011 Foley & Lardner LLP

11/8/08



## Preparing for an Audit

- Conduct Internal Compliance Review
  - Comprehensive review of pricing and discounting data & practices
  - Analyze sales to BOA customer(s) for potential price reductions
  - Confirm accuracy and submission of IFF payments
  - Review sales data to detect any potential overcharges to the government
  - Ensure TAA compliance
  - Update your pricing, CSP-1 information, and other terms and conditions (*e.g.*, via contract modification)
  - Read your Schedule contract!



24

©2011 Foley & Lardner LLP

11/8/08



## Recent Developments

- Rewrite of the GSAR / Elimination or Change to the PRC
  - March 28, 2008, GSA established the GSA MAS Advisory Panel
  - Objective: To “review the MAS policy statements , implementing regulations, solicitation provisions and other related documents regarding the structure, use, and pricing for the MAS contract awards.”
  - Primary focus: Evaluating the Price Reduction Clause and MFC pricing practices
  - Membership: 11 government officials/4 industry
  - Final Recommendations (February 2010)
    - Eliminate the PRC from Schedule contracts and instead require competition for orders
    - GSA issue clear and consistent guidance regarding the price objective - to obtain fair and reasonable prices
    - GSA disclose the basis on which it finds the prices to be fair and reasonable
    - Explore addition of cost-type SINS to Schedules
    - Review policies and procedures relating to Schedule contracts, including the length of contracts



25



## Recent Developments

- Interim Rule (March 16, 2011)
  - Implements requirements in the fiscal year 2009 defense authorization act and recommendations of the Acquisition Advisory Panel.
  - For each individual purchase of property or services in excess of the simplified acquisition threshold under a multiple award contract, there is:
    - Fair notice of intent to make the purchase provided to all contractors offering the property or services; and
    - A fair opportunity for all contractors responding to the notice to make an offer and have that offer fairly considered by the purchasing official
    - Notify as many contractors as practicable
    - Purchase cannot be made unless:
      - Offers were received from at least three qualified offerors; or
      - A Contracting Officer determines in writing that no additional qualified contractors were able to be identified despite reasonable efforts to do so.
- Rest of recommendations from the Acquisition Advisory Panel appear to still be under consideration



26

## Compliance Potpourri

George W. Ash  
October 2011

★★★★★  
**False Claims Act – FY 2010**

- Total settlements and judgments \$3 Billion
- Qui Tam settlements and judgments \$2.4 Billion
- Relator's share \$385 Million
- Matters under investigation at beginning of FY2011 1,246
- Total recovery since 1986 \$27.2 Billion
  
- Notable contractors paying in FY2010:  
GlaxoSmithKline, Allegan, AstraZeneca, Novartis, Bell  
Helicopter, Textron, University of Phoenix, Hewlett  
Packard, Louis Berger, Northrop Grumman



## Suspension and Debarment (FY2009/FY2010)

	AF	Army	Navy	DLA
- Suspensions	73/91	134/133	12/ <b>25</b>	48/ <b>140</b>
- Proposed Debarments	86/68	112/125	39/38	163/169
- Debarments	63/ <b>206</b>	117/ <b>170</b>	44/ <b>78</b>	131/ <b>166</b>

At the same time, civilian agencies (DOT, DHS, USAID, SBA, GSA and even DoJ) have been criticized for failing to take timely and effective suspension and debarment action



## Small Business Eligibility Abuse

- More than 5,000 firms have been kicked out of small business contracting programs in the past year
  - 4,000 HubZone
  - 1,000 8(a)
  - 50 SDVOSB
- 30 firms and individuals suspended, proposed for debarment or debarred for small business contracting status abuse





## Pending Legislative Response

- September 22, 2011 – The U.S. Senate unanimously approved a bill targeting companies that illegally obtain contracts set aside for small businesses
  - Estimate \$125 Billion improper payments to ineligible contractors
  - In 2010 the top 100 recipients of federal small business contracts included 52 larger corporations including Lockheed Martin Corp., A&T, Inc. and Office Depot, Inc.
- Bill proposes stiffer penalties, increased criminal enforcement



## Enforcement Actions Up

- According to OMB, in FY2010 federal agencies paid out roughly \$125 Billion in improper payments, up from \$110 Billion in FY2009
- DoJ imposed the most criminal penalties in Foreign Corrupt Practices Act related cases in any 12 month period – totaling over \$1 Billion





## Budget Deficit Reduction

- National Commission on Fiscal Responsibility & Reform (President Obama's bi-partisan task force) identified increased fraud enforcement as one way of paying for government programs and reducing the deficit
  - Additional CMS authority would save \$1 Billion in 2015, and \$9 Billion through 2020



## Corporate Sentencing Guidelines

- U.S. Sentencing Commission has revised the Federal Sentencing Guidelines based on relationship of the corporations' chief compliance officer and the board of directors. To qualify for the **three level downward** adjustment you need:
  - Effective compliance and ethics program
  - Chief compliance officer with direct access to the board of directors
  - Corporation promptly reported the offense

*Note: this downward adjustment is available even if high level employees are involved in the wrongdoing*



★★★★★  
**DoD Fraud Hotline Poster**  
**76 FR 57674 (September 16, 2011)**

- The DoD unique Hotline Poster is now required for any DoD contract to be performed in the U.S., that is not a commercial item and valued in excess of \$5 Million
  - The requirement for the DoD Poster and DFARS clause 252.203-7004 trumps the FAR clause at 52.203-14
  - Requirement is flowed down if the subcontract meets the above criteria
  - Also, if the contract is funded in whole or in part by DHS disaster relief funds, you must also display the DHS fraud hotline poster
  - If the contractor has a company-wide website, an electronic version of the poster must be displayed on that site

★★★★★  
**DFARS - Business Systems Definitions and**  
**Administration Interim Rule – 76 FR 28856 (May 18, 2011)**

- Business systems and internal controls are the first line of defense against waste, fraud and abuse
- Includes Accounting Systems, Estimating Systems, Purchasing Systems, Earned Value Management Systems, Material Management and Accounting Systems and Property Management Systems
- Enforcement mechanism includes payments withholding on
  - Interim payments on CR, Incentive, T&M and LH contracts
  - Progress payments
  - Performance based payments
- Applies to CAS covered contracts



## Wrap-Up – Compliance Best Practices

- If you do business with the government, you should:
  - Have a compliance program tailored to your business, including:
    - A compliance code/handbook
    - A training program
    - A compliance officer (someone with clear responsibility)
- Having an effective compliance program reduces violations and provides more favorable treatment if a violation occurs
- Know what is in your contract
  - Minimize risk by rejecting unnecessary provisions/requirements





## Foley's 2011 Annual Update on Government Contracts

### 2011 Budget Control Act Forces Sequestrations Get Ready For Adverse Contract Actions

David Ralston  
Frank Murray  
October 2011



## 2011 Budget Control Act (BCA)

- BCA = August 2011 Debt Increase Law
- Established super committee to attain \$1.2 trillion in future reductions for FYs 2012-2021
- If \$1.2 trillion reductions not *enacted* by January 15, 2012:
  - BCA mandatory sequestrations - i.e., budget caps
    - DoD/Security cap
      - \$684 billion (FY 2012)
      - \$686 billion (FY 2013)
    - Non-DoD/Security cap
      - \$359 billion (FY2012)
      - \$361 billion (FY 2013)
  - Combine cap FY 2014-2021 from \$1.066 - 1.234 trillion





## Comparison for DoD

- FY 2010 actual and 2011 CR = \$691/685 billion
- FY 2011/2012 Obama requests = \$708/670 billion
  - Reflects \$42 billion reduction in Overseas Contingency Operations (OCO)
- So, DoD FY 2012 spending down \$1 billion from FY 2011
  - FY 2011 CR \$685 billion versus FY 2012 cap of \$684 billion
  - Spending down \$6 billion from FY 2010
- But, with inflation of 2% considered
  - Represents a \$13+ billion real cut from FY 2011
  - A \$35+ billion real cut from FY 2010



## Comparison for DoD

- Also, with \$7 billion FY 2012 increase in personnel costs considered
  - Means \$13 billion reduction falls mostly on suppliers
- FY 2012 OCO spending down at least \$40 billion (about 25%)
  - OCO reduction re-channeled for increases in
    - Personnel costs
    - Non-OCO Procurement
    - Non-OCO Operations and Maintenance
- FY 2012 cuts in
  - R&D
  - Military construction
  - Family housing





## Sequestrations = Adverse Contract Actions

- Sequestrations will force re-programming of funds
- With programs losing funds, contractors face a variety of adverse actions
  - De-scoping
    - Partial Terminations for convenience
  - Stretch-outs
  - Production breaks
  - Total terminations for convenience



## De-scoping

- De-scoping = program reductions to match budget restraints
- Changes clause for minor deductive de-scoping changes
- Partial T4Cs for major changes
- COs will prefer deductive change approach
- Usually T4C financially preferable for contractors





## Stretch-outs & Production Breaks

- Stretch-outs = contract requirements not changed, but spread over longer period
  - Can be a “cardinal change”
  - Contractor entitled to equitable adjustment (EA) for additional costs
  
- Production Breaks
  - Production stop during funding gaps
  - Contractor entitled to EA for higher unit costs, re-start costs



## Terminations

- T4C s
  - Partial or Total
  - Requires termination settlement proposal
  - Converts fixed price programs into cost basis
  - Principle is fair compensation for T4C
  - Recovery may be limited by LOC/LOF clauses
  - TSP must be submitted within 1 year of termination





## Sequestrations = Terminations for Convenience

- Opportunity to recover
  - Unrecovered sunken investment
  - Wind-down costs
  - But not lost profits
- Termination settlement proposal
  - Need to obtain settlement proposal from subs
  - Settlement preparation costs are reimbursable
    - Attorneys fees
    - Accountants
  - If government rejects/limits recovery, claim can be filed
    - But if no or late proposal, no allowable claim



## Get Professional Help Early

- Legal and accounting fees are recoverable as part of EA or settlement proposal
  - Professional fees recoverable even if EA/settlement proposal otherwise denied
- If EA/settlement not satisfactory
  - Convert REA/settlement proposal to CDA claim
  - Better REA/settlement proposal = better CDA claim
- Legal fees not recoverable once claims process starts (unless EAJA eligible)





## Protecting and Preserving Intellectual Property Rights

George W. Ash  
October 2011



## Overview

- FAR/DFARS Intellectual Property Provisions
  - Inventions
  - Technical Data
  - Computer Software
- Difference Between Commercial Item and Non-Commercial Item Provisions
- Marking Requirements
- Protecting Intellectual Property in Government Contracts and Subcontracts
- Important Recent Cases
- Recent DFARS Final and Proposed Rules





## Types of IP

- Government procurement breaks IP into three general categories
  - Patents
  - Technical Data
  - Computer Software
- Within each category rights are classified and treated differently



## Maximizing Rights Through the Form of Agreement

- FAR applies to procurement contracts of most federal agencies
- Increased flexibility in “Other Transactions”
- Individual agency regulatory schemes should be reviewed to determine benefits of using cooperative agreements, CRADAs, grants, etc. (*Data and software only*)
- Be vigilant in protecting your “Crown Jewels” in whatever agreement you negotiate





## Patents

- Since 1980 governed by the Bayh-Dole Act
- FAR 52.227-11, *Patent Rights – Ownership by the Contractor*
- U.S. Contractor gets to retain title in the subject invention provided it satisfies the notice requirements
- Government gets a nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced for or on its behalf, the subject invention throughout the world
- Contractors can “lose” title by not reporting the invention or failing to commercialize



## Patent Protection

- Understanding “subject invention” is critical –
  - “Invention of the contractor that is conceived or first actually reduced to practice in the performance of work under this contract.”
- Application: At Ends of the Spectrum –
  - An invention is conceived and developed at private expense, but government funding is provided to demonstrate the invention in its first reduction to practice
  - An invention is conceived under a government contract, but all development and reduction to practice is accomplished at private expense
  - Two Scenarios = Both Subject Inventions





## Patents

### ■ Notice Requirements

- Disclose subject inventions, in writing, to the CO within **2 months** after the inventor discloses it in writing to Contractor personnel responsible for patent matters
- Disclosure must:
  - Identify the inventor
  - Identify the contract under which the invention was made
  - Be sufficiently complete in technical detail to convey a clear understanding of the subject invention
  - Identify any publication, on sale (i.e., sale or offer for sale), or public use of the subject invention
  - Identify whether a manuscript describing the invention has been submitted and, if so, whether it has been accepted for publication
- Contractor must elect in writing whether or not to retain ownership of any subject invention by notifying the CO within **2 years** of disclosure to the agency of the subject invention



## Patents

### ■ Reporting Requirements

- Annual reports on utilization of subject invention or efforts to obtain utilization by the Contractor or its licensees or assignees
  - Status of development
  - Date of first commercial sale or use
  - Gross royalties received by the Contractor
  - Other data and information as the agency may reasonably specify
- The Contractor must mark utilization reports as confidential/proprietary and the agency should not disclose the reports outside the Government without the Contractor's permission





## Patents

### ■ Marking Requirements

- The Contractor must include within the specification of any U.S. nonprovisional patent and any patent protection certificate issuing covering a subject invention the following statement:
  - “This invention was made with Government support under (*identify the contract*) awarded by (*identify the agency*). The Government has certain rights in the invention.”



## Patents

### ■ Preference for US Industry

- Neither the Contractor nor its assignee may grant to any person the exclusive right to use or sell any subject invention in the U.S. unless the person agrees that any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the U.S.
  - Exceptions if not commercially feasible

### ■ March-In Rights

- Gives the Government the ability to require licensing if the contractor or assignee has not taken steps to achieve practical application of the subject invention in the field(s) of use
- The Government has yet to exercise this right





## Best Practices in Patent Protection

- Protect pre-existing rights
  - Notify the government in your proposal of these rights
  - Provide written notice after award
  - Try to obtain acknowledgement in the contract
  
- Helps avoid disputes during contract performance = Better customer-contractor relationships
  
- Recordkeeping and notice systems are also critical for protecting patent rights
  - Campbell Plastics Eng'g & Mfg. Inc. (Fed. Cir. 2004)



## Setting the Scene Technical Data and Computer Software

- Understanding the landscape will help determine how to treat data and software
- No statutory, uniform rules – each agency has flexibility
- Unlike patents and corresponding “title” concerns, focus is on a “license” to use data or software and any related restrictions
- Rights are generally determined based on who funded the data or software developed or delivered in the performance of the contract





## Technical Data and Computer Software

- Identify when/why technical data/software was developed (and how funded) at the lowest practicable, segregable level
- Government gets **limited rights** (technical data) or **restricted rights** (software) when the item was funded exclusively at private expense
  - Government can use for “form, fit and function”
  - Government can use for emergency repair or overhaul
- Government gets **unlimited rights** in technical data and computer software developed in whole or in part with government funds and delivered under the Contract



## Technical Data and Computer Software

- **DoD Contracts Only**
  - Government gets **unlimited rights** in technical data and computer software developed **exclusively with government funds** and delivered under the Contract
  - Government gets **government purpose rights** in technical data and computer software developed with **mixed funding** and delivered under the Contract





## Protecting Your Developments

- It is possible to segregate rights to the “part” without giving up the “whole” piece of data or software?
- Doctrine of segregability clearly exists under the DFARS
- Generally, government’s rights will be determined by (1) why the IP was developed and (2) who paid for it at the **lowest component level**
- Possible, then, to have different components of a single system (or computer program modules) subject to varying rights



## Protecting Your Developments

<p><b>Module 1</b></p> <p>Developed at Private Expense</p> <p><u>Completion Date:</u> November 1, 2010</p>	<p><b>Module 2</b></p> <p>Developed at Private Expense</p> <p><u>Completion Date:</u> December 1, 2010</p>
<p><b>Module 3</b></p> <p>Developed with Mixed Funding (Contractor/Government)</p> <p><u>Completion Date:</u> January 1, 2011</p>	<p><b>Module 4</b></p> <p>Developed Entirely at Government Expense</p> <p><u>Completion Date:</u> February 1, 2011</p>

- ◆ **Critical Lesson:** Establish a system to track and document development to ensure support for proper rights allocation
  - IR&D treated as a private expense (limited rights) – Note DoD proposed rule discussed later
  - Make the work you are doing (and not doing) under the contract clear in your proposal and in the contract itself
- ◆ What system do you have in place to identify and preserve development and funding of your IP?





## Technical Data and Computer Software

### ■ Technical Data

- FAR/DFARS Clauses
  - FAR 52.227-14, *Rights in Data - General*
  - DFARS 252.227-7013, *Rights in Technical Data - Noncommercial Items*
  - DFARS 252.227-7015, *Technical Data - Commercial Items*
- Definition - Recorded information of a scientific or technical nature regardless of its form or method of the recording
  - Includes computer software documentation
  - Does not include computer software or data incidental to contract administration (financial and/or management information)



## Technical Data and Computer Software

### ■ Computer Software

- FAR/DFARS Clauses
  - FAR 52.227-14, *Rights in Data - General*
  - DFARS 252.227-7014, *Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation*
- Definition - Computer programs, source code, object code, design details, etc. that would enable the software to be reproduced, recreated or recompiled
  - Does not include computer databases or computer software documentation





## Technical Data and Computer Software

- When Government receives unlimited rights
  - Technical Data
    - Information describing items developed with government funds
    - Test data specified as an element of performance
    - Manuals for installation, operation or training
    - Corrections to technical data furnished by the Government
  - Computer Software
    - Developed with Government funds
    - Documentation required to be delivered
    - Corrections to government furnished software



## Technical Data and Computer Software

- When Government receives limited rights/restricted rights
  - Technical Data
    - Pertaining to items, components, or processes developed exclusively at private expense **and** marked with the limited rights legend
    - Created exclusively at private expense in the performance of a contract that does not require the development, manufacture, construction or production of items, components, or processes
  - Computer Software
    - Required to be delivered and was developed exclusively at private expense





## Technical Data and Computer Software

- When Government receives **government purpose rights**
  - Only found in DoD contracts
  - Mixed funding, results in rights “in between” limited and unlimited
    - Contractor generally retains commercialization rights, but Government gets to use the data or software for Government purposes, including competitive procurements
    - Government is supposed to use non-disclosure agreements, etc. to protect “owner” of rights, but can be difficult to police
    - Government purpose rights change to unlimited rights after a stated period of time, typically 5 years, but negotiable



## Data Rights Assertion Table

Contractor asserts for itself, or the persons identified below, that the Government’s rights to use, release, or disclose the following technical data or computer software should be restricted:

Technical Data or Computer Software to be Furnished with Restrictions	Basis for Assertion	Asserted Rights Category	Name of Person Asserting Restrictions
For technical data pertaining to items, components, or processes developed at private expense, identify both the deliverable and each such item, component, or process	Development exclusively at private expense	Government Purpose Rights under this or a prior contract	corporation or individual
	<b>OR</b>	SBIR data under a prior contract	**Include assertions of actual or potential subcontractors/suppliers
	Development partially at private expense	Limited Rights	
		Restricted Rights	
		Specially Negotiated Licenses	





## Subcontractor Issues

- Subcontractor perspective
  - Subcontractor rights flow directly to the Government
  - If data is delivered with less than unlimited rights, can be delivered directly to the government
  - A prime contractor or higher-tiered contractor may not “use their power to award subcontracts as economic leverage to obtain rights in technical data” from the Subcontractor
- Higher-tiered contractor perspective:
  - Must flowdown applicable clauses to subcontractors and suppliers
  - Must get sufficient rights to perform the contract, both for it and the government



## Difference Between Commercial Item and Non-Commercial Item Provisions

- Benefits of commercial item contracts
  - Presumption technical data and computer software were developed exclusively at private expense
  - Presumption applies for all COTS items and commercial items other than part of a “Major System”
  - Relaxed marking requirements
  - Ability to negotiate standard commercial licenses





## Marking Requirements

- Data or software delivered without marking is considered to be delivered with unlimited rights
- If something other than unlimited rights is desired, documents, software, etc. must be marked with the appropriate legend
- Government has the right to challenge the legend, and it is then up to the contractor to justify the restriction



## Marking Requirements

- **Marking Of Proposals**
  - Review the Solicitation for special marking requirements
  - Solicitations issued under FAR Part 15 should include FAR Clause 52.215-1, *Instructions to Offerors - Competitive Acquisition*
    - Paragraph FAR 52.215-1(e) sets forth the legend that should be included on proposals to prevent the proposals from being disclosed to the public





## Marking Requirements

### ■ Marking of Proposals

- For a commercial item solicitation issued under FAR Part 12, if the solicitation does not include a specific marking requirement, the Contractor can choose which legend to place on its proposals
  - The Contractor can use the legend in FAR 52.215-1(e)
  - the Contractor can use the following legend:
    - Portions of this proposal contain the Contractor's confidential and proprietary material exempt from disclosure under Section (b)(4) of the Freedom of Information Act, 5 U.S.C. § 552 (the "Act"). Portions containing confidential and proprietary material are marked with a "Confidential" legend. No release under the Act of Contractor confidential and proprietary document should take place without consulting the Contractor.
  - The Contractor should include the legend above on the first page of each volume of its proposal, and then mark each subsequent page of the proposal that contains confidential or proprietary information with a "Confidential" legend



## Marking Requirements

### ■ Marking Of Deliverables

- Deliverables under noncommercial item contracts
  - Legend must be conspicuous and legible
  - Place legends on the transmittal document or storage container and for printed material, each page that contains technical data for which restrictions are asserted
  - Embed legend digitally in software if possible (e.g., in the "boot-up screens")





## Marking Requirements

### ■ Marking Of Deliverables

- Deliverables under noncommercial item contracts
  - Must use the **EXACT** legend found in FAR Clause 52.227-14, DFARS Clause 252.227-7013 (technical data), or DFARS Clause 252.227-7014 (computer software),
    - Contractor will be given an opportunity to correct nonconforming markings (*i.e.*, not in the format authorized by the contract)
    - If a Contractor inadvertently uses an incorrect legend or fails to mark its data or software delivered to the Government, it should seek the CO's permission as soon as possible to place the correct legends on the data or software
  - For DoD contracts, the Government may challenge unjustified markings through DFARS Clause 252.227-7037, *Validation of Restrictive Markings on Technical Data*
  - Can use a copyright marking



## Marking Requirements

### ■ Marking Of Deliverables

- Deliverables under commercial item contracts
  - No standard legend
  - For DoD contracts, recommend using a legend as follows:
    - “Data contained herein is proprietary to the Contractor and may not be used, disclosed, reproduced, modified, performed, or displayed without the prior written approval of the Contractor. United States Government license rights are limited to those mandatory rights identified in DFARS 252.227-7015(b).”





## Marking Requirements

- **Marking of Hardware and Firmware**
  - No obligation to mark hardware in FAR/DFARS, but *Night Vision Corp. v. United States* suggests otherwise
    - Government may give hardware to third parties to be reverse engineered – negotiate contract language to prevent this from occurring
    - Government may be liable for payment of “reasonable and entire compensation” for the “unauthorized use” of a patent, but will not be liable for the tort of “patent infringement”
  - Mark firmware delivered to the Government
    - Firmware is essentially software etched into the silicon of a computer chip
    - State in proposal that there is restricted rights software in a chip that bears a particular identifying number, that is to be found at a particular coordinate on a particular circuit board, and that it is going into a particular item or component
    - Identify the location of the chip and include the restricted rights legend in any documentation that accompanies the hardware



## Protecting IP in Government Contracts and Subcontracts

- Use a Non-Disclosure Agreement (NDA) when disclosing confidential or proprietary information to outside entity
- Key Provisions
  - Appropriate definition of “Confidential” or “Proprietary” information with the proper exclusions
  - Marking requirement
  - Ability to terminate the agreement at any time
  - Confidentiality obligations survive termination
  - Disclosure does not confer license rights on the receiving party
  - Requirement to comply with export control restrictions
  - Agreement can not be assigned to another party
  - Requirement to return or destroy documents disclosed after the agreement has been terminated





## Protecting IP in Government Contracts and Subcontracts

- Take advantage of commercial item rules whenever possible
- Fund the important technologies yourself
- Be circumspect in the deliverables you agree to deliver
- Keep clear and convincing cost records
- When giving government special purpose rights, define what they are
- Prior to the contract signing, give written notice of data/software to be delivered with less than unlimited rights
  - Give notice again during performance, try to get CO approval or agreement
- Mark deliverables with less than unlimited rights
- Sever/segregate data whenever possible



## DoD Proposed Rules for Commercial Software and Technical Data

- Proposed rules include some fundamental changes
  - New government rights to “access” non-commercial technical data and computer software, so control via “deliverables” is lost
  - A “marking” is required for commercial software that characterizes the government’s rights
  - Pre-award identification of technical data as computer software delivered with less than unlimited rights
    - signed by prime and subs at all tiers





## Emerging Trends

- Government wants more IP, to include the right to use data and software for reprocurement
  - See, e.g., the *Air Force Space and Missile Systems Handbook* found at: [http://mil-oss.org/resources/us-airforce\\_acquiring-enforcing-governments-software-rights-under-dod-contracts.pdf](http://mil-oss.org/resources/us-airforce_acquiring-enforcing-governments-software-rights-under-dod-contracts.pdf)
- But, buying the IP will (1) discourage sellers and (2) raise the price
- DFARS Proposed Rule on IR&D 76 FR11414 (March 2, 2011)
  - Condition the allowability of IR&D on reporting IR&D projects to DoD when the contractor's annual IR&D exceeds \$50,000
  - Designed to promote visibility into the technical content of industry IR&D
  - Annual updates required



## Intellectual Property Protection and Recovery of IR&D Costs. ATK Thiokol Inc. v. United States, 68 Fed. Cl. 612 (2005)

- Issue: When is R&D not “required in the performance of a contract”?
- Court held answer is in CAS, the FAR and the terms of the contract.
- Facts: Thiokol included IR&D costs of a commercial rocket motor as IR&D cost. DCAA argued tooling and equipment should be a direct cost of the first contract for the motor. The dispute involved questions of allocation of IR&D costs, the treatment of depreciation, and the status of the contractor's CAS disclosure statement. From a data rights perspective, defeating the government's argument that “implicitly” required efforts should be charged as a direct cost to the contract allows the Contractor to treat such costs as allowable IR&D.





## ATK Thiokol Inc. v. United States (Cont'd.)

- IR&D costs are treated as “private expense” allowing the contractor to retain the maximum rights in technical data.
- Best practice: Make it clear in the contract what is/is not “required in the performance of a contract” in order to maximize the protection of IR&D funding.



## USSC states Inventor has initial rights on Government Funded IP *Bd of Trs., Leland Stanford Jr. University v. Roche Molecular Systems, 180 L.Ed2d 1 (2011)*

- Bayh-Dole provides the contractor with the right to retain title to subject inventions, with the government receiving its license
- Investigator “agreed to assign” to Stanford his “right title and interest” in inventions resulting from his employment at Stanford
- Investigator also signed a visitor’s confidentiality agreement with another company (Cetus) that stated he “will assign and do[es] hereby assign” to Cetus his “right title and interest”
- Investigator did research at Cetus and clinical studies at Stanford
- Roche acquired the assets of Cetus
- Held Bayh-Dole did not automatically vest title, only to right to retain title to what you had. Established rule is title belongs to inventor
- If the contractor doesn’t have title, does the government have rights?





## U.S. Export Controls and Economic Sanctions Compliance

Greg Husisian  
October 2011



## The Export Controls and Economic Sanctions Structure



## ★★★★★ Overview: U.S. Export Controls and Economic Sanctions At-A-Glance

- **International Traffic in Arms Regulations (ITAR)**
  - Controls on things that go “boom” (munitions items)
  - Department of State, Directorate of Defense Trade Controls (DDTC)
  - Arms Export Control Act (AECA)
  - 22 CFR Parts 120-130
- **Export Administration Regulations (EAR)**
  - Controls on dual-use goods and technology (items with a commercial and military utility) and purely commercial items
  - Department of Commerce, Bureau of Industry and Security (BIS)
  - Export Administration Act (EAA)
  - 15 CFR Parts 730-774
- **Foreign Assets Control Regulations**
  - U.S. economic embargoes (Cuba, Iran, Sudan, and so forth) and prohibitions on dealing with terrorists and drug traffickers
  - Department of the Treasury, Office of Foreign Assets Control (OFAC)
  - Various statutes and executive orders
  - 31 CFR Parts 500-597

## ★★★★★ Export Controls: Scope of U.S. Regulations

- **Export Controls– U.S. Regulations Reach:**
  - All direct exports of products, technology, software, or services from the United States or to a foreign national
    - How an item leaves the United States does not matter for export control purposes
    - Any release of information or technology to foreign nationals in the United States or abroad
  - Foreign manufactured products containing U.S.-origin raw materials, components, software, or technology
  - Re-exports of U.S. items from any location – jurisdiction follows the items
  - Re-export of foreign items that only passed through the United States



## OFAC: How the Sanctions Function

- Sanctions on activities of U.S. persons with regard to persons, entities, or governments who have taken actions counter to U.S. interests
- Sanctions generally function by:
  - Designating a country, person, or entity
  - Thereby creating an obligation for any covered U.S. person to refrain from trading in any goods or services, or from engaging in financial transactions with the covered entity
  - Unless there is a license allowing the transaction to proceed.
  - OFAC requires that U.S. persons who come into control of any assets of such persons block the assets and report their actions to the Government



## Economic Sanctions: Overview

- There is a presumption under sanction programs that all shipments of goods and provision of services to boycotted countries or persons in those countries violates U.S. law.
- U.S. persons generally are prohibited from direct or indirect involvement in, or facilitating, any transaction involving an embargoed country or with any OFAC-listed individual or entity.
  - Targets foreign countries, terrorists, international narcotics traffickers, and those engaged in activities related to the proliferation of weapons of mass destruction
  - Also prohibits transactions with “Specially Designated Nationals” and “Blocked Persons”
  - Sanctions are different for each country – governed by different regulations, and sometimes different statutes





## Compliance Remains Key

- It all starts with education and creating a culture of compliance
- Proper risk management addresses intentional violations (get-the-sale-at-any-cost mentality), unintentional ones (get-the-shipment-out-now violations), and negligent ones.
- Risk management should not be viewed as barrier to conducting business, but rather a means of effectuating business objectives and carrying out corporate policy of pursuing lawful sales.



## Export Controls and Economic Sanctions Compliance





## Risk Management: General Principles

- | ■ <b>Common Practice:</b>  | ■ <b>Best Practice:</b>   |
|--|---|
| ■ Putting in place an off-the-shelf export compliance program          | ■ Tailoring compliance to the firm's business and operating environments                    |
| ■ Program and training in English despite multinational operations     | ■ Translating compliance materials into all relevant languages                              |
| ■ Viewing compliance as a necessary evil and an impediment to business | ■ Viewing compliance as part of corporate controls and as an essential risk-management tool |
| ■ Setting up stand-alone export control compliance initiative.         | ■ Unifying export compliance with other corporate programs                                  |
| ■ Implementing a program and running on auto-pilot                     | ■ Regularly updating the program, learning from issues that arise                           |
| ■ Treating compliance as a distraction from job duties                 | ■ Incorporating compliance into performance reviews   |



## Risk Management: Elements of an Internal Controls Program

- Develop written policies and procedures: create culture of compliance
- Create routine systems that catch most errors; but with easily involved human intervention to avoid mechanical over-reliance on fallible systems
- Conduct periodic self-assessment of risk and audit results
- Monitor and periodically audit compliance
- Adopt appropriate incentives and disincentives to encourage compliance by employees
- Establish internal mechanism for employees to communicate compliance concerns



## ★★★★★ Risk Management: Elements of an Internal Controls Program

- Train and periodically refresh all employees on internal compliance program.
- Train and periodically refresh employees requiring expert level compliance training.
- Designate a risk-management supervisor to manage compliance, supported by appropriate staff.
- Designate an internal legal resource to support the risk-management supervisor.
- Ensure adequate budgeting to allow adequate supervision of exports.

## ★★★★★ Risk Management: Export Controls and Economic Sanctions Elements

- Policy statement
- General internal controls with real-life examples
- Red flags
- Specific internal controls
  - Hotline/anonymous reporting
  - Investigation procedures for potential issues
- Regular training
- Regular internal audits
- Involvement of legal counsel
- Require holds on shipments at all levels



## Risk Management

- Classify all products, materials, product design, and development technology, product manufacturing technology, and product design and manufacturing software according to the EAR, ITAR, or other applicable local regulations; do not forget foreign export controls
- Determine whether licenses are required for exports of product, software or technical data: identify countries for which licenses are required and ensure that there are processes in place to prevent exports/transfers without appropriate authorizations
- Ensure the engineering enterprise is aware of applicable trade controls, both dual-use and sanctions.
- Ensure processes in place to prevent transfers of controlled information or data without appropriate authorizations
- Ensure all servers with trade controlled technical data appropriately protected: file protection, system administrators are U.S. nationals and all technical support/service performed by U.S. nationals



## Risk Management

### Key Elements: Setting up a Program That Will –

- Screen all transactions for possible controlled items
- Screen all transactions and business relationships for countries of concern
- Screen all transactions and business relationships for involvement of individuals or entities subject to sanction or restriction
- Review all business operating processes and procedures for involvement of U.S. persons in transactions involving embargoed destinations
- Ensure internet marketing channel appropriately protected—screen all users at the transaction level and limit use of wizards or other technical services, without appropriate screening
- Monitor changes to regulations and keep processes current





## Risk Management

- Global sourcing: ensure sourcing enterprise is aware of all applicable trade controls (ITAR, dual-use, and sanctions) as applied to deemed exports.
  - Ensure processes in place to prevent transfers of technical data without appropriate authorizations.
  - Foreign national employees in the United States: If business has controlled technical data, coordinate with HR to identify all employees who are not either U.S. nationals or permanent resident aliens, ensure processes in place to prevent transfers of technical data within the U.S. without appropriate authorizations.
  - Implement foreign visitors control program.



## Risk Management: Dual Use – Specific Elements

- Systematic system for classifying products using detailed EAR criteria
- Automatic hold-ups for prohibited shipments without appropriate authorizations
- Integration of oversight with applicable partners (freight forwarders, customs brokers, customers, etc.)
- Know-Your-Customer guidelines to prevent discoverable transshipping



★★★★★  
Risk Management:  
Continually Monitor Key Risk Areas

- Foreign Subsidiaries
- Foreign Nationals in United States and abroad
- Whistle Blowers
- Mergers and Acquisitions
- Shipping
- Affiliates and partners
- Inadequate Compliance Program
- Gray Areas/Classification Difficulties
- Re-export/Knowledge – Know Your Customer



## Foley's 2011 Annual Update on Government Contracts

### Safeguarding Unclassified DoD Information

#### New Rules and Risks for DoD Contractors and Subcontractors

Frank Murray  
October 2011



## Safeguarding Unclassified DoD Information

- The Department of Defense has proposed new contract clauses that would impose new requirements on DoD contractors & subcontractors regarding the steps needed to “safeguard” certain unclassified DoD information within their information systems (76 FR 38089 (June 29, 2011))
- Based on concern that certain unclassified DoD information may yet be valuable if compromised and is not yet adequately protected by contractor information systems





## Two Protection Standards

- Basic Safeguarding – applies to unclassified DoD information not falling into one of the specific categories requiring “Enhanced Safeguarding”
- Enhanced Safeguarding – stricter requirements applicable to seven categories of information deemed to require greater protection; however, those categories are very broad
- DoD estimates that Enhanced Safeguarding requirements will apply to 75% of small business contractors



3

©2011 Foley & Lardner LLP

11/8/08



## Key Definitions

- “Nonpublic Information”
  - Government or 3<sup>rd</sup>-party information that
    - Is exempt from disclosure under FOIA or otherwise protected from disclosure by statute, Executive Order or regulation; OR
    - Has not been disseminated to the general public, and the Government has not yet decided whether the information can or will be made available to the public
- “DoD Information” is a subcategory of “Nonpublic Information”



4

©2011 Foley & Lardner LLP

11/8/08



## Key Definitions

- DoD Information is “nonpublic information”
  - That has not been cleared for public release in accordance with DoD Directive 5230.09, “Clearance of DoD Information for Public Release”; and
  - Is:
    - Provided by or on behalf of DoD to the Contractor or its Subcontractor, OR
    - Collected, developed, received, transmitted, used, or stored by the Contractor or its Subcontractor “in support of an official DoD activity”



5

©2011 Foley & Lardner LLP

11.8.09



## Basic Safeguarding Requirements

- Can't access or process unclassified information on public/open-access computers
  - For instance, can't use computers in hotel business center
- Access control required for unclassified information posted to websites (password protected, user certificates)
- Security and privacy protections for e-mails, texts, and similar communications (“best level of security and privacy available, given facilities, conditions, and environment”)
- Transmit voice and fax information only when you have reasonable assurance that access is limited to authorized recipients



6

©2011 Foley & Lardner LLP

11.8.09



## Basic Safeguarding Requirements (cont.)

- Protect information with at least one physical or electronic barrier when not in use
  - Physical: locked container or room;
  - Electronic: login and password
- Sanitize electronic media containing unclassified data prior to external release or disposal (must clear/overwrite)
- Must provide intrusion protections for computers and information systems (malware/virus protection, prompt application of security software upgrades)
- Transfer limitations – limit contractor/subcontractor access to information to those who have a need to know, and those that employ the same level of security



7

©2011 Foley & Lardner LLP

11/8/08



## Enhanced Safeguarding

- Enhanced Safeguarding requirements apply when contract involves:
  - Information designated as critical program information or critical information per various DoD Instructions;
  - Information subject to export control under ITAR/Export Administration Regulations;
  - Information exempt from mandatory disclosure under DoD FOIA programs;
  - Information bearing current or prior controlled access designations (FOUO, Sensitive But Unclassified, Limited Distribution, Proprietary, Originator Controlled, etc.);
  - Technical data, software, or other data covered by DoD Directive 5230.24; or
  - Personally identifiable information (to include Privacy Act and HIPAA information).



8

©2011 Foley & Lardner LLP

11/8/08



## Enhanced Safeguarding Requirements

- In addition to the Basic Safeguarding requirements (which continue to apply), Contractors and Subcontractors subject to the Enhanced Safeguarding Requirements must:
  - Implement information security in their project, enterprise, or company-wide unclassified IT systems. The information security program must comply with NIST Special Publication 800-53 minimum requirements
  - Comply with cyber-incident reporting requirements



9

©2011 Foley & Lardner LLP

11.8.09



## Enhanced Safeguarding – Cyber-Incidents

- Cyber-incident Reporting
  - Contractor required to report all cyber incidents involving exfiltration, manipulation, loss or compromise of DoD information resident in contractor's information systems
  - Contractor also required to report any unauthorized access to its information systems
  - Reports of Cyber-incidents are required to be made to DoD within 72 hours of discovery, via a website DoD intends to set up to receive reports



10

©2011 Foley & Lardner LLP

11.8.09



## Issues for Contractors and Subcontractors

- Broad definition of the types of information triggering “enhanced” safeguarding means the vast majority of affected contractors/subcontractors will need to meet the higher level information security/cyber-incident reporting requirements
- While most contractors probably provide some level of information security (such as malware protection), the new rules will likely require some contractors or subcontractors to adopt new, potentially costly information security programs
- “Enhanced” safeguarding criteria are defined in terms of several internal DoD regulations with which contractors and subcontractors may not be familiar



11

©2011 Foley & Lardner LLP

11.8.2011



## Issues for Contractors and Subcontractors

- Flow-down requirements – impact both at the contractor and subcontractor level
  - Contractors: challenge to add these requirements to terms/conditions and flow-downs, including adding as changes to existing subcontracts
  - Subcontractors: can be subject to these requirements even if they don’t have any direct contracts with DoD
- How will DoD use cyber-incident reports?
  - Evidence of inadequate information security?
  - How will DoD prevent further disclosure of contractors’ cyber-incident reports?
- Proposed rules remain open for public comment through November 30, 2011



12

©2011 Foley & Lardner LLP

11.8.2011



## Foley's 2011 Annual Update on Government Contracts

# U.S. Export Control Trends: Increasing Enforcement, Increasing Risks, and Uncertain Prospects for Change

Greg Huisian  
October 2011



## Export Controls at the Crossroads





## Where We Are: The Top Ten Trends in Enforcement



## Trends in Enforcement

- **Trend #1: Higher fines**
  - The 2007 IEEPA Enhancement Act increased the maximum civil penalty to \$250,000 per violation (or twice the amount of the transaction, whichever is greater)
  - Eye-popping sanctions settlements (Credit Suisse; Lloyds) and ITAR (ITT) of \$100 million and upwards
  
- **Trend #2: Increasing use of criminal fines**
  - Traditionally, U.S. government reserved criminal fines for most egregious conduct
  - The BIS trend is more criminal enforcement – BIS reported hundreds of criminal cases initiated since 2007, including 16 criminal convictions for EAR violations in 2007, 39 in 2008, and 40 for 2009





## Trends in Enforcement

- **Trend #3: Increasing focus on individuals**
  - General announced intent of U.S. government in enforcement actions to focus on role of individuals
  - Increased deterrent effect sought by holding people in positions to oversee conduct of corporation personally accountable
  - Getting away from companies performing a cost-benefit analysis regarding when it makes sense to undertake suspect transactions
  
- **Trend #4: Increasing focus on Iran and China**
  - Almost half of current fines are occasioned by exports to China and Iran
  - With new Iranian sanctions legislation passed by Congress, and with China trade/outsourcing expected to continue, trend will only increase
  - Continuing Congressional pressure



## Trends in Enforcement

- **Trend #5 – An Integrated Approach to Enforcement**
  - Traditionally, the U.S. government viewed regulations regarding international conduct in a very compartmentalized fashion
  - Trend is of inter-agency cooperation – there is increasing realization that the laws are linked, such as sanctions and export controls; sanctions and anti-money laundering; FCPA and anti-money laundering; and so forth
  
- **Trend #6: Increased Cross-Border Cooperation**
  - UK and U.S. cooperation is high
  - MOUs in place with more than forty countries
  - Increased risk of investigation, due to information sharing





## Trends in Enforcement

- **Trend #7 – Increased focus on end users**
  - BIS enforcement increasingly is focused on end users
  - Focus on terrorism and non-proliferation naturally encourages focus on end users, since these entities can exist in any country
  
- **Trend #8: Increasing focus on technology and information**
  - Best shown by China, the largest source of licenses by BIS, where exports of information (deemed exports) now constitute more than 40% of all license applications
  - Announcements of U.S. government that focus will be more on information, software, and technology
  - Largest enforcement case to date (ITT) concerned export of information, not goods



## Trends in Enforcement

- **Trend #9 – Increasing extraterritorial application**
  - Increasing recognition that primary boycotts/embargoes are not effective except on a unilateral basis
  - New Iranian sanctions legislation places increased pressure on foreign affiliates
  - Increasing pressure on financial institutions in third countries to choose between U.S. financial system and sanctioned entities (Credit Suisse; Lloyds)
  
- **Trend #10: Simultaneous loosening of some restrictions and selective tightening of others**
  - Iran v. Cuba
  - Encryption v. China controls
  - Greater recognition of the futility of restricting technology found worldwide





## Reform Proposals: Why This Time Might Be Different



## Reform Proposals

- Calls for years to reform the system have bogged down due to need to balance commercial and national security interests
- What is different now?
  - Recognition that current system is broken
  - Linkage of issue to President Obama's call to double U.S. exports over next five years
  - Realization that current system does not fully protect either economic interests or national security
- Result: Announcement of three-part process to modify system by Secretary of Defense Gates





## Reform Proposals

- Gates Proposal: Four “singles”
  - Single export-control list
  - Single licensing agency
  - Single enforcement-coordination agency
  - Single information-technology system
- None of these items yet realized or on the near-term horizon
- Nonetheless, some progress has been made



## Reform Proposals

- Gates Proposal: Three steps
  - First phase: beginning the transition towards a single list by “establishing criteria for a tiered control list”
    - Can be done without Congressional authorization
    - Movement to positive ITAR list has, slowly, begun but progress has been bogged down
      - Announcements of positive list for Category VII (tanks and military vehicles) as a model (74% ITAR elimination)
      - Categories VI (naval vessels) and VIII (military aircraft) to follow
      - Creation of Level 600 in EAR (military items)
      - Hoped-for completion by end of 2012
      - Elimination of “Specially Designed” as an example of difficulties





## Reform Proposals

- Gates Proposal: Three steps
  - First phase: beginning the transition towards a single list by “establishing criteria for a tiered control list”
    - EAR developments
      - Creation of Level 600 in EAR (military items)
      - Creation of STA exception allowing license-free exports to 36 countries



## Reform Proposals

- Gates Proposal: Three steps
  - Second phase: “complet[ing] the transition to a single IT structure” and implementing “the tiered control list”
    - Intended to achieve a significant reduction in licensing requirements
    - Can be done without Congressional authorization
    - Not anywhere near completion and prospects not good in short term





## Reform Proposals

- Gates Proposal: Three steps
  - Third phase: Creating a “single licensing agency and single enforcement coordination agency”
    - Requires congressional action
    - Would not impact overlapping OFAC functions
    - Would implement a single control list and implement processes to keep new list current
    - Administration has given up on this: does not appear to be short-term prospect



## Reform Proposals

- What obstacles remain?
  - Bureaucratic inertia
  - Congressional involvement
    - Congress has not even managed to pass a new version of the Export Administration Act since August 2001
    - Ongoing debate between tightening and loosening controls in Congress
    - Other concerns as an election year approaches
  - System has been in place since 1976, and withstood efforts to “reform” since the mid-1980s





## Resolution

- At the minimum, incremental reform
  - Biggest change, especially for small- and medium-sized defense contractors: movement from ITAR to EAR
  - Greater consistency in ITAR and EAR definitions
    - Reconciliation of different definitions by State and Commerce
    - Consideration of how tightly to apply definitions
  - Greater liberalization for widely available restricted technologies, as evidenced by new encryption rules



## FAPIIS - Increased Transparency at the Expense of Contractors' Rights

Erin L. Toomey  
October 2011

## ★★★★★ What Is the Federal Awardee Performance and Integrity Information System (FAPIIS)?

- FAPIIS is a database that consolidates all data that contracting officers use when making their responsibility determinations, including:
  - past performance reviews
  - suspensions
  - debarments
  - non-responsibility determinations
  - civil, criminal and administrative proceedings relating to a contractor's performance of federal, state, and local contracts, grants, and cooperative agreements
- FAPIIS was created by the General Services Administration ("GSA") in response to Section 872 of the National Defense Authorization Act for Fiscal Year 2009, which required GSA to create a system containing specific information on covered Federal government contractors' integrity and performance
- FAPIIS is intended to help the government evaluate the "responsibility" of contractors as well as their business ethics
- FAPIIS initially was only available to the contractor, government personnel and authorized users performing business on behalf of the government
- An interim rule issued on January 24, 2011 requires all information posted in FAPIIS on or after April 15, 2011, except for past performance information, to be publicly available



## FAPIIS Overview

- FAPIIS consolidates information from existing systems such as:
  - Excluded Parties List System (“EPLS”)
  - The Past Performance Information Retrieval System (“PIIRS”)
  - The Contractor Performance Assessment Reporting System (“CPARS”)
- FAPIIS collects new information from:
  - Contracting officers regarding responsibility determinations (i.e., determination of non-responsibility and contract terminations);
  - Debarment officials for information on administrative agreements; and
  - Government contractors for information related to criminal, civil, and administrative proceedings
- Since April 22, 2010, contracting officers are required to:
  - Review information in FAPIIS and “other past performance information” when making responsibility determinations for contracts over the simplified acquisition threshold (currently \$150,000)
  - Provide contractors with an opportunity to provide additional information demonstrating their responsibility if a contracting officer intends to make a non-responsibility determination based on information in FAPIIS



## FAPIIS Clauses

- FAR 52.209-7, “Information Regarding Responsibility Matters”
  - Required for all solicitations over \$500,000
  - Contractors must identify whether the offeror has “current active Federal contracts and grants” with a total value greater than \$10 million
    - Does not identify whether the terms “contract” and “grant” include subcontracts or subgrants
    - Does not specifically include cooperative agreements
    - Does not provide guidance regarding what is an “active” contract or grant
- If the contractor checks “yes” that it has current active contracts and grants over \$10 million then:
  - The contractor must execute certain representations and certifications in the Central Contractor Registration (“CCR”) relating to Federal and State civil, criminal and administrative proceedings involving the contractor or any of its principals, within the last five years
  - The contractor, by submitting an offer under the solicitation, certifies that the information it has entered in FAPIIS is “current, accurate, and complete” as of the date of submission of the offer





## Representation and Certification Comparisons

- **All Contractors:**
  - Must disclose criminal and civil proceedings
  - Must disclose convictions and judgments
  - Must disclose proceedings using a three year look-back period
  - Must execute reps and certs in the Online Representations and Certifications Application ("ORCA") database
- **Contractors with \$10 million in contracts/grants:**
  - Must disclose administrative proceedings
  - Must disclose criminal, civil, and administrative proceedings disposed of by consent or compromise with an acknowledgement of fault
  - Must disclose proceedings using a five year look-back period
  - Must execute reps and certs in the CCR database



## FAPIS Clauses

- **FAR 52.209-8, "Updates of Information Regarding Responsibility Matters"**
  - Requires contractors that meet the \$10 million threshold to update their information on a semi-annual basis by entering the information in CCR
  - Contractors receive notification when the government posts new information
  - Contractors are provided an opportunity to post comments which will become part of the record
  - Information is only available to the contractor, the government, and authorized personnel on behalf of the government
  - Public requests for information handled under the Freedom of Information Act (FOIA)





## The January 24, 2011 Interim Rule

- All information posted in FAPIIS on or after April 15, 2011 will be available to the public, with the exception of past performance reviews
- New FAR clause 52.209-9, “Updates of Publicly Available Information Regarding Responsibility Matters,” replaced FAR 52.209-8
- FAR 52.209-9 is identical to FAR 52.209-8, except:
  - All information posted in FAPIIS on or after April 15, 2011, except past performance reviews, is available to the public
  - Public requests for information in FAPIIS entered prior to April 15, 2011 are processed under FOIA



## Implications for Contractors

- Contractors have instant access to information about competitors
- Likely to lead to an increase in bid protests, especially those relating to agencies’ responsibility determinations and agencies’ source selection past performance evaluations
- FAPIIS doesn’t contain sufficient safeguards to protect against the disclosure of contractors’ trade secrets or commercial or financial information otherwise protected from public disclosure under Exemption 4 of FOIA
  - Contracting officers are not required to notify contractors **prior** to posting information in FAPIIS nor give them opportunity to identify information that may be protected from disclosure under a FOIA exemption
  - Contracting officers are not required to seek a legal review to ensure compliance with FOIA prior to posting information in FAPIIS
- Once the information is publicly available, a contractor’s only recourse is to:
  - Submit comments through a clarification or rebuttal
  - Request removal of the information from FAPIIS based on a FOIA exemption





## Recommendations for Contractors

- Review the public FAPIIS database (<http://fapiis.ppirs.gov>)
- Contractors that meet the \$10 million threshold should submit a FOIA request to GSA requesting a copy of all information in FAPIIS relating to the Contractor
  - Allows contractors to view the information in FAPIIS and comment on negative or incorrect information posted in FAPIIS through a clarification or rebuttal to ensure the information in FAPIIS is accurate
  - Contractors should identify information in FAPIIS covered under a FOIA exemption and put GSA on notice that such information should not be produced in response to any FOIA requests from third parties
- Contractors should also have third parties, such as law firms, submit FOIA requests for all information in FAPIIS relating to the contractor, to see what GSA may disclose to competitors, and voice their objection, prior to such disclosure



## Most Common Misconceptions in Government Contracting

Erin Toomey  
October 2011

★★★★★  
Misconception #1

- A purchase order from a customer does not qualify as a government subcontract



## Misconception #2

- If a contractor submits a claim to the government or files a bid protest, such actions will prevent the contractor from receiving future government prime contract awards



## Misconception #3

- If a FAR clause is not a required clause but is nonetheless in a government subcontract, it is automatically "self-deleting" and the contractor does not need to comply with the clause





## Misconception #4

- A company can represent itself as a small business concern under FAR Part 19 even though it is a wholly owned subsidiary of a large company



5

©2011 Foley & Lardner LLP

11.8.09



## Misconception #5

- A company only needs a code of business conduct and compliance and a compliance program if it has a prime contract or subcontract containing FAR 52.203-13 (i.e., a prime contract or subcontract over \$5 million with a period of performance longer than 120 days)



6

©2011 Foley & Lardner LLP

11.8.09



## Misconception #6

- If there is something wrong with a government prime contract solicitation, a contractor should submit a proposal - if the contractor does not get an award, it can file a post-award protest



## Misconception #7

- It is safe to rely on the contracting officer representative's direction to a contractor to make a change in the specifications





## Misconception #8

- If a contractor does not ship goods internationally, export control regulations do not apply



9

©2011 Foley & Lardner LLP

11.8.09



## Misconception #9

- If the products a contractor supplies to the government are not identical to the products the contractor sells commercially, they do not qualify as a commercial item



10

©2011 Foley & Lardner LLP

11.8.09



## Misconception #10

- Marking technical data and computer software with a contractor's standard commercial marking is always sufficient to protect the contractor's rights



## Misconception # 11

- A contractor developed its subcontracting terms and conditions, including FAR flowdowns, 10 years ago – those flowdowns will be equally effective in any of its current subcontracts





## Misconception #12

- Contract changes are only important when a contractor is late or losing money



13

©2011 Foley & Lardner LLP



## Misconception #13

- Contract price should not be affected by contract type



14

©2011 Foley & Lardner LLP



## Misconception #14

- In developing a negotiation strategy on a prime contract, the government has the same motivations as any other commercial customer





---

## **GLOSSARY OF ACRONYMS**

ADR	Alternative Dispute Resolution
AECA	Arms Export Control Act
BCA	Budget Control Act
BIS	Bureau of Industry & Security
BOA	Basis of Award
CAS	Cost Accounting Standards
CCR	Central Contractor Registration
CFR	Code of Federal Regulations
CO	Contracting Officer
COFC	Court of Federal Claims
COTS	Commercial Off The Shelf
CPARS	Contractor Performance Assessment Reporting System
CR	Continuing Resolution
CRADAS	Cooperative Research and Development Agreements
CSP	Commercial Sales Practice
DFARS	Department of Defense Federal Acquisition Regulation Supplement
DHS	Department of Homeland Security
DoD	Department of Defense
DoJ	Department of Justice
DoT	Department of Transportation
EA	Equitable Adjustment
EAA	Export Administration Act
EAJA	Equal Access to Justice Act
EAR	Export Administration Regulations



---

EPA	Economic Price Adjustment
EPLS	Excluded Parties List System
FAA	Federal Aviation Administration
FAPIIS	Federal Awardee Performance and Integrity Information System
FAR	Federal Acquisition Regulation
FCPA	Foreign Corrupt Practices Act
FFP	Firm Fixed Price
FPR	Final Proposal Revision
FOB	Free on Board
FOIA	Freedom of Information Act
FOUO	For Official Use Only
FSS	Federal Supply Schedule
FY	Fiscal Year
GAO	Government Accountability Office
GSA	General Services Administration
GSAM	General Services Acquisition Manual
GSA MAS	General Services Administration Multiple Award Schedule
GSAR	General Services Acquisition Regulation
HIPAA	Health Insurance Portability and Accountability Act
HUBZone	Historically Underutilized Business Zone
IDIQ	Indefinite Delivery Indefinite Quantity
IEEPA	International Emergency Economic Powers Act
IFF	Industrial Funding Fee
IP	Intellectual Property
IR&D	Independent Research and Development
ITAR	International Traffic in Arms Regulation
LH	Labor Hour



---

LOC	Limitation of Costs
LOF	Limitation of Funds
MFC	Most Favored Customer
MOU	Memorandum of Understanding
NDA	Non-Disclosure Agreement
NIST	National Institute of Standards and Technology
OCO	Overseas Contingency Operations
ODRA	Office of Dispute Resolution for Acquisition
OFAC	Office of Foreign Assets Control
OIG	Office of Inspector General
OMB	Office of Management and Budget
ORCA	Online Representations and Certification Application
PPIRS	Past Performance Information Retrieval System
PRC	Price Reduction Clause
R&D	Research & Development
RFP	Request for Proposal
RFQ	Request for Quotation
SBA	Small Business Act
SDVOSB	Service Disabled Veteran Owned Small Business
SIN	Special Item Numbers
SSA	Social Security Administration
STA	Strategic Trade Authorization
T&M	Time and Material
T4C	Termination for Convenience
TAA	Trade Agreement Act
TSP	Termination Settlement Proposal
USAID	United States Agency for International Development



---

## GEORGE W. ASH



PARTNER

GASH@FOLEY.COM

ONE DETROIT CENTER  
DETROIT, MI 48226-3489  
313.234.7147

George W. Ash is a partner and chair of the Regulated Industries Department and Government & Public Policy Practice. Additionally, he is chair of the firm's Government Procurement Practice which was recognized by *Chambers USA* (2011) as one of the top practices in the nation. He is also a member of the Automotive, Energy and Nanotechnology Industry Teams as well as the Privacy, Security & Information Management Practice.

Mr. Ash's practice focuses on government procurement law. He counsels clients on the preproposal, proposal, negotiation and performance of the U.S. government prime contracts and subcontracts, and on resolving contract disputes. He also has an extensive background in other types of procurements such as grants, cooperative agreements, CRADAs and other transactions, and assists companies with state and municipal contract issues.

Mr. Ash has successfully litigated bid protests; negotiated contracts and subcontracts; submitted, negotiated and litigated claims; advised clients concerning audits and compliance issues and the preservation of intellectual property rights; and appeared before various Federal Boards of Contract Appeals and Courts.

In recognition of the work of Mr. Ash and key attorneys in Foley's Detroit office, *U.S. News Media Group* and *Best Lawyers* recently ranked this office as a Tier 1 provider of government relations counsel in its 2010 "Best Law Firms" Rankings Report. Mr. Ash leads this area of practice for the firm.

Mr. Ash was named one of the 2011 Leaders in the Law by *Michigan Lawyers Weekly*, a recognition bestowed upon only 25 attorneys in the state. In addition, he has been recognized as a leader in the field of government relations numerous times over, most recently by *DBusiness* magazine which listed him in its 2011 list of



---

*Top Lawyers* in the area of government relations law. Mr. Ash also has been Peer Review Rated as AV® Preeminent™, the highest performance rating in Martindale-Hubbell's peer review rating system. He was selected by his peers for inclusion in the 2008-2012 editions of *The Best Lawyers in America*® in the area of government relations law and was ranked as one of the top government attorneys in the nation in 2007 by *Chambers USA*. In 2006, Mr. Ash was named in the list of *Michigan Super Lawyers*.

A retired United States Air Force (USAF) Lieutenant Colonel, Mr. Ash spent his 20 years of active duty as a judge advocate, an associate professor of law at the USAF Academy, serving as assistant general counsel for the SDI (Star Wars) Program and was responsible for international and arms control issues. He also served as an advisor to the strategic arms reductions talks in Geneva with the former USSR.

Mr. Ash authored "Practical Negotiation of Government Contracts," *Federal Publications* (1996).

Mr. Ash obtained his B.S. from the United States Air Force Academy (1972) where he was named "The Cadet Who Best Exemplifies the Highest Ideals of Loyalty, Integrity and Courage." He earned his J.D. from the University of Denver (1975), where he was elected to the Order of St. Ives. He received an LL.M. in international law from the University of London (1985), and a diploma in Air and Space law from the London Institute of World Affairs (1985).

His professional associations include memberships in the USAF Academy Association of Graduates, American Bar Association (Public Contract Law Section, current Michigan chair), Detroit Metropolitan Bar Association, Michigan and Iowa Bar Associations, and the Retired Air Force Judge Advocate Association.

He is admitted to practice in Michigan and Iowa.



## GREGORY HUSISIAN



OF COUNSEL

[GHUSISIAN@FOLEY.COM](mailto:GHUSISIAN@FOLEY.COM)

3000 K STREET, N.W.  
WASHINGTON, DC 20007-5109  
202.945.6149

Gregory Husisian is of counsel with Foley & Lardner LLP and has extensive experience in export controls and sanctions, the Foreign Corrupt Practices Act (FCPA), corporate risk management and compliance, and issues arising from international trade. Mr. Husisian is a member of the firm's Government Enforcement, Compliance & White Collar Defense, Securities Enforcement & Litigation, Automotive, and Appellate Practices.

Mr. Husisian advises clients regarding various export control issues under the Department of State's International Traffic in Arms Regulations (ITAR) restrictions and the Department of Commerce's dual-use regulations (EAR), as well as sanctions/embargo issues under the Office of Foreign Assets Control (OFAC) regulations. Mr. Husisian also counsels clients regarding the Foreign FCPA. His practice covers all aspects of these laws, including compliance, due diligence, enforcement, mergers and restructurings, and other issues relating to U.S. regulation of international conduct and the export of U.S.-origin goods, information, and technology.

Mr. Husisian also regularly counsels clients regarding risk-management and compliance, including through the conduct of sophisticated risk assessments, the creation of compliance programs designed to minimize the risk of violations, and the conduct of training tailored to the risk profile of the client. Mr. Husisian also has helped multiple companies create or expand compliance departments, including through the training of chief compliance officers regarding the most effective ways to implement and oversee effective compliance policies.

Mr. Husisian is the author of a treatise on the U.S. regulation of exports and international conduct, which will be published by Thomson/West in the Winter of 2011. This treatise will be the first comprehensive treatment of the complex regulations that apply to multinational corporations that sell and operate abroad, and will



---

include extensive chapters on dual-use export controls, munitions export controls, sanctions, the FCPA, and the antiboycott regulations. Consistent with his focus on the creation of risk-based compliance solutions, the treatise includes nearly 500 pages of practical advice regarding the conduct of risk assessments and creation of effective compliance procedures for companies seeking to comply with these complicated laws.

In addition to his treatise, Mr. Husisian also is a frequent author on issues relating to U.S. regulation of exports and international conduct, as well as the subjects of risk management and compliance. He is the featured columnist for *Corporate Compliance Insights*, on the topic of compliance strategies for multinational corporations; the country reporter for developments in U.S. trade law for the *Journal of International Trade Law & Regulation*; and a featured columnist for *Aftermarket Business World* on compliance strategies for automotive companies.

Mr. Husisian also counsels clients on a wide variety of international trade litigation matters, including antidumping and countervailing duty issues arising before the International Trade Commission and the Department of Commerce and other international trade issues, such as Section 332 investigations and GSP issues before the U.S. Trade Representative. An experienced court litigator, he also has represented clients in numerous trade appeals before the Court of International Trade and the Court of Appeals for the Federal Circuit, as well as in cases before NAFTA and U.S.-Canada Dispute Resolution Panels.

Mr. Husisian is admitted to practice in the District of Columbia, the Court of Appeals for the Federal Circuit, and the Fourth and Fifth Circuit Courts of Appeals. Before entering private practice, Mr. Husisian clerked for the Honorable Jerry E. Smith of the Fifth Circuit Court of Appeals.

Mr. Husisian graduated from Cornell University (B.A., double major, economics and government, with honors in law and public policy, 1987). He received his J.D. from Cornell Law School in 1990, where he graduated *magna*



---

*cum laude* and was elected to the Order of the Coif. While at Cornell Law School, he was the managing editor of the *Cornell Law Review* and the national editor of the *Harvard Journal of Law & Public Policy*.

Prior to joining Foley & Lardner LLP, Mr. Husisian was a partner at a national law firm, and of counsel at a large international law firm.

Mr. Husisian's client representations include the following:

- Representing clients in export controls and enforcement actions before the Department of Commerce, the State Department, and OFAC
- Creation of comprehensive set of compliance programs at a *Fortune* 100 company and assisting the company to create a new compliance structure
- Counseling clients regarding FCPA export-control, and sanction needs, including through the creation of compliance/risk-management programs, internal investigations of potential problems, and legal analysis of a wide variety of FCPA, export-control, and sanction issues
- Counseling a major international company involved in a takeover of a company that was under investigation by the Department of Justice and Securities and Exchange Commission for alleged FCPA wrongdoing; the matter was resolved in a manner that permitted the acquisition to be completed
- Representing a large provider of uranium enrichment services in antidumping and countervailing duty actions at the Court of Appeals for the Federal Circuit and the Court of International Trade, resulting in favorable rulings ordering the return of all collected duties
- Representing a U.S. chemical company in bringing antidumping petitions and administrative reviews under the antidumping duty laws, resulting in triple-digit margins against Chinese importers of the subject merchandise



- Representing a large multinational tire company in a Section 332 investigation and GSP CNL waiver proceeding before the U.S. Trade Representative

His authored and co-authored works include:

#### Treatises and Textbooks

- *U.S. Regulation of Exports and International Conduct* (forthcoming Winter of 2011)
  - "U.S. Export Controls," in *U.S. Regulation of Exports and International Conduct*
  - "U.S. Sanctions," in *U.S. Regulation of Exports and International Conduct*
  - "U.S. Export Controls and Sanctions Risk Management and Compliance," in *U.S. Regulation of Exports and International Conduct*
  - "The Foreign Corrupt Practices Act," in *U.S. Regulation of Exports and International Conduct*
  - "The Foreign Corrupt Practices Act Risk Management and Compliance," in *U.S. Regulation of Exports and International Conduct*
  - "U.S. Anti-Boycott Regulations," in *U.S. Regulation of Exports and International Conduct*

#### Other Treatises

- *The Foreign Corrupt Practices Act: Coping with Corruption in Transitional Economies* (1997) (treatise by Oceana Publications)
- Chapter 9, "The Subsidies Agreement," *The World Trade Organization: The Multilateral Trade Framework for the 21st Century and U.S. Implementing Legislation* (1996) (treatise by the American Bar Association)



---

## Export Controls and Sanctions Articles/Interviews

- "Export Controls Developments in 2011," *International Law360* (January 28, 2011)
- Quoted in: "Shut Out: Embassies Paying Price for Tighter Banking Regulations," *The Washington Diplomat* (January 2011)
- "Minimizing Regulatory Risks for Multinational Corporations," *Export/Import Daily Update* – six-part series on FCPA, export controls, sanctions, and antiboycott risk mitigation, (September 2010)
- "A Risk-Based Approach for Anti-Boycott Compliance," *Corporate Compliance Insights* (July 23, 2010)
- "A Risk-Based Approach for International Financial Institutions Coping with U.S. Anti-Money Laundering and Sanctions Regulations," *Corporate Compliance Insights* (July 16, 2010)
- "A Risk-Based Approach for Exporters Coping with U.S. Export Controls and Sanctions Regulations," *Corporate Compliance Insights* (June 25, 2010)
- "U.S. Regulation of International Financial Institutions: It's Time for an Integrated Approach to Compliance," *127 Banking Law Journal* 195 (March 2010)
- "21st Century Export Control Compliance Strategies," *Export/Import Daily Update* (January 29, 2010)
- "Coping with U.S. Regulation of International Conduct (Part III): Anti-Money Laundering and Sanctions Compliance Strategies for Financial Institutions," *24 Insights: The Corporate & Securities Law Advisor*, No. 1 (January 2010)
- "Coping with U.S. Regulation of International Conduct (Part II): Compliance Strategies for Export Controls and Sanctions," *23 Insights: The Corporate & Securities Law Advisor*, No. 10 (December 2009)



- "Coping with the New Export Control Paradigm," *International Law* 360 (September 2009)
- "The Sanctions Paradox," *Cornell Law Forum* (March 1998)
- "Extraterritorial Sanctions in an Interdependent World," *International and National Security Law News* (Fall 1996)

#### FCPA Articles/Interviews

- "The Law of Unintended Regulatory Consequences: The Need for Corrective SEC Regulations for the Whistleblower Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act," 4 *Bloomberg Law Reports* No. 33 (September 2010)
- "A Risk-Based Approach to Coping with the FCPA," *Corporate Compliance Insights* (June 18, 2010)
- "No Doctoring the Books," *MX: Medical Device and Diagnostic Industry* (May 2010)
- Quoted in: "SEC, Justice Get New FCPA Power Over Directors," *Agenda Week* (April 5, 2010) (quoted Mr. Husisian regarding liability of directors and senior officers under the FCPA)
- Quoted in: "Experts Highlight Increased Focus on Individuals in FCPA Prosecutions," *Inside U.S. Trade* (January 8, 2010) (also available in *World Trade Online* (January 6, 2010)) (quoted Mr. Husisian regarding intersection of FCPA and export control principles)
- "Recent Opinion Sheds Light on the Relevance of Due Diligence to the FCPA's 'Knowledge' Requirement," 7 *Corporate Accountability* no. 45 at 1346 (November 13, 2009)
- "Coping with U.S. Regulation of International Conduct (Part I): Compliance Strategies for the Foreign Corrupt Practices Act," 23 *Insights: The Corporate & Securities Law Advisor*, No. 9 (November 2009)



- "The 'Knowledge' Requirement of the FCPA Anti-Bribery Provisions: Effectuating or Frustrating Congressional Intent," 24 *Andrews Litigation Reporter: White-Collar Crime*, No. 1, at 3 (October 2009)
- "The Foreign Corrupt Practices Act: Risk-Management and Compliance Strategies For High-Tech Companies," for the Practising Law Institute's FCPA Conference: Implications for Technology Companies (September 2009)
- "The Foreign Corrupt Practices Act: Risk-Management and Compliance Strategies For Life Sciences and Pharmaceutical Companies," for the American Conference Institute's Conference: FCPA and Pharmaceutical and Life Sciences Industries (March 2009)
- "Foreign Corrupt Practices Act: Dealing with Illicit Payments in Transitional and Emerging Economies," 8 *International Quarterly* 183 (April 1996) (reprinted in the *Foreign Corrupt Practices Act Reporter*)
- "The Foreign Corrupt Practices Act: Select Issues in the NIS and Other Transitional Economies," 5 *East-West Executive Guide*, No. 5, at 24 (May 1995)
- "The Foreign Corrupt Practices Act: Select Issues in the NIS and Other Transitional Economies," 6 *Russia and Commonwealth Business Law Report*, No. 3, at 1 (May 1995)

#### General Compliance

- "A Basic Compliance Primer," *Corporate Compliance Insights* (twelve-part series on application of compliance principles)
- A Compliance Primer for the Automotive Industry," *Aftermarket Business World* (twelve-part series on compliance complications for members of the automotive industry)
- Quoted in: "The Changing Role of the Compliance Officer," *Corporate Secretary* (February 2011) at 12



- 
- "Implementing an Integrated, Risk-Based Approach to Compliance," *Corporate Compliance Insights* (June 11, 2010)
  - "Risk-Management for Multinational Corporations: Sentencing Guidelines Proposals Reflect Evolving Compliance Norms," 5 *Global Trade & Customs Law Journal* 293 (July 2010)
  - "Risk Management for International Financial Institutions: Implementing a Coordinated Compliance Approach," *Bloomberg's Corporate Counsel Law Report* (May 3, 2010)
  - "Revising Multinational Corp. Compliance Programs," *International Law* 360 (April 12, 2010)

#### International Trade

- Quoted in: "China Blocks Minerals Shipping," *Detroit Free Press* (October 20, 2010)
- "U.S. Anti-Dumping and Countervailing Duties Increasingly a China-Specific Remedy," *China Quarterly Newsletter* (Summer 2010)
- "International Legal Developments in Review: 2008," 43 *The International Lawyer* 335 (International Trade) (Summer 2009)
- "International Legal Developments in Review: 2007," 42 *The International Lawyer* 323 (International Trade) (Summer 2008)
- "Judicial Review by the U.S. Court of International Trade and the U.S. Court of Appeals for the Federal Circuit Under 19 U.S.C. 1581(c) of Antidumping and Countervailing Duty Determinations Issued by the Department of Commerce," 38 *Georgetown Journal of International Law* 39 (Fall 2006)
- "When a New Sheriff Comes to Town: The Impending Showdown Between the U.S. Trade Court and the World Trade Organization," *St. John's Journal of Legal Commentary* 457 (Spring 2003)



- 
- "Sunset's Dawn: A New Day Under the Trade Laws," 6 *Metropolitan Corporate Counsel*, No. 5, at 10 (May 1998)
  - "Market Access in the New World Order," 3 *Metropolitan Corporate Counsel*, No. 10, at 8 (1995)
  - "Antidumping and Anticircumvention: The New Regime," 3 *Metropolitan Corporate Counsel*, No. 10, at 8 (1995)
  - "The Ascent of the Intellectual: How the U.S. Moved to Protect American Intellectual Property Rights in China," 2 *International Trade Law and Regulation* 54 (May/June 1995)

#### Litigation

- "The Globalization of Mass Torts," *International Commercial Litigation Reporter* (1996)
- "What Standard of Care Should Govern the World's Shortest Editorials?: An Analysis of Bond Rating Agency Liability," 75 *Cornell Law Review* 411 (1991)

#### Presentations

Mr. Husisian is an experienced speaker who has presented at dozens of conferences on international trade issues, covering topics such as export controls, the FCPA, and antidumping and countervailing duty proceedings. His most recent presentations include:

- "Coping with U.S. Export Controls and Sanctions in the Latin American Market" Presentation at Foley's Miami office (June 2011)
- "Current Trends in FCPA Enforcement and Compliance" Presentation at Foley's Milwaukee office (May 2011)
- "U.S. Export Controls Reform and Free Trade Developments: Prospects for Change in 2011," for the Overseas Automotive Council (January 2011)



- 
- "Establishment of an Effective FCPA Compliance Program," for the D.C. Bar Association (December 1, 2010)
  - "The Opportunities of Trade & Challenges of Corruption: Working with Emerging Economies," for the George Washington University School of Business (November 18, 2010)
  - "The Future of U.S. Export Controls and Sanctions," for IDCC (June 2010)
  - "Conducting an Effective Internal Investigation of Suspected FCPA Violations," American Conference Institute (April 2009)
  - "FCPA Compliance Strategies for High-Tech Companies," Practising Law Institute (September 2009)
  - "FCPA Compliance for Pharmaceutical and Life Sciences Companies," American Conference Institute (April 2008)



---

## DANIEL A. KAPLAN



PARTNER

DKAPLAN@FOLEY.COM

VEREX PLAZA  
MADISON, WI 53703  
608.258.4231

Daniel A. Kaplan is a partner with Foley & Lardner LLP, practicing with the Labor & Employment Practice.

Mr. Kaplan counsels employers in all aspects of the employer-employee relationship, including wage and hour, employment contracts, confidentiality and non-compete agreements, worker's compensation, unemployment compensation, family and medical leave, and all state, federal and local discrimination laws. Mr. Kaplan has experience litigating before various state and federal agencies, various state courts, and federal courts, including the Supreme Court, throughout the country.

In addition, Mr. Kaplan works with employers on employee and supervisor training and traditional labor matters, such as union organizing, collective bargaining, grievance processes and arbitration. Mr. Kaplan also has extensive experience in defending and advising employers on safety and health related matters under the Occupational Safety & Health Act (OSHA). Mr. Kaplan has defended employers in OSHA matters throughout the country and in over a dozen matters involving employee fatalities.

Mr. Kaplan also regularly counsels employers on affirmative action obligations under Executive Order 11246, affirmative action plans, AAP audits, and all matters involving the OFCCP. Mr. Kaplan has represented employers throughout the country on their AAP needs, including petitions to the OFCCP for functional plan development, and the implementation of applicant tracking requirements and compliance with the Internet applicant regulations.

Mr. Kaplan's wage and hour experience includes regularly representing national and international clients in federal and state courts, as well as the United States Supreme Court, on FLSA collective action claims and state wage and hour class actions claims.



---

Mr. Kaplan has been a presenter at numerous employment seminars, including seminars for the Wisconsin State Bar Association, the *Labor Letter* (a management-side employment law publication), the Labor Employment Advanced Practices Symposium, the Society of Human Resource Management, and MRA - the Management Association.

Mr. Kaplan joined Foley in 1995 after practicing law for a large firm in Salt Lake City, Utah for three years in the same areas.

Mr. Kaplan earned his J.D. degree, *cum laude*, from the Marquette University Law School in 1992. He earned a bachelor's degree from the University of Wisconsin - Madison in 1988.

Mr. Kaplan is a member on the board of directors for the Wisconsin State Bar's Labor & Employment Law Section and is a member of the Utah State Bar. He is admitted to practice before the state courts of Wisconsin and Utah, the Western and Eastern District Courts of Wisconsin, the District Court of Utah, the Seventh Circuit Court of Appeals, and the United States Supreme Court.

Mr. Kaplan has been Peer Review Rated as BV® Distinguished™, a mark of excellence in Martindale-Hubbell's peer review rating system and has been included in each edition of *The Best Lawyers in America*® since 2007 for his work in labor and employment. He has also been included in every edition of *Chambers USA: America's Leading Lawyers for Business* since 2008 in recognition of his labor and employment work. In addition, he was selected for inclusion in the 2010 *Wisconsin Super Lawyers*® list, again for his employment and labor work.

#### Recent Presentations and Publications:

- "OFCCP & More - Unique Issues for Federal Contractors," Labor & Employment Law Advanced Practices Symposium, San Diego, CA (April 22, 2010)



- "Web 2.0 - Social Media Policies and Practices for HR Professionals," Labor & Employment Law Advanced Practices Symposium, San Diego, CA (April 22, 2010)
- "FMLA Update - New Rights, New Interpretations," Labor Employment Advanced Practices Symposium, Washington, D.C. (November 5, 2009)
- Contributor, *The Law Guide - Employee Relations Law for Wisconsin Employers*, annual employment law treatise published by MRA - The Management Association, Inc.
- "Recordkeeping - How the New Ledbetter Fair Pay Act Changes What You Thought You Knew!," Labor Employment Advanced Practices Symposium, Washington, D.C. (November 5, 2009)
- "Wage and Hour Class Action Suits Come to Health Care: What You Need to Know," Foley & Lardner LLP Web Conference (October 9, 2009)
- "What Employment Law Issues Are Keeping In-House Counsel Awake at Night (or Should Be?)," West Legal Center/Celesq Web Conference (September 15, 2009)
- "After Star Direct - The Shifting Wisconsin Restrictive Covenant Landscape," Wisconsin State Bar Labor & Employment Law Presentation (September 17, 2009)
- "The Legal Implications for Businesses Using Social Media (and for the Agencies Helping Them)," Comet Branding Blog Podcast (May 20, 2009)
- "Wage & Hour Litigation - Class/Collective Actions," and "Affirmative Action Obligations - Compliance with Executive Order 11246/OFCCP Enforcement," Johnson Controls Lunch & Learn Web Conference Series (sponsored by Foley & Lardner) (June 2009)
- Co-author, "Unresolved Questions: When Are Actual Damages Required in Stored Communications Act Cases?," BNA's *Privacy & Security Law* (April 2009)



- "MySpace, Your Liability? Blogs, Web Surfing, IMs and Workplace Privacy Rights In An Increasingly Open World," Labor & Employment Law Advanced Practices Symposium, Las Vegas, NV (March 19, 2009)
- "Privacy In the Workplace," Labor Employment Advanced Practices Symposium, Las Vegas, NV (March 2009)
- "The New FMLA Regulations," "Privacy In the Workplace," and "Separation Agreements," MRA Employment Law Update Symposium, Waukesha, WI (January 2009)
- "Electronic Communications in the Workplace," "Responding to an Employment Discrimination Charge," and "Diversity Issues In Employment," MRA Employment Law Update Symposium, Waukesha, WI (January 2008)



## JEFFREY S. KOPP



PARTNER

JKOPP@FOLEY.COM

ONE DETROIT CENTER  
DETROIT, MI 48226-3489  
313.234.7140

Jeffrey S. Kopp is a partner with Foley & Lardner LLP and is a member of the Litigation Department, the Labor & Employment Practice, the Automotive Industry Team and the Trade Secret/Non-Compete Task Force.

Mr. Kopp is an experienced litigator, handling a wide variety of civil litigation matters in federal and state courts in Michigan, Ohio, Indiana, and California. He has successfully defended clients before the Sixth Circuit and the Michigan Court of Appeals. Mr. Kopp has represented and counseled clients in various labor and employment, FMLA, OFCCP and EEO compliance, and non-compete and trade secret matters. He has arbitrated traditional labor grievances and regularly provides employers with proactive employment counseling techniques to minimize the risk of litigation. He also represents lenders in commercial foreclosure cases in Michigan.

Representative matters include:

- Obtained numerous summary judgment victories for clients in age, sex, disability and race discrimination lawsuits
- Advises clients regarding FMLA, military leave and benefits issues under USERRA
- Obtained favorable results in OFCCP desk and on-site audits, and Service Contract Act audits
- Successfully obtained and defeated restraining orders to enjoin employees from breaching non-competition obligations and disclosing trade secrets
- Obtained a favorable settlement in a multi-million dollar warranty dispute for an automotive supplier
- Successfully represented lenders in numerous commercial foreclosure matters resulting in obtaining receivers, foreclosing mortgages, and obtaining deeds-in-lieu of foreclosure



---

Mr. Kopp received his J.D., *cum laude*, in 1996 from the University of Notre Dame Law School, where he was Symposium Editor of the *Journal of College and University Law*. He graduated from the United States Military Academy at West Point in 1990 and served on active duty in the U.S. Army in Germany, Oklahoma, Texas and Iraq.

Mr. Kopp is a lieutenant colonel in the U.S. Army Reserves, where he currently serves as the director of legal services in the JAG Corps. He is responsible for a team of attorneys that provide legal services for soldiers and their families in Michigan and Ohio. Mr. Kopp served in Iraq in 2008 as the detainee operations counsel at Camp Cropper in Bagdad. Among other awards, Mr. Kopp is a recipient of the Bronze Star Medal.

Mr. Kopp is a member of the state bars of Michigan and California. His professional affiliations include the Detroit Metropolitan Bar Association, where he is the president of the Barristers Organization. Mr. Kopp also is on the board of governors of the West Point Society of Michigan. He also provides pro bono volunteer services for the Detroit Legal Services Clinic and Project Salute. Mr. Kopp is a recent graduate of Leadership Detroit XXVIII.

Mr. Kopp's representative presentations and publications include:

- "FMLA Abuse: How to Spot It - and Stop It," BLR FMLA Abuse Webinar, March 2011
- "Implementing a Drug and Alcohol Testing Program — Things to Consider," *Employment Law Update - Foley & Lardner LLP Legal News*, December 2010
- "The Expanding Reach of the OFCCP — Are You a Government Contractor?" *Employment Law Update - Foley & Lardner LLP Legal News*, November 2010
- "When Johnny (or Joanna) Comes Marching Home Again: Are You on Top of USERRA," Foley & Lardner LLP Web conference, June 2009



- 
- "Labor and Employment Year in Review," Fourth Annual State of the Law Update, Association of Corporate Counsel (ACCA) - Michigan, April 2009
  - "Teenagers and the Law Handbook," (editor in chief) 2008



## FRANK S. MURRAY JR.



SENIOR COUNSEL

FMURRAY@FOLEY.COM

3000 K STREET, N.W.  
WASHINGTON, DC 20007-5109  
202.295.4163

Frank Murray, Jr. is senior counsel with Foley & Lardner LLP where he focuses his practice on issues related to government procurement. Mr. Murray advises government contractors and commercial clients seeking to do business with the federal government on wide-ranging procurement law issues, including both pre-award and post-award bid protests, Buy American and related domestic preference and sourcing issues, supply chain management, data rights and intellectual property issues, false claims, defective pricing, organizational conflicts of interest ("OCIs"), contractor claims, contract administration issues, debarment/suspension, commercial item procurements, contractor codes of business ethics and conduct, small business subcontracting, small business set aside issues and protests of small business size status, and cost accounting matters. He has been particularly active in matters concerning U.S. domestic content laws, such as the Buy American Act, the Federal Transit Administration's "Buy America" Regulations, the Berry Amendment, the Trade Agreements Act, and "Buy American" provisions in the American Recovery and Reinvestment Act of 2009.

Mr. Murray has drafted and negotiated government contracts and subcontracts for clients, including the negotiation of two sole-source multi-year contracts with the Department of Defense worth a combined total of approximately \$50 million.

In his role as counselor to clients on government procurement issues, Mr. Murray has also conducted internal investigations for various clients to assess contract and statutory compliance issues and make recommendations regarding appropriate corrective action. These internal investigations have encompassed issues under the Truth In Negotiations Act ("TINA"), False Claims Act, and Trade Agreements Act/Buy American Act. He has also assisted clients by reviewing their contract administration practices and providing advice



---

regarding process improvements and internal compliance systems. Mr. Murray has also developed training materials for clients on contract compliance issues, particularly with respect to supply chain management/domestic content requirements and contractor codes of business ethics and conduct, and has provided in-person or remote training to client personnel on government procurement issues.

Mr. Murray has represented clients in state and federal courts, before administrative agencies, and in alternative dispute resolution proceedings. He also has substantial experience in construction law, and has represented contractors, subcontractors, and sureties in all aspects of public and private construction projects. Mr. Murray is a member of the firm's Business Litigation & Dispute Resolution and Government & Public Policy Practices as well as the Automotive Industry Team.

Prior to joining Foley, Mr. Murray served for over four years in the Judge Advocate General's Department of the United States Air Force. In this role, he was lead prosecutor in several felony cases and administrative hearings. In addition to his prosecution work, he reviewed government contracts between the Air Force and private corporations and advised Air Force contracting officers on legal issues regarding such contracts. During his deployment in Kuwait for the Air Force in 2001, Mr. Murray served as sole legal advisor to a detachment of over 1,100 U.S. military members, which was then the Air Force's most forward-deployed base located only 39 miles from Iraq.

Mr. Murray is a graduate of the University of Virginia School of Law (J.D., 1995), where he served on the editorial board for the *Virginia Environmental Law Journal*. He received his Bachelor of Arts degree in English from Yale University (*magna cum laude*, 1992).

Mr. Murray is admitted to practice in Virginia, the District of Columbia and Florida. He is also admitted to practice before the U.S. Court of Appeals for the First and Fourth Circuits, the U.S. Court of Federal Claims, and the U.S. District Courts for the Eastern District of Virginia, the District of Columbia, and the District of Maryland.



## DAVID T. RALSTON JR.



PARTNER

DRALSTON@FOLEY.COM

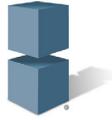
3000 K STREET, N.W.  
WASHINGTON, DC 20007-5109  
202.295.4097

David T. Ralston, Jr. is a partner in the Washington, D.C. office of Foley & Lardner LLP where his practice focuses on rail and air transportation; government contract litigation and counseling; national and homeland security.

Mr. Ralston has handled virtually all aspects of government contracts, including bid and small business size protests, claims, defective pricing, intellectual property, qui tam litigation, and Cost Accounting Standards matters. He has successfully defended government contractors against fraud and bribery charges, including coordinating corporate investigations, voluntary disclosures to the Justice and Defense Departments, and represented firms in debarment/suspension proceedings at numerous federal agencies. Mr. Ralston frequently lectures and writes on government contracts matters. His most recent publication is "The Foley & Lardner Guide to Federal Procurement Protests (second edition)," available at [www.foley.com/procurementprotest](http://www.foley.com/procurementprotest), which will soon be published as part of "Inside The Minds: The Impact of Recent Changes in Government Contracts," *Aspatore Books*, 2011.

In rail transportation, Mr. Ralston represents a leading Class I railroad, a major commuter rail carrier and shortline railroads on federal regulatory, legislative and compliance matters. In aviation, he has represented and advised a number of major U.S. airports on federal regulatory and grant assurance requirements, particularly in the security arena, and serves as vice-chair of the Federal Bar Association's Transportation and Transportation Security Law Committee.

Mr. Ralston has been Peer Review Rated as AV® Preeminent™, the highest performance rating in Martindale-Hubbell's peer review rating system. In 2011, he was named one of America's Leading Lawyers in the area of government contracts by *Chambers USA*, and in 2010 *Legal 500* cited him for his knowledge of government contracts issues and client availability.



---

In recent years, Mr. Ralston has been particularly active in contracts claims resolution, and matters concerning US domestic content laws, such as the Buy American Act, the Berry Amendment, the Trade Agreements Act, and international trade areas. He has also been active in matters where government contracts and intellectual property issues intersect, having led multi-year litigation opposing Department of Defense efforts to compete with the private sector in publishing military standards and specifications over the Internet. In 2011, he presented to European procurement leaders at the EU Parliament in Brussels on US perspectives concerning innovation in government procurement during the Science|Business Policy Bridge conference *Power of the Purse: Can Europe use procurement power to stimulate innovation?*

Virginia Governors George Allen and James Gilmore appointed Mr. Ralston to the board of the Metropolitan Washington Airports Authority. He was elected as chairman of the board from 1997-2000, and has served as vice-chairman and chair of several committees. In 2010, Governor Robert McDonnell appointed him to the board of trustees of the Southern Growth Policies Board, a non-partisan public policy think tank focused on advancing effective economic development policies in 13 Southern states.

From 1980 to 1984, Mr. Ralston served on active duty with the U.S. Army as a prosecutor and appellate attorney, handling over 100 courts-martial, including more than 30 contested cases. From 1984 to 1994, he served as a military judge in the U.S. Army Reserves.

A law graduate of Georgetown University (J.D., 1979, *cum laude*), Mr. Ralston received his B.S.F.S. degree from Georgetown University - School of Foreign Service (1976). He is a graduate of the Army War College National Security Seminar (2007).

Mr. Ralston is admitted to the bars of the District of Columbia, Virginia and New York, and served from 2008-2011 on the Litigation Section Committee of the D.C.



---

Bar. He is vice-chair of the Federal Circuit Bar Association's Government Contracts and Construction Law Committee and the Federal Bar Association's Transportation and Transportation Security Law Committee. He is admitted to practice before the U.S. Courts of Appeal for the Armed Forces, the Federal, Fourth, Sixth and District of Columbia Circuits. He is also admitted before the U.S. District Courts for the Eastern District of Virginia, the District of Columbia, the District of Maryland, and the U.S. Court of Federal Claims.



## ERIN L. TOOMEY



SENIOR COUNSEL

ETOOMEY@FOLEY.COM

ONE DETROIT CENTER  
DETROIT, MI 48226-3489  
313.234.7138

Erin L. Toomey is senior counsel with Foley & Lardner LLP, where she is a member of the Government & Public Policy Practice.

Ms. Toomey's practice focuses on counseling clients in all areas of government procurement, including reviewing solicitations; drafting proposals; drafting contracts and subcontracts; assisting with the development of negotiation positions; protecting contractors' intellectual property rights; submitting, negotiating, and litigating claims; representing contractors during bid protests; and performing government contract due diligence for mergers and acquisitions.

In recognition of the work of Ms. Toomey and key attorneys in Foley's Detroit office, *U.S. News Media Group* and *Best Lawyers* recently ranked this office as a Tier 1 provider of government relations counsel in its 2010 "Best Law Firms" Rankings Report.

Ms. Toomey's practice also includes assessing contractors' compliance programs, assisting contractors in developing and implementing compliance programs, counseling contractors during government investigations, performing internal investigations, advising contractors regarding avoiding suspension and debarment, and defending clients accused of healthcare related fraud.

Ms. Toomey served an externship for the Honorable Wayne R. Andersen of the Northern District of Illinois and also is a certified mediator by the Center for Conflict Resolution.

Ms. Toomey graduated *cum laude* from Northwestern University School of Law (J.D., 2004), where she was selected for the Order of the Coif and served as membership editor of the *Northwestern University Law Review* in 2003-2004. She was a member of the National Moot Court Team and was a semi-finalist in the Julius



---

Minor Moot Court Competition, where she was honored with Best Brief. Ms. Toomey received her undergraduate degree from the University of Michigan, Ann Arbor with high distinction (B.A., 2000).

Ms. Toomey co-authored the article, "Selling Goods and Services to the Federal Government with Reduced Risk through Commercial Item Contracting," featured in the Spring 2011 issue of the *Michigan Business Law Journal*. Additionally, Ms. Toomey co-authored the article, "Lawyers Don't Look Good in Stripes: Lawyers, The New Target of Federal Prosecution," featured in the December 2007 issue of the *Michigan Bar Journal*. Ms. Toomey has also co-authored various other publications and spoken at government procurement seminars.

Ms. Toomey is admitted to practice in the State of Michigan, the Sixth Circuit, the Eastern District of Michigan, the Western District of Michigan, the Northern District of Ohio, and the United States Court of Federal Claims.