Complying with Prevailing Wage Laws

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Agenda

- Hot Issues in Employment Law Compliance
- Overview of the Prevailing Wage Statutes
- DBA / CWHSSA / PCA
- Executive Order 13706
- SCLS Coverage
- SCLS Compliance Principles
- Wage Determinations
- Fringe Benefits
- Recordkeeping
- Notice to Employees
- Required Posting
- Overtime Compensation Issues
- SCLS Enforcement
- Avoiding Common Mistakes
Hot Employment Law Issues

- **New Affirmative Action Portal**
  - DOL reported new web portal nearly complete
  - Will require contractors to upload AAP’s

- **DOL Issues New Overtime Rules**
  - On September 24, 2019, DOL announced long awaited final rule on OT exemptions for executive, administrative, professional, outside sales and computer employees
  - Raises minimum salary level for exemption from FLSA minimum wage and overtime from $455/week ($23,660 annually) to $684/week ($35,568 annually)
  - Increases total annual compensation requirement for highly compensated employees (HCE) from $100,000 to $107,432 per year
Hot Employment Law Issues (cont.)

- **Minimum Wage for Government Contractors Increases January 1, 2020**
  - Executive Order 13658 established a minimum wage for employees working on government contracts
  - DOL announced the rate increases to $10.80 per hour on January 1, 2020
  - Tipped employees’ rate increases to $7.55 per hour

- **Executive Order (EO) 13706 requires certain federal contractors to allow their employees to earn and use up to 7 days of paid sick leave each year.**

- **Recent Press Releases:**
  - DOL recovers $7.0 million from Dell Technologies to resolve discrimination allegations based on race and gender pay differences
  - DOL recover $10.0 million from Goldman Sachs & Co. for pay discrimination
  - DOL recovers $4.2 million from Bank of America for hiring practices
  - DOL recovered $178,784 for SCA violations from contractor at Warner Robins AFB
  - DOL recovers $41,000 in back pay for 9 employees for employer’s violations of SCA and CWHSSA
Prevailing Wage Statutes

- The **Davis-Bacon and Related Acts (DBRA)** require payment of prevailing wages to laborers and mechanics employed on federal and federally-assisted construction projects.

- The **McNamara-O'Hara Service Contract Act (SCLS)** requires payment of prevailing wage rates and fringe benefits to service employees employed on contracts to provide services to the federal government.

- The **Contract Work Hours and Safety Standards Act (CWHSSA)** requires contractors and subcontractors on federal contracts to pay laborers and mechanics at least one and one-half times their basic rate of pay for all hours worked over 40 in a workweek. This Act also prohibits unsanitary, hazardous, or dangerous working conditions in the construction industry on federal and federally-financed and assisted projects.

- The **Copeland "Anti-Kickback" Act** prohibits a contractor or subcontractor from inducing an employee to give up any part of his/her compensation to which he/she is entitled under his/her contract of employment. The Act's implementing regulations requires a contractor and subcontractor to submit a weekly statement of the wages paid each employee performing covered work during the preceding payroll period.

- The **Walsh-Healey Public Contracts Act (PCA)** requires payment of minimum wage rates and overtime pay on federal contracts to manufacture or furnish materials, supplies, or equipment.
Davis-Bacon Act (DBA)

- Neither DBA nor SCLS provide premium rates for overtime hours of work, but both recognize other federal laws that do:
  - Contract Work Hours and Safety Standards Act (CWHSSA) (40 U.S.C. §§ 327-332) applies to contracts in excess of $100,000 ($150,000 for contracts procured under the Federal Acquisition Regulations) that employ laborers, mechanics, guards, and watchmen
  - Fair Labor Standards Act (FLSA) (29 U.S.C. § 201, *et seq.*) applies more broadly, with over 143 million workers subject to coverage
Davis-Bacon Act (DBA) (cont.)

- Requires payment of locally “prevailing wages” and fringe benefits to laborers or mechanics employed on direct federal contracts in excess of $2,000 for construction, alteration or repair of a public building or a public work.

- For prime contracts in excess of $100,000, contractors and subcontractors must also, under the provisions of the Contract Work Hours and Safety Standards Act (CWHSSA), as amended, pay laborers and mechanics, including guards and watchmen, at least one and one-half times their regular rate of pay for all hours worked over 40 in a work week.

- The overtime provisions of the Fair Labor Standards Act may also apply to DBA-covered contracts.
Davis-Bacon Act (DBA) (cont.)

- Example - DOD base maintenance contract that requires construction work, *i.e.*, painting or repainting, refinishing floors, or re-roofing facilities
Davis-Bacon Act (DBA) (cont.)

- Laborers and mechanics
- Does not include:
  - Timekeepers, inspectors, architects, engineers; or
  - Bona fide executive, administrative, and professional employees as defined under FLSA
  - Working foremen are generally non-exempt

- Site of the work
  - Davis-Bacon applies only to laborers and mechanics employed “directly on the site of the work”

- Classification of work

- Fringe Benefits
  - Under DBA, FB’s are a component of the DBA “prevailing wage”
  - The prevailing wage obligation may be satisfied by:
    - Paying the BHR and FB in cash (including negotiable instruments payable on demand);
    - Contributing payments to a bona fide plan; or any combination of the two

- Deductions – only certain deductions from pay are permitted
Davis-Bacon Act (DBA) (cont.)

- Certified Payrolls

- DBA contract clause provisions:
  - “Payrolls and basic records”: 29 C.F.R. § 5.5(a)(3)

- Provisions in 29 C.F.R. Part 3:
  - 29 C.F.R. § 3.3 – “Weekly statement with respect to payment of wages”
  - 29 C.F.R. § 3.4 – “Submission of weekly statements and the preservation and inspection of weekly payroll records”
Davis-Bacon Act (DBA) (cont.)

- Fringe benefits must be paid weekly for all hours worked:
  - Unless the fringe benefits are paid into a bona fide FB plan, and then contributions must be paid no less often than quarterly

- Cash wages paid in excess of base hourly rate may count to offset or satisfy the FB obligation (unlike under SCLS)
CWHSSA

- Requires overtime pay for laborers, mechanics, guards, and watchmen at a rate of one and a half times the basic rate of pay for hours worked in excess of 40 in a work week on covered contracts.

- Liquidated damages can be assessed per day for each laborer, mechanic, guard, or watchman not paid proper overtime.

- Covers contracts over $100,000 ($150,000 for contracts procured under the FAR) that require or involve the employment of laborers, mechanics, watchmen or guards on:
  - DBA covered construction contracts
  - DBRA covered construction contracts; and
  - SCA covered service contracts

- Is self-executing (even if not stated in contract)

- Has no “site of the work” limitation.
CWHSSA

- CWHSSA applies only for the time spent on covered contract work only

- When determining whether an employee has worked overtime hours under CWHSSA:
  - Total up all the time each employee spent working on covered contracts (off-site as well as on-site on DBA/DBRA projects)
  - Exclude all commercial, non-government, non-covered work
  - On contracts to which CWHSSA does not apply (for example, on DBRA a prime contract of $100,000 or less, or a FAR contract of $150,000 or less) overtime pay requirements may apply to a contractor or subcontractor under the FLSA
  - On contracts to which CWHSSA applies, FLSA may also apply
CWHSSA

- CWHSSA and FLSA requirements apply only to hours worked
  - Non-work hours such as paid holidays and paid leave are not counted in computing overtime pay
  - Rules concerning “Hours Worked” are at 29 C.F.R. Part 785
Liquidated Damages

- **CWHSSA**
  - The statute provides that liquidated damages shall be computed in the sum of $26 per calendar day on which an individual did not receive the required overtime compensation.
  - Liquidated damages are assessed by the contracting agency, and the contracting agency must seek DOL concurrence to reduce or waive them, per 29 CFR 5.8.

- **FLSA**
  - Liquidated damages shall be assessed in an amount equal to the unpaid overtime compensation.
  - Assessed by WHD.
Walsh Healy Public Contracts Act (PCA)

- Provides labor standards for employees working on federal contracts over $10,000 for the manufacturing or furnishing of goods, supplies, articles, or equipment

  - PCA does not apply to certain contracts, including the following:

    - Certain “open market” purchases
    - Purchases of perishables
    - Certain agricultural purchases
    - Contracts for public utility services and certain transportation and communication services
    - Supplies manufactured or furnished outside the U.S. (including Puerto Rico) or the Virgin Islands
    - Contracts administratively exempted by the Secretary of Labor in special circumstances

- Difference between SCLS and PCA is that PCA applies to major equipment overhaul that is completely torn down and rebuilt

- Child labor standards
Copeland Anti-Kickback Act

- When the Copeland Act was passed in 1934, reports presented to the Senate Committee on Crime found that up to “25 percent of the money which is supposed to be paid for labor under the prevailing rates of wage is unlawfully, unjustly, and indecently returned to contractors, subcontractors, or officials on the job”
- Prohibits “kickback” of wages and back wages
- Requires contractors on DBA/DBRA covered projects to submit weekly a “statement of compliance”
- Regulates payroll deductions
Executive Order 13706

- Executive Order (EO) 13706 requires certain federal contractors to allow their employees to earn and use up to 7 days of paid sick leave each year.

- EO 13706 applies to four types of contracts entered into by the federal government - 29 CFR 13.3(a)(1), including procurement contracts for construction covered by the Davis-Bacon Act (DBA) and Service contracts covered by the Service Contract Act (SCA).

- EO 13706 does not apply to:
  - Contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the federal government, including those subject to the PCA (29 CFR 13.3(d));
  - Contracts that are subject only to the Davis-Bacon Related Acts (81 FR 67613);
  - Grants within the meaning of the Federal Grant and Cooperative Agreement Act (29 CFR 13.4(a)); or
  - Contracts and agreements with and grants to Indian Tribes under the Indian Self-Determination and Education Assistance Act (29 CFR 13.4(b)).
EO 13706

- EO 13706 requires covered contractors to allow employees to accrue 1 hour of paid sick leave for every 30 hours worked on or in connection with a covered contract, up to 56 hours (7 days) per year, and to use accrued leave for certain purposes.

- Regulations for the EO were published on September 30, 2016 (29 CFR Part 13)
  - Provide details about coverage, exclusions, the accrual and use of paid sick leave, requirements for contractors and contracting agencies, and enforcement.
What is the Service Contract Labor Standards Act?

- Applies to every contract entered into by the U.S. or the District of Columbia, the principal purpose of which is to furnish services in the U.S. through the use of service employees. 41 U.S.C. 6702(a)

- Contracts over $2,500 require SCA-related clauses and wage determinations

- Requirements (29 CFR 4.6):
  - Contractors and subcontractors to observe minimum wages and fringe benefits
  - Record keeping – posting requirements
  - Safety and health provisions
Legislative History

- Intended to remove wages as a bidding factor in the competition for federal service contracts
- Also intended to provide labor standards for service contracts similar to the Davis Bacon Act and Public Contracts Act
SCA Coverage (29 CFR 4.110)

- Contract’s principal purpose is services
- Services furnished in the United States
- Contracts performed through the use of service employee (FAR 22.1003-1)
- Contracts entered into by an agency or instrumentality of the federal government (e.g., DOD, Dept. of the Air Force)
- Contracts issued by wholly-owned corporations of the government (e.g., U.S. Postal Service, Tennessee Valley Authority)
- Contracts with non-appropriated fund activities (e.g., AAFES)
Contracts to Furnish Services
(29 CFR 4.111 & 4.130)

- Examples of Service Contracts:
  - Aerial Spraying
  - Mortuary Services
  - Chemical Analysis
  - Motor Pool Operation
  - Maintenance/Repair of Aircraft Equipment
  - Chemical Testing
  - Nursing Home Services
  - Computer Services
  - Engineering Support
  - Electronic Equipment Maintenance
“Service Employees” (29 CFR 4.113)

- “Service employees” (as defined at FAR 22.1001) are persons performing service contract work as hourly-paid non-exempt workers.
- Excludes workers employed as bona fide exempt professionals (engineers, doctors, etc.), executives (upper level managers), or administrators (personnel directors, etc.) as defined by Department of Labor regulations at 29 CFR 541.
- *Note that highly skilled technicians and lower level supervisors would normally not qualify for exemption.*
Contracts in the U.S. (29 CFR 4.112)

- Includes all 50 states and U.S. territories
SCA Statutory Exemptions (29 CFR 4.115 & FAR 22.1003-3)

- Construction contracts subject to the Davis-Bacon Act
- Work subject to the Walsh-Healey Public Contracts Act
- Transportation of freight/personnel or oil/gas pipeline, where published tariff rates are in effect
- Radio, telephone, telegraph, or cable companies furnishing services subject to the Communications Act of 1934
- Contracts for public utility services if rates are regulated by state, local, or federal law
- U.S. Postal Service contracts for operation of contract stations (as in a remote general store or remote small town substation)
- Contracts for direct services to a federal agency by an individual or individuals
SCA Administrative Exemptions (29 CFR 4.123 & FAR 22.1003-4)

- Maintenance, calibration, and repair of automatic data processing equipment (ADPE), scientific and medical equipment, and office/business equipment may be exempt if the criteria found at FAR 22.1003-4 is met.

- Contracts for “remanufacturing”, if the criteria found at FAR 22-1003-6 is met.

- Contracts for major overhaul or major modification of equipment that is so extensive as to be equivalent to manufacturing are not subject to the SCA.
  - Instead they are subject to the Walsh-Healey Public Contracts Act.
  - Examples that fall within this statutory exemption are contracts for complete tear down and rebuilding of aircraft engines and rebuilding of large generators or compressors at a contractor's facility using processes similar to original manufacturing where the end item is totally rebuilt.
  - Such contracts must meet the stringent criteria found at FAR 22.1003-6.
SCA Compliance Principles

- Timely payment of Wages and Fringe Benefits (29 CFR 4.165)
- Bona Fide Fringe Benefit Plans (29 CFR 4.171)
- Health and Welfare Fringe Benefits (29 CFR 4.175) ($4.41 per hour up to 40 hours in a work week)
- Paid Vacation Fringe Benefits (29 CFR 4.173)
- Paid Holiday Fringe Benefits (29 CFR 4.174)
- Equivalent Fringe Benefits (29 CFR 4.177)
- Temporary and Part-Time Employment (29 CFR 4.176)
Payment of Wages (29 CFR 4.165)

- Wages established by wage determinations (WD) issued by DOL
- Wages and hours worked must be calculated on a fixed and regularly recurring workweek of seven consecutive 24-hour workday periods
  - Payroll records should be kept on this basis
  - May use bi-weekly or semi-monthly pay periods if advance notice is given to affected employees
  - A pay period longer than semi-monthly will not comply with the SCA
Payment of Wages (29 CFR 4.165)(cont.)

- When incorporated into a federal service contract, a WD requires a contractor to pay service employees no less than the specified wages and fringe benefits.

- Minimum hourly wage rates are listed by classification of work performed.

- Required fringe benefits are described following the list of classifications, and typically include a specified amount for “health and welfare,” 10 or 11 paid holidays, and 2-4 weeks vacation, depending upon total length of service with the contractor and any predecessors.
Wage Determinations

A new or revised wage determination (WD) (if available) must be incorporated for each of the following situations:

- New solicitations and contracts in excess of $2,500
- Option years/periods
- Extension periods
- Changes in scope significantly affecting the labor requirements (not just more of the same type of work)
- Multiple year contracts
- Annual anniversary date, if subject to annual appropriations
- Biennial (every other year) anniversary date, if not subject to annual appropriation

- See FAR 22.1007
Wage Determinations

- “Effective” WDs available timely in the WDOL.gov SCA database or received in response to an “E98” WD request
- WDs published during a contract period would not be effective until the start of the following contract period
- FAR 22.1012 provides the following rules:
  - Other than sealed bidding -- A revised WD shall not be effective if it is received by the contracting agency after award and performance starts within 30 days of award date. If performance starts more than 30 days from award date, the revised WD shall be effective if received no later than 10 days before start of performance
  - Sealed bidding -- A revised WD shall not be effective if received by the contracting agency less than 10 days before the opening of bids, and the Contracting Officer determines that there is not reasonable time to incorporate the revision in the solicitation
- The WDOL.gov SCA database must be monitored for revisions until the FAR deadline for receipt of WDs for the particular contract action
- The WDOL.gov “Alert Service” may be used to receive notice of WD revisions after obtaining a WD
  - However, the Contracting Officer should not rely entirely on the “Alert Service” as it is not failsafe
Wage Determinations

- Types:
  - Standard WDs listing close to 300 work classifications
  - Non-standard WDs for services such as elevator maintenance, moving & storage of household goods, off-base food & lodging, baggage inspection, and others less commonly used
  - Contract-specific or special WDs for services for which a unique WD has been established for those services in one or more localities or services performed under a sole-source contract with a state or local government
    - These WDs are less common
  - Collective Bargaining Agreement (CBA)-based WDs without submission of an SF98/98a request to the U.S. Department of Labor (DOL)
Wage Determinations

- FAR 52.222-43 permits contractors to recover increased labor costs during contract
- But be sure to comply with regulatory requirements
- *Stobil Enterprises v. Dept. of Veterans Affairs*, CBCA 5698 (Sept. 10, 2019)
Computation of Hours Worked (29 CFR 4.178 and 4.179)

- In general, the hours worked by an employee include all periods in which the employee is suffered or permitted to work whether or not required to do so, and all time during which the employee is required to be on duty or to be on the employer’s premises or to be at a prescribed workplace.

- The hours worked which are subject to the compensation provisions of this Act are those in which the employee is engaged in performing work on contracts subject to the Act.
Computation of Hours Worked (29 CFR 4.178 and 4.179) (cont.)

- A contractor must keep affirmative proof (i.e. adequate records) of time spent on SCA covered work and non-covered work
  - Absent such adequate records adequately segregating covered and non-covered work, all employees working in the establishment or department where such covered work is performed shall be presumed to have worked on or in connection with the contract during the period of its performance
  - Additionally, in the absence of such records, an employee performing any work on or in connection with the contract in a workweek shall be presumed to have continued to perform such work throughout the work week
Payment of Fringe Benefits (Vacation, Holidays, and Health and Welfare)

- Cash payments in lieu of fringe benefits must be paid on the regular pay date (29 CFR 4.165)
- Payments into bona fide fringe benefit plans must be made no less than quarterly (29 CFR 4.175(d))
- An employee is entitled to holiday pay if he/she works in the holiday work week
- An employee is not entitled to holiday pay if the holiday not named in the WD (i.e., government closed by proclamation)
- Paid holidays can be traded for another day off if communicated to employees
Payment of Fringe Benefits (Vacation, Holidays, and Health and Welfare)

- The contractor may not credit excess wage payment against the FB obligation

  - For example, pursuant to the wage determination, employee is to be paid $15.00 per hour and FB of $4.41. Instead, the employee is paid $16.00 per hour and FB of $3.41. While both total $19.41, the contractor has failed to provide the full FB of $4.41
Bona Fide Fringe Benefits (29 CFR 4.71(a))

- Constitute a legally enforceable obligation that:
  - Is specified in writing and communicated in writing to affected employees;
  - Provides for the payment of benefits to employees;
  - Contains a definite formula for determining the amount to be contributed and for determining benefits for each employee participating in the plan;
  - Payments must be irrevocably to a trustee or third person pursuant to an insurance agreement, trust or other funded arrangement; and
  - Must comply with IRS and ERISA requirements
Health and Welfare

- Three Types:
  - “Standard/Fixed Cost” WD Benefits
  - “Average Cost” Benefits
  - Collectively Bargained (CBA) Benefits
Health and Welfare (H&W) Fringe Benefits (29 CFR 4.175(a))

- “Standard/Fixed Cost” WD Benefits
  - Most common
  - Currently $4.41 per hour
  - Required to be paid on an individual employee basis “FOR ALL HOURS PAID FOR” up to 40 hours in a workweek, including leave and holidays
Health and Welfare (H&W) Fringe Benefits (Collectively Bargained)

- Based on CBA

- If there is a CBA, when the employees of the predecessor contractor (or subcontractor) are represented by a union, Section 4(c) of the Service Contract Act requires DOL to reflect the wage and fringe benefit terms of the applicable collective bargaining agreement (CBA) in a WD for any follow-on contract period

- To qualify, the CBA must be submitted to the contracting agency on a timely basis (per FAR 22.1012-3) without any contingencies “prohibited” by DOL
Vacation Fringe Benefits (29 CFR 4.173)

- Vested and become due after the employee’s anniversary date
  - For example, employee starts on February 1, 2019. Employee would be entitled to vacation on February 1, 2020

- Must be discharged before the next anniversary date, completion of the contract, or the employee’s termination date
To determine an employee’s length of service for eligibility for vacation benefits, an employer must consider:

- Total length of time spent by an employee in any capacity in the continuous service of the present (successor) contractor; and

- Where applicable, the total length of time spent in any capacity as employee in the continuous service of any predecessor contractor(s) who carried out similar contract functions at the same federal facility.
Vacation Fringe Benefits (29 CFR 4.173) (cont.)

- For example, if contract called for “one week of paid vacation after one year of service with a contractor or successor, the following employees would be entitled to vacation benefits:
  - An employee who has worked for 18 months on regular commercial work and 6 months on a Government service contract
  - An employee who worked for 16 months for a predecessor contractor at the same facility and only 8 months with the present contractor
Holiday Fringe Benefits (29 CFR 4.174)

- If any work is performed in a workweek in which the holiday falls, the employee is entitled to the holiday pay.
- Holiday pay not applicable to holidays not named in the contract WD.
- Paid holidays can be traded for another day off with pay in accordance with a plan communicated to employee.
Equivalent Fringe Benefits (29 CFR 4.177)

- For FB’s listed in weekly amounts, divide the weekly amount by the hours worked (40):
  - e.g., $60/40 hours = $1.50 per hour

- For FB’s listed in non-cash amounts (one week paid vacation), multiply the wage rate by the hours making up the vacation and divide by the annual hours:
  - e.g., $10 x 40 hours = $400/2080 hours = $.19 per hour
Part Time Employees (29 CFR 4.176)

- Paid proportionately for vacation and holidays
- Maximum vacation and holidays: 40/8 hours
  - For example, contract calls for 1 week of vacation. Part-time employee who works 20 hours per week and otherwise meets eligibility requirements is entitled to 20 hours of vacation
  - If same employee worked during a week with a holiday, he/she would be entitled to 4 hours of holiday pay, regardless of whether scheduled to work on day of holiday
- Entitled to same H&W rate of $4.41
Recordkeeping Requirements (29 CFR 4.6(g) and 4.185)

- Every contractor and subcontractor performing work on an SCA contract shall maintain for at least three years employment records for all employees performing work on the contract.

- However, statute of limitations is 6 years.

- Basic records include:
  - Name, address, and SSN
  - Work classifications, wage rates, fringe benefits furnished
  - Total daily and weekly comp for each employee
  - Deductions, rebates, and refunds from comp
  - Any applicable CBAs
Recordkeeping Requirements (DBA)

- Payrolls and related basic records shall be maintained by the contractor during the course of the work and for three years thereafter for all laborers and mechanics working at the site of the work.

- Such records shall contain:
  - The name, address, and social security number of each such worker.
  - His or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act).
  - Daily and weekly number of hours worked.
  - Deductions made and actual wages paid.
    - 29 CFR 5.5(a)(3)
Notice to Employees (29 CFR 4.183 and 4.184)

- The contractor or subcontractor shall notify each employee commencing work on a contract to which the Act applies of the compensation required to be paid such employee as well as the fringe benefits to be provided.

- A notice form (WH Publication 1313 and any applicable wage determination) provided by the Wage and Hour Division is to be used for this purpose.

- The notice may be delivered to the employee or posted as stated in 29 CFR 4.184.
Required Postings

- At the time of the award, the DOL Publication WH-1313 must be furnished to the contractor (FAR 22.1018), which must be displayed at the worksite for employees to see.

- The poster must be posted in a prominent and accessible place at the worksite (i.e., displayed in a place where it may be seen by employees performing on the contract).

  - The contractor is required to notify each employee of the compensation due or attach to the poster any applicable wage determination specified in the contract listing all minimum monetary wages and fringe benefits to be paid or furnished to the classes of service employees performing on the contract.
SCA Enforcement

- DOL will review required stipulations: minimum wage to be paid, fringe benefits, safety and health provisions, notice of required compensation, and statement of rates that may be paid to federal employees for like services

- DOL has sole enforcement authority

- Investigation conducted by Wage and Hour Division
SCA Enforcement

- Initial Employer Conference
- DOL will meet initially with the employer to examine payroll (up to 2 years), conduct employee interviews, inspect job site, and obtain other relevant information
- Review Prime Contract to determine applicable WD
- Determine whether employees are properly classified
- Review subcontract
**SCA Enforcement**

- Prime contractor responsible for violations by subcontractors and back wages due to employees
- Prime contractor should be notified of investigation
- DOL determines whether Contracting Officer determined SCA not applicable to contract or whether contracting agency failed to obtain WD
- As appropriate, DOL will contact contracting agency to insert SCA stipulations and/or WD into contract
Review of Conformance Actions (29 CFR 4.6(b)(s))

- Conformance action permits the addition of unlisted classes of workers to WD
- Requires contractor to submit paperwork to contracting agency, who in turn submits to DOL for final approval
- Investigation will determine:
  - If conformance procedures followed
  - If not, will require parties to do so
  - Back wage liability retroactive to date conformed class started work on contract
Conclusion of Investigation Final Conference

- Inform contractor of investigation findings
- Detail steps to eliminate violations
- Consider additional evidence that may impact on findings (e.g., conformance)
- Request payment of back wages
- Notify of any liquidated damages under CWHSSA
Withholding (41 U.S.C. 352(a); 29 CFR 4.6(i))

- Withholding actions may be necessary to recover back wages as SCA does not have a right of individual action (private lawsuit)
- Government may institute court action against contractor or its surety to recover wage and fringe benefit underpayments
- Subcontractor’s failure to make restitution becomes the prime contractor’s responsibility
- Contractor will be notified in writing
- Wage claims have priority
Withholding -DBA

- DBA and CWHSSA provide for withholding of contract funds to satisfy alleged wage underpayments pending resolution of a wage dispute
  - 40 U.S.C. § 3142(c)(3); 40 U.S.C. § 3702(d)

- Withholding of contract funds is an effective enforcement tool in DBA/DBRA/CWHSSA cases
  - It protects the rights of covered workers to wages due

- The contract clause language set forth at 29 C.F.R. § 5.5(a)(2), (reflected at FAR 48 C.F.R. 5.222-7), states that:
  - The federal agency or the loan or grant recipient shall, upon its own action or upon written request of an authorized representative of DOL, withhold or cause to be withheld from the contractor under this contract
  - or any other federal contract with the same prime contractor, or any other federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime contractor,
  - so much of the accrued payments or advances as may be considered necessary to pay … the full amount of wages required by the contract.
Debarment - DBRA

- Occurs when a contractor is declared ineligible for future contracts due to:
  - Violations of the DBA in disregard of its obligations to employees or subcontractors
  - Aggravated or willful violations under the labor standards provisions of related Acts
- Period of ineligibility is 3 years for DBA and up to 3 years for DBRA
Debarment – DBRA/SCLS

- Debarment is considered when a contractor has:
  - Submitted falsified certified payrolls;
  - Required “kickbacks” of wages or back wages;
  - Committed repeat violations;
  - Committed serious violations;
  - Misclassified covered workers in clear disregard of proper classification norms; and/or
  - As a prime contractor, failed to ensure compliance by subcontractors
Debarment (41 U.S.C. 354; 29 CFR 4.188)

- Any person or firm found to have violated the SCA may be ineligible to receive further contracts for three years
- Unless finding of “unusual circumstances” – burden is on contractor to establish
- Comptroller General distributes debarred bidders list to all agencies
Administrative Review Board (ARB)

- Members appointed by the Secretary of Labor
- Hears appeals of ALJ decisions
- Acts on petitions to review final rulings of the WHD Administrator:
  - 60 days on coverage & interpretations
  - 20 days on WD matters
- Enforcement proceedings may be an oral hearing in Washington, D.C., or, typically, by review of record in closed session
Avoiding Common Mistakes

- Failing to properly differentiate on paystubs wages vs. health and welfare benefits
  - WD requires payment of minimum wage and fringe benefits
  - Employer pays employee $15.00 per hour but fails to differentiate on paystub that $4.41 is for benefits
  - Employer may be required to pay an additional $4.41 for each hour worked for each employee
Avoiding Common Mistakes (cont.)

- Current benefits are not consistent with benefits required under SCA
  - Pursuant to the contract, the employer is required to pay $.30 per hour for health and welfare benefits
  - Employer provides hospitalization insurance at a cost of $10 per week
  - While the employer may credit $.25 per hour towards its fringe benefit requirement, the employer is still short $.05 per hour to meet its obligations
  - Employer may make up the difference with cash payment
Avoiding Common Mistakes (cont.)

- Failing to extend coverage to all worksites
  - Employer has 5 service employees performing SCA covered work
  - 1 of 5 works at home office and only spends approximately 20% of time on covered work
  - Employer fails to pay the home office employee the wage determination rate
Avoiding Common Mistakes (cont.)

- Misclassifying work actually performed
  - Computer Sciences Corp., misclassified employees and failed to pay them the proper prevailing wage rates for the type of work they actually were performing
  - Company agreed to pay $1,448,505 in back wages to 237 workers
Updates in GSA Multiple Award Schedule Contracting

Micah Zomer
Julia Di Vito
Opportunities Available in GSA Schedule Contracting

- General Services Administration (GSA) Multiple Award Schedule (MAS) Contracts (GSA Schedule Contracts)
  - GSA managed program - contractor’s commercial supplies or services may be provided to a wide range of federal government customers (and some state and local government agencies) on an expedited and streamlined basis
  - Any agency may purchase products or services from a contractor’s GSA Schedule Contract
  - Awarded contract is an Indefinite Delivery/Indefinite Quantity Contract
    - Base term of 5 years with three 5-year option periods
    - Agencies issue Task or Delivery Orders
Opportunities Available in GSA Schedule Contracting

- Commonly used, commercial items/services
- Over 11 million types of products and services offered for sale
- Currently over 19,000 GSA Schedule Contracts
- Sales exceed $30 billion annually
- GSA Schedule Contract is essentially a “hunting license”
Overview of Schedule Process

- Find the current solicitation on FedBizOpps (www.fbo.gov)
  - Used to be separate solicitations for each GSA Schedule, but now one consolidated solicitation
  - Contain FAR and GSAM clauses

- Identify applicable Special Identification Number (SIN) for the products/services being offered

- Prepare a proposal
  - Review solicitation to ensure proposals strictly comply with all requirements
  - Failure to submit required information may result in proposal being returned to the offeror or rejected
Overview of Schedule Process

- Complete the Commercial Sales Practices (CSP) Chart
  - GSA Schedule solicitation includes 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
Overview of Schedule Process

- Complete the Commercial Sales Practices (CSP) Chart (cont.)
  - 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 Reductions Clause
  - Must be updated during contract term
  - Not “one size fits all” and difficult to complete
Overview of Schedule Process

- Failure to Accurately Disclose Information in CSP: GSAM 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 negotiation
Overview of Schedule Process

- 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
Overview of 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 known 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, the 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
Price Reductions Clause (PRC)

- **GSAM 552.238-81, 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%
Price Reductions Clause (PRC)

- 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
Price Reductions Clause (PRC)

- 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
Price Reductions Clause (PRC)

- Avoid Triggering the Price Reduction Clause
  - 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 the result of a quotation or billing error
  - Notice does not mean that the Government will require a corresponding price reduction
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 a specified percentage (varies per negotiations)
  - 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
Industrial Funding Fee (IFF)

- 552.238-80, *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 is .75%
  - Paid quarterly based on the calendar quarter – Make sure you file timely
  - Reports and payments submitted within 30 days after the completion of each reporting quarter
  - Failure to pay constitutes a debt and interest will accrue
Industrial Funding Fee (IFF)

- 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
Trade Agreement Act (TAA)

- FAR 52.225-5, *Trade Agreements*
  - Applies to sales of goods and services under all GSA Schedule Contracts
  - Requires contractors to deliver end products made only in the U.S. or a designated country
  - If contractor intends to provide a foreign end product, it must disclose its intent to do so in its Trade Agreements Certificate submitted with its proposal in response to the GSA solicitation

- GSA accepts proposal for foreign-end products only under limited circumstances; acceptance must be incorporated into GSA Schedule Contract
Trade Agreement Act (TAA)

- Government actively enforces requirements of the TAA clause
- Penalties for noncompliance can be significant, including:
  - Termination for Default
  - False Claims Act Liability
  - False Statements Act Liability
  - Criminal Prosecution
  - Suspension or Debarment
  - Price Adjustment
Trade Agreement Act (TAA)

- Protective measures to ensure compliance with the TAA clause
  - Review internal sourcing and manufacturing data to ensure end product is a U.S.-made or designated country end product
  - For non-manufacturers (i.e., distributors and resellers):
    - Obtain letters of supply from manufacturers and suppliers certifying that end products comply with TAA clause
    - Require manufacturers and suppliers of end products to provide indemnification for TAA violations for which they are responsible
Recent Enforcement Actions

- Informatica Corporation (May 2019)
  - Whistleblower suit alleged that Informatica provided resellers false information concerning its commercial discounting practices
  - Resellers then used that false information in negotiations with GSA, which caused GSA to agree to less favorable pricing and Government purchases to be overcharged
  - Suit also alleged violations of the TAA
  - Informatica agreed to pay the Government $21.75 million, $4.3 million of which was to be shared by the whistleblower
Recent Enforcement Actions

- United Parcel Service, Inc. (UPS) (Sept. 2019)
  - UPS provided ground and air delivery services under its GSA Schedule Contract
  - UPS allegedly failed to follow the PRC, which required UPS to provide GSA with lower prices offered to another customer
  - UPS’ failure to comply with the PRC resulted in the Government paying more than it should have for package deliveries
  - UPS agreed to pay $8.4 million to settle the claims
Internal Compliance Reviews

- Conduct internal compliance reviews related to GSA Schedule Contract periodically (but at least before GSA Schedule Contract renewal)

- As part of compliance reviews, contractors should:
  - Conduct 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!
Preparing for a GSA Audit

- **552.215-71, Examination of Records by GSA (Federal Supply Schedules)**
  - 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
Preparing for a GSA 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
Preparing for a GSA Audit

- Contract files should contain the following key documents:
  - 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
Preparing for a GSA 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
Recent GSA Schedule Developments

- Consolidation of the GSA Schedules
- Schedule Modification to Add Telecommunications Equipment Clauses
- GSA’s Transactional Data Reporting Pilot Program
- GSA’s e-Commerce Portal Pilot Program
GSA Schedule Consolidation: Overview

- GSA is consolidating the following Schedules into one Schedule:

<table>
<thead>
<tr>
<th>Original Schedule</th>
<th>New Schedule</th>
</tr>
</thead>
<tbody>
<tr>
<td>00CORP – Professional Services Schedule</td>
<td>71 II K – Comprehensive Furniture Mgmt. Services</td>
</tr>
<tr>
<td>03FAC – Facilities Maintenance &amp; Mgmt.</td>
<td>72 – Furnishings and Floor Coverings</td>
</tr>
<tr>
<td>23 V – Automotive Superstore</td>
<td>73 – Food Service, Hospitality, Cleaning, etc.</td>
</tr>
<tr>
<td>36 – Office, Imaging and Document Solutions</td>
<td>75 – Office Products, Supplies, and Services</td>
</tr>
<tr>
<td>48 – Transportation, Delivery, Relocation</td>
<td>76 – Publication Media</td>
</tr>
<tr>
<td>51 V – Hardware Superstore</td>
<td>78 – SPORTS</td>
</tr>
<tr>
<td>56 – Building and Building Materials</td>
<td>81 I B – Packaging and Packaging Supplies, Services</td>
</tr>
<tr>
<td>58 I – Professional Audio/Video, etc.</td>
<td>84 – Law Enforcement, Security, etc.</td>
</tr>
<tr>
<td>66 – Scientific Equipment &amp; Services</td>
<td>599 – Travel Services Solutions</td>
</tr>
<tr>
<td>67 – Cameras, Photographic Printers, etc.</td>
<td>736 – Temporary Administrative, Professional Staffing</td>
</tr>
<tr>
<td>70 – IT Equipment, Software, and Services</td>
<td>738 X – Human Capital Management</td>
</tr>
<tr>
<td>71 – Furniture</td>
<td>751 – Leasing of Automobiles &amp; Light Trucks</td>
</tr>
</tbody>
</table>
GSA Schedule Consolidation: Phase 1

- Time period: Through end of 2019
- GSA consolidated Special Item Numbers (SIN) to avoid duplication
  - SINs now look more like NAICS codes
  - If there is only one SIN for a NAICS code, the SIN was renamed to correspond to the NAICS code description
  - GSA issued a cross-walk that maps existing SINs to new SINs
GSA Schedule Consolidation: Phase 1

- GSA issued a new solicitation for the consolidated GSA Schedule in October 2019
  - GSA considered more than 1,000 comments on its requests for information about consolidation
  - The new solicitation includes streamlined terms and conditions, new large categories and sub-categories, and updated SINs
  - Categories of SINs conform to the current government-wide category structure
  - Since October 1, 2019, all offers for GSA Schedule Contracts must use the new solicitation
GSA Schedule Consolidation: Phase 2

- Time period: January 2020 to July 2020
- GSA will issue a mass modification to all GSA Schedule Contract-holders
  - The mass modification will apply to all existing GSA Schedule Contracts even if contractor has more than one Schedule
  - Pricing, period of performance, and individually negotiated terms will remain the same
  - Socioeconomic statuses will remain the same
  - Contract numbers will remain the same
GSA Schedule Consolidation: Phase 2

- GSA will map existing SINs to the new SINs
  - The contractor does not need to take any action
- GSA will update eLibrary, GSA Advantage, and eBuy to align with the consolidated SINs
- Contractors can add new SINs that previously were not available on their GSA Schedule Contracts
  - All consolidated SINs will be available to all Schedule contractors
  - Contractors will work with their contracting officer to add SINs to their contract through the modification process
GSA Schedule Consolidation: Phase 2

- Once a contractor’s SINs are updated:
  - The contractor will start to see new SINs in the Federal Acquisition Service Sales Reporting Portal
  - The contractor will see opportunities in eBuy listed for the contractor’s new SINs and legacy mapped SINs
  - SINs that have Contract Access Fees other than the Industrial Funding Fee will remain the same

- GSA’s plan is that all GSA Schedule contractors will sign the mass modification by July 2020
GSA Schedule Consolidation: Phase 3

- Time period: July 2020 and beyond

- GSA will work with contractors with multiple GSA Schedule Contracts to consolidate them
  - GSA will not consolidate Schedule Contracts expected to complete the 20-year term shortly
  - Consolidation may take years if it would impact existing BPAs
  - BPAs will continue until the BPA or GSA Schedule Contract expires, whichever occurs first
GSA Schedule Consolidation: Phase 3

- Contractors with only one GSA Schedule Contract do not need to take any action
- If a contractor has multiple GSA Schedule Contracts with different BOAs, GSA will work with the contractor to determine how to proceed
- The Transactional Data Reporting pilot will not be affected by consolidation (more on that later)
Schedule Modification to Add Telecommunications Equipment Clauses

- In September 2019, GSA issued a mass modification to all Schedule contractors to bilaterally add two clauses to all Schedule contracts:
  - FAR clause 52.204-25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment (AUG 2019)
  - GSAR clause 552.204-70, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment (Aug 2019)

- These clauses prohibit providing telecommunications equipment or services produced by Huawei Technologies Company, ZTE Corporation, or other named companies or their subsidiaries or affiliates
Schedule Modification to Add Telecommunications Equipment Clauses

- Within 60 days of the modification, contractors will have to accept the modification and provide a representation regarding whether it will provide telecommunications equipment or services from the identified companies.

- GSA may cancel contracts that have not timely accepted the modification, and acceptance is required prior to GSA exercising the next contract option period.
GSA Transactional Data Pilot Program

- Pilot program started in August 2016
- Under the pilot, contractors would report the price paid for Schedule products and services
- In exchange, the contractors would not be subject to three requirements:
  - Tracking compliance with the Price Reductions Clause
  - Tracking prices for the BOA customer
  - Submitting Commercial Sales Practice disclosures
GSA Transactional Data Pilot Program

- Contractors with these schedules and SINs can participate:
  - **Schedule 58 I**, Professional Audio/Video, Telemetry/Tracking, Recording/Reproducing and Signal Data Solutions: All SINs
  - **Schedule 72**, Furnishing and Floor Coverings: All SINs
  - **Schedule 03FAC**, Facilities Maintenance and Management: All SINs
  - **Schedule 51 V**, Hardware Superstore: All SINs
  - **Schedule 75**, Office Products: All SINs
  - **Schedule 73**, Food Service, Hospitality, Cleaning Equipment and Supplies, Chemicals and Services: All SINs
  - **Schedule 00CORP**, The Professional Services Schedule: SINs 871-1, 2, 3, 4, 5, 6, and 7 (Professional Engineering Services)
  - **Schedule 70**, General Purpose Information Technology Equipment, Software, and Services: SINs 132-8 (Purchase of Hardware), 132-32, 33, and 34 (Software), and 132-54 and 55 (COMSATCOM)
GSA Transactional Data Pilot Program

- In August 2017, this program became voluntary for new GSA Schedule Contract holders.
- In August 2019, GSA announced it would extend the pilot through Fiscal Year 2020.
  - That same month, GSA’s Office of Inspector General questioned the benefits of the pilot program and reiterated the importance of the Commercial Sales Practice and Price Reductions Clause requirements.
- At the end of Fiscal Year 2020, GSA will reevaluate and decide whether to continue with the pilot, cancel it, or expand it to all SINs.
GSA e-Commerce Portal

- Required by 2018 National Defense Authorization Act
  - GSA required to establish a program to procure commercial-off-the-shelf products through commercial e-Commerce portals to enhance competition, expedite procurement, enable market research, and ensure reasonable pricing of commercial products
  - GSA required to enter into multiple contracts with multiple commercial e-Commerce portal providers
- The e-Commerce portal would be separate from the GSA Schedule program
GSA e-Commerce Portal

- GSA identified 3 types of e-Commerce portals:
  - e-Commerce Model: Vendors sell their own products on their own websites
  - e-Marketplace Model: Vendors sell through a marketplace that connects buyers with providers and/or third-party vendors
  - e-Procurement Model: Software-as-a-service managed by the buying organization; the portal provider connects contracted suppliers from outside marketplaces to buyer

- GSA selected e-Marketplace model as initial proof of concept
GSA e-Commerce Portal

- On October 1, 2019, GSA issued a solicitation for the e-Marketplace Model
  - The solicitation will result in two or more no-cost contracts with commercial e-Marketplace providers
  - The contracts will be able to be used by Federal agencies using the Government Purchase Card for the purchase of commercial off-the-shelf items
  - The solicitation contemplates contracts with a one-year base period and two one-year option periods
- GSA’s goal is to have the pilot program platforms up by early 2020
Are you Protecting Your Intellectual Property?

Erin Toomey
Overview

- FAR breaks IP into three general categories
  - Patents / Inventions
  - Technical Data
  - Computer Software
Patents / Inventions

  - Originally only applied to small businesses and non-profits
  - Extended to domestic large businesses in 1987 by Executive Order 12591
  - NIST regulations updated effective 5/1/18 to clarify the implementing regulations apply to large businesses as well
Patents / Inventions

- Applicable Clauses
  - FAR 52.227-11, Patent Rights – Ownership by the Contractor
  - FAR 52.227-13, Patent Rights – Ownership by the Government
  - DFARS 252.227-7038, Patent Rights – Ownership by the Contractor (Large Business)

*Department of Energy has its own clauses with different allocations of rights not covered in this presentation

Read each clause carefully
Patents / Inventions

- The Government receives rights in “subject inventions”
  - *Invention*: Any invention or discovery which is or may be patentable
  - *Subject Invention*: Any invention a contractor conceives or first actually reduces to practice in the performance of work under the contract
Patents / Inventions

- **Conception**
  - Requires:
    - Definite and permanent idea for the
    - Complete and operative invention
    - Is formed in the inventor’s mind (*Dawson v. Dawson*, 710 F.3d 1347, 1352 (Fed. Cir. 2013))
  - Employees must maintain:
    - Detailed laboratory notebooks
    - Other pertinent engineering information
    - Dated documentation
Patents / Inventions

- Actual Reduction to Practice
  - Requires:
    - Production or physical embodiment of the claimed item or process
    - Demonstration the invention works for its intended purpose
  - Constructive reduction to practice (e.g., filing a patent application) is not sufficient to demonstrate actual reduction to practice
Patents / Inventions

- In the performance of work under the contract
  - Connection or nexus between the nature of the work to be performed under the contract
    - Includes contractor cost-share portion of the contract
  - Does not include work performed contemporaneously with the contract, but outside the scope of work of the contract
  - Employees must accurately document time spent on federally-funded contracts to distinguish federally-funded development from privately-funded or contractor-funded Independent Research & Development (IR&D)
Patents / Inventions

- Subject Invention Reporting (*differs depending on applicable clause*)
  - FAR 52.227-11: Within 2 months after the inventor discloses, in writing, the subject invention to contractor personnel responsible for patent matters
  - FAR 52.227-13:
    - Within 2 months after the inventor discloses, in writing, the subject invention to contractor personnel responsible for patent matters OR
    - If earlier, within 6 months after the contractor becomes aware that a subject invention has been made,
    - BUT, in both cases, prior to any on sale (i.e., sale or offer for sale), public use, or publication of the subject invention
  - DFARS 252.227-7038:
    - Within 2 months after the inventor discloses, in writing, the subject invention to contractor personnel responsible for patent matters OR
    - If earlier, within 6 months after the contractor becomes aware that a subject invention has been made
Patents / Inventions

- Content of Subject Invention Disclosure
  - In the form of a written report (sent to the Contracting Officer)
  - Sufficiently complete in technical detail to convey a clear understanding of the subject invention
  - Identify the inventors
  - Identify the contract under which the invention was made
  - Identify any publication, on sale, or public use of the invention
  - Identify whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure
Patents / Inventions

- Election to Retain Title
  - FAR 52.227-11:
    - At the time of subject invention disclosure; OR
    - Within 2 years of disclosure; BUT
    - 60 days prior to the end of the 1-year statutory period when initiated by publication, on sale, or public use
  - DFARS 252.227-7038
    - At the time of subject invention disclosure; OR
    - Within 8 months of disclosure; BUT
    - 60 days prior to the end of the 1-year statutory period when initiated by publication, on sale, or public use
Patents / Inventions

- **Content of Notice of Election to Retain Title**
  - To the Contracting Officer (and potentially the higher-tiered contractor)
  - Identify those countries (including the United States) in which the contractor will retain title

- **Greater Rights Determinations (FAR 52.227-13)**
  - At the time of first disclosure of the subject invention; OR
  - Within **8 months** of disclosure
  - Submitted to the Contracting Officer
Patents / Inventions

- **Patent Applications**
  - File U.S. provisional or non-provisional patent application on an elected invention within **1 year** after election
    - Shorter timeframe if publication, on sale, or public use has occurred
  - File a U.S. non-provisional application within **10 months** of the provisional application
  - File patent applications in additional countries within **10 months** of the initial patent application
  - Required statement:
    - “This invention was made with Government support under *(identify the contract)* awarded by *(identify the agency)*. The Government has certain rights in this invention.”
Patents / Inventions

- Contractors can request extensions of time
- Failure to timely provide notice can result in the contractor losing title in the subject invention, and potentially license rights as well
  - The Government may only request title within 60 days after learning of the contractor’s failure to report or elect within the specified times
  - BUT effective May 14, 2018, NIST regulations removed the 60-day requirement, providing the Government with an unlimited amount of time to request ownership
- Also a process for disputing whether an invention is in fact a Subject Invention
Patents / Inventions

- If the contractor retains ownership of a subject invention, the Government receives a license in the subject invention
  - Non-exclusive
  - Non-transferable
  - Irrevocable
  - Paid-Up
  - To practice, or have practiced for or on its behalf, the subject invention throughout the world
Patents / Inventions

- The Government can obtain title in subject inventions for which:
  - The contract contains FAR 52.227-13
  - The contractor elects not to retain title
  - In those countries in which the contractor fails to file patent applications within the times specified
    - If the contractor files a patent application prior to receipt of a written request from the Government, the contractor shall continue to retain title in that country
  - In any country in which the contractor decides not to:
    - Continue the prosecution of any application;
    - Pay the maintenance fees; or
    - Defend in reexamination or opposition proceeding
Patents / Inventions

- The contractor will still retain a nonexclusive, royalty-free license throughout the world, except if the contractor failed to timely disclose the subject invention to the Government
  - License extends to domestic subsidiaries and affiliates
  - License includes the right to grant sublicenses
  - License transferable only with the approval of the agency
    - Exception: When transferred to the successor of that part of the contractor’s business to which the invention pertains
Patents / Inventions

- Subcontract Flowdown Requirements
  - The contractor must include an applicable patent rights clause in subcontracts for experimental, developmental, or research work
    - Note this may not be the same patent rights clause that is in the contractor’s contract
  - Rights flow directly from the subcontractor to the Government
    - Higher-tiered contractors may not, as part of consideration for award of a subcontract, obtain rights in the subcontractor’s inventions
Patents / Inventions

- Ongoing Reporting Requirements
  - Decision not to continue the prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding
    - Not less than 30 days before the expiration of the response period required by the patent office
  - Upon request but no more frequently than annually, reports on the utilization of each subject invention or on efforts at obtaining such utilization
- Can mark reports privileged / confidential so they are not disclosed outside of the Government
Patents / Inventions

- Preference for U.S. Industry
  - Neither the contractor, nor its assignee, may grant a person the exclusive right to use or sell any subject invention in the U.S. unless that 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.
  - May be waived by the Government if:
    - Domestic manufacture is not commercially feasible
    - The contractor shows reasonable but unsuccessful efforts to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the U.S.
Patents / Inventions

- March-In Rights
  - The Government can require the contractor, an assignee, or an exclusive licensee to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant(s) upon a determination:
    - Such action is necessary because the contractor/assignee has not taken, or is not expected to take within a reasonable amount of time, effective steps to achieve practical application in such field of use
    - Necessary to alleviate health or safety needs
    - Necessary to meet requirements for public use
  - No reports of this being exercised by the Government
Patents / Inventions

- Contractors Must Establish Active and Effective Procedures
  - Ensure subject inventions are promptly identified and disclosed to contractor personnel responsible for patent matters
  - Maintenance of laboratory notebooks or equivalent records to document conception/actual reduction to practice
  - Maintenance of records to show these procedures are followed
  - Require employees, by written agreement, to disclose promptly in writing to personnel responsible for patent matters each subject invention
  - Require employees to assign to the contractor all right, title and interest in and to subject inventions
  - When licensing a subject invention for a federal Government acquisition (at any tier), the contractor must avoid royalty charges
  - Deliver confirmatory instruments to the Government establishing license / title as applicable
Technical Data – Non-Commercial Items

- Non-Commercial Item Technical Data FAR/DFARS Clauses
  - FAR 52.227-14, Rights in Data – General
  - DFARS 252.227-7013, Rights in Technical Data – Noncommercial Items

- “Technical Data”: Recorded information of a scientific or technical nature regardless of the form or method of recording
  - Includes computer software documentation
  - Does not include computer software or data incidental to contract administration (financial and/or management information)

- General rule is “follow the funds”

- Doctrine of segregability – identify when technical data was developed at the lowest practicable, segregable level
Technical Data – Non-Commercial Items

- Government gets **limited rights** when the item was funded exclusively at private expense and data is delivered under the contract

- Limited Rights
  - Permits the Government to reproduce and use the data within the government
  - Prohibits the Government from:
    - Using the data for manufacture
    - Disclosing the data outside the Government
Technical Data – Non-Commercial Items

- Under FAR, Government gets **unlimited rights** in:
  - Technical data first produced in the performance of the contract
  - Manuals or instructional and training material for installation, operation, or routine maintenance and repair of items delivered under the contract
  - Form, Fit and Function Data
    - Data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability
    - Data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements
    - Computer software identifying source, functional characteristics and performance requirements *but excludes* the source code, algorithms, processes, formulas and flow charts of the software
  - All other delivered data if not marked as limited rights data or restricted rights computer software
Technical Data – Non-Commercial Items

- Under DFARS, Government also receives unlimited rights in:
  - Studies, analyses, test data, or similar data produced for the contract when the study, analysis, test or similar work was specified as an element of performance
  - Corrections or changes to technical data furnished to the contractor by the Government
  - Otherwise publicly available or released/disclosed by the contractor without restrictions on further use, release or disclosure
    - Doesn’t apply to the sale, transfer or assignment of such data
  - Data in which the Government obtained unlimited rights under another Government contract
Technical Data – Non-Commercial Items

- Under the DFARS only, Government receives Government purpose rights in technical data developed with mixed funding and delivered under the contract
  - Provides the Government with the ability to use the technical data for Government purposes only for a specified period of time (typically 5 years, but negotiable)
    - After that period, the Government receives an unlimited rights license in the technical data
  - Provides the contractor with an opportunity to use the technical data commercially before any other company can do so
Technical Data – Commercial Items

- No FAR clause – Contractor to propose its standard commercial license
- DFARS 252.227-7015, *Technical Data – Commercial Items*
  - The Government receives *unrestricted rights* for itself and others in:
    - Form, fit and function data
    - Correction or change to technical data furnished by the Government
    - Necessary for operation, maintenance, installation, or training (other than detailed manufacturing process data)
    - Provided to the Government without restrictions or under a prior contract with such a license
  - For all other data delivered, the Government may use, modify, reproduce, release, perform, display, or disclose technical data within the Government only
  - The Government cannot:
    - Use the technical data to manufacture additional quantities of commercial items
    - Release, perform, display, disclose, or authorize use of the technical data outside the Government without contractor’s written permission
Computer Software – Non-Commercial Items

- 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

- “Computer Software”: 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

- General rule is “follow the funds”
- Identify when software was developed at the lowest practicable, segregable level
Computer Software – Non-Commercial Items

- Government obtains **restricted rights** when the item was funded exclusively at private expense and software is delivered under the contract.

- Government obtains **unlimited rights** in computer software developed in whole or in part with Government funds and delivered under the contract.

- **DoD Only**: Government obtains **Government purpose rights** in computer software developed with **mixed funding** and delivered under the contract.
Commercial Computer Software

- **FAR**
  - Defined in FAR 2.101: Any computer software that is a commercial item
  - Government receives license customarily provided to the public to the extent such licenses are consistent with federal law and satisfy the Government’s needs (FAR 12.212)
  - FAR 52.227-19, *Commercial Computer Software License*
    - Used when there is a question regarding whether the license is consistent with federal law and/or satisfies the Government’s needs
  - FAR 52.232-39, *Unenforceability of Unauthorized Obligations*
    - Clauses in license agreements that require the Government to indemnify the contractor in violation of the Anti-Deficiency Act are unenforceable
Commercial Computer Software

- **DFARS**
  - Defined in DFARS 252.227-7014: Software developed or regularly used for nongovernmental purposes which:
    - Has been sold, leased or licensed to the public;
    - Has been offered for sale, lease, or license to the public;
    - Has not been offered, sold, leased, or licensed to the public but will be available for commercial sale, lease, or license in time to satisfy the delivery requirements of the contract; or
    - Satisfies one of the above criterion and would require only minor modification to meet the requirements of the contract
  - Software developed at Government expense but then regularly used for nongovernmental purposes and sold or offered for sale to the general public qualifies as Commercial Computer Software
  - If software meets the definition, no DoD clause applies and the Government acquires the software under the contractor’s “standard commercial license” (DFARS 227.7202)
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:

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

- **Handling Commercial Items**
  - *While commercial rights items and software are not required to be listed by DFARS 252.227-7013, contractor has identified those data, both technical data and software, that relate to commercial items and software to avoid any misunderstanding regarding license rights to be granted to the Government. “Commercial Rights” are those license rights defined at DFARS 227.7102-2 and DFARS 227.7202-3.

- Insert comparable FAR clauses if under the FAR
Marking Requirements

- Data or software delivered without specified 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.
- For technical data pertaining to commercial items and commercial computer software, there is no standard legend.
Deferred Ordering/Delivery

- **Beware of Deferred Ordering and Delivery Clauses**
  - FAR 52.227-16, *Additional Data Requirements*
    - Government can order any data first produced or specifically used in the performance of the contract for up to 3 years after acceptance of all items to be delivered under the contract
    - Contractor compensated for converting the data into the prescribed form, for reproduction, and for delivery
  - DFARS 252.227-7026, *Deferred Delivery*
    - Government can require, at any time during performance of the contract, within 2 years after acceptance of all items or termination of contract (whichever is later), delivery of technical data or computer software identified as “deferred delivery” data or software
  - DFARS 252.227-7027, *Deferred Ordering*
    - Government can, at any time during performance of contract or 3 years after acceptance of all items or termination of contract, order any technical data or computer software generated in the performance of the contract or a subcontract
    - Contractor only compensated for converting the data or computer software into the prescribed form, reproduction, and delivery
Summary

- Benefits of Commercial Item Contracts
  - Presumption technical data and computer software were developed exclusively at private expense
    - Does not apply to DoD acquisitions of major systems (now major weapons systems) or subsystems or components
    - Still applies to DoD acquisitions of major systems or subsystems or components that are COTS (and additional recent exceptions)
  - Relaxed marking requirements
  - Ability to negotiate standard commercial licenses
Summary

- **Prime Contractor’s Perspective**
  - Contractor must flowdown applicable clauses to subcontractors and suppliers
  - Contractor should request data rights assertion tables from subcontractors delivering technical data or computer software

- **Subcontractor’s Perspective**
  - Subcontractor rights flow directly to the Government
  - If data is delivered with less than unlimited rights, it 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 a subcontractor
Key Cases

- **Boeing Co., ASBCA 61387 (Nov. 28, 2018)**
  - Boeing awarded a delivery order under a contract containing DFARS 252.227-7013
  - Government conceded that Boeing retained ownership of the data, but the Government would receive unlimited rights in delivered data
  - Boeing included a legend on the technical data
    - NON-US GOVERNMENT NOTICE
    - BOEING PROPRIETARY
    - THIRD PARY DISCLOSURE REQUIRES WRITTEN APPROVAL
    - A COPYRIGHT LEGEND
    - NON-US GOVERNMENT ENTITIES MAY USE AND DISCLOSE ONLY AS PERMITTED IN WRITING BY BOEING OR BY THE US GOVERNMENT
Key Cases

- **Boeing Co., ASBCA 61387 (Nov. 28, 2018)**
  - CO issued a final decision stating the legends were not authorized by the contract and Boeing must remove them at its own expense
  - Boeing appealed the CO’s final decision
  - The Board rejected Boeing’s argument that technical data does not lose its trade secret status when delivered with unlimited rights
    - Trade secret status extinguished if the trade secret is disclosed to others with no obligation to protect the confidentiality of the information
    - The Government is under no obligation to protect the confidentiality of data delivered with unlimited rights
  - The Board could not identify any other legally-cognizable property right to be protected
  - Board held that the legends in the clause are the only permissible legends limiting data rights and no other data rights legends are allowed
Key Cases

- **Takeaway**
  - Still include copyright notices on deliverables, which are permitted under the DFARS clause
  - Try to negotiate a special license and legend with the Government that allows markings that will put commercial companies on notice that use of the technical data is not permitted without a license from the contractor or the Government
Legal Update

- **FY 2019 NDAA**
  - Prior standard required “urgent and compelling circumstances” to permit DoD to release a contractor’s technical data outside of the Government while a dispute is pending
  - New standard only requires DoD to show “compelling mission readiness requirements” will not permit DoD to wait for a final decision by the BCA
  - Contractor can still seek damages if it prevails, but this may inhibit a contractor’s ability to seek immediate injunctive relief
Final DFARS Rules

- Revised DFARS 231.205-18, Independent Research and Development and Bid and Proposal Costs
  - For annual IR&D costs to be allowable for “major contractors”
    - New IR&D efforts must be reported to the Defense Technical Information Center (DTIC) using the online input form and instructions at [http://www.defenseinnovationmarketplace.mil](http://www.defenseinnovationmarketplace.mil)
    - Inputs must be updated at least annually and when the project is completed
    - Copies of inputs and updates must be made available for review by the ACO and DCAA to support the allowability of costs
  - Removed contested provisions requiring “technical interchange” prior to generating IR&D costs
  - Stated purpose to:
    - Ensure that both IR&D performers and potential DoD customers have “sufficient awareness of each other’s efforts”
    - “Provide industry with some feedback on the relevance of proposed and completed IR&D work”
Summary

- DoD, in particular, has an increased focus on technical data / computer software rights.

- Contractors must be diligent in:
  - Submitting data rights assertions tables and marking delivered technical data and computer software.
  - Maintaining adequate records to demonstrate development was at private expense.

- Clearly communicating with the Government regarding the Government’s rights is key to avoiding False Claims Act liability.
Presentation Overview

- U.S. Policy Framework
- The National Security Ecosystem
  - Cybersecurity
  - Export Controls
  - Foreign Investment
  - Security Clearances
- Economic Sanctions (OFAC)
- Enforcement Risks
- Compliance Strategies
- Your Questions
U.S. Policy Framework
National Security Framework

- International trade and investment laws reflect U.S. foreign policy goals
  - Companies traditionally view international trade issues as “regulatory” matters, but federal agents and prosecutors *always* view them through a national security lens

- Requirements constantly evolve in response to changing global events
  - 2011 Syrian Civil War
  - 2014 Russian Invasion of Ukraine
  - 2015 Iran Nuclear Accord
  - 2016 Venezuela Crisis / Russian Election Interference
  - 2017 U.S. Withdrawal from the Iran Nuclear Accord
  - 2018 U.S.-China Trade War
“National Security” Now Includes “Industrial Security”

- The U.S. Government now views trade and investment laws as an instrument of domestic policy as well
  - **Cybersecurity.** New requirements force companies to take precautions to protect themselves and certain information from hacking
  - **Foreign Investment.** Increased oversight of cross-border mergers and acquisitions on “national security” grounds
  - **Global Supply Chains.** Higher tariffs and other measures to insulate U.S. industries from foreign competition and “dangerous” foreign components
  - **Security Clearances.** Stronger measures to protect classified information and sensitive military programs
  - **Technology Transfer.** New measures to prevent IP theft and technology transfers to foreign competitors
Overlapping Enforcement Mechanisms

- Statutes
- Regulations
- Contract Requirement
National Security Ecosystem
Enforcement Mechanism

- Many of these requirements now appear in the DFARS
  - DFARS 252.225-7007: Prohibits sourcing materials from Chinese military companies
    - FAR 52.204-23 imposes similar restrictions on various Chinese products
  - DFARS 252.204-7012: Requires companies to implement cybersecurity measures to protect Controlled Unclassified Information (CUI)
    - Implements standards imposed under DOD-NIST 800-171
  - DFARS 252.255-7048: Requires companies to comply with requirements imposed under U.S. export control laws
    - International Traffic in Arms Regulations (ITAR)
    - Export Administration Regulations (EAR)
National Security Ecosystem

DFARS

Supply Chain

Cyber-Security

Security Clearances

Export Controls

Foreign Investment
Cyber-Security

- **DOD-NIST 800-171**
  - Requires defense contractors to protect Controlled Unclassified Information (CUI) stored in their own servers and systems
  - CUI includes any information that is not classified, but is otherwise subject to restrictions under other applicable U.S. laws
    - Export Control Laws
    - Defense Department Distribution Statements
  - There is no required format or degree of detail for cybersecurity plans, as long as defense contractors meet the underlying requirements
  - Defense contractors that fail to comply are subject to audits and may lose their ability to conduct U.S. Government business
Export Controls

- Control the shipment of certain goods to certain countries or parties
  - International Traffic in Arms Regulations (ITAR)
    - Governs defense articles, defense services, and related technical data
    - Shipments of all ITAR-controlled items require an export license
    - Requires prior registration with the U.S. State Department
  - Export Administration Regulations (EAR)
    - Governs dual-use commercial items, production equipment, software, technology, and technical data (but not services)
    - Rules vary according to the item, the end-destination, and the end-country
    - No prior registration required
  - ITAR and EAR data is considered CUI for cyber-security purposes
Foreign Investment

- Committee on Foreign Investment in the United States (CFIUS)
  - Exercises authority over any foreign merger, acquisition, investment, or joint venture involving a U.S. business
  - Foreign Investment Risk Review Modernization Act (FIRRMA) imposes mandatory CFIUS filings in certain cases
    - The U.S. business designs, develops, fabricates, manufactures, or tests “Critical Technology” (including ITAR and EAR items)
    - The U.S. business operates in or sells Critical Technology to one of 27 designated “Critical Industries” (including the Aerospace & Defense sector)
  - Voluntary CFIUS filings may also be appropriate in cases where the U.S. business has other national security, homeland security, or industrial security attributes
    - Notable examples include U.S. Government contracts, Facility Security Clearances (FCLs), and other “emerging or foundational” technologies
Security Clearances

- Special requirements for classified information and projects
  - Companies must first obtain an FCL
    - Requires special sponsorship by an agency or incumbent contractor
  - Companies must comply with the requirements imposed under the National Industrial Security Program Operating Manual (NISPOM)
    - Facility security plan (including visitor procedures)
    - Technology security plan (for on-site and off-site servers)
  - Companies with foreign owners or investors must meet special Foreign Ownership, Control & Influence (FOCI) mitigation requirements
    - May require a proxy board, outside directors, etc.
DFARS “Flow Down” Requirements

- Many of these requirements appear in the DFARS
  - DFARS “flow-down” requirements
    - FAR 52.204-23 imposes similar restrictions on various Chinese products
  - DFARS 252.204-7012: Requires companies to implement cybersecurity measures to protect Controlled Unclassified Information (CUI)
    - Implements standards imposed under DOD-NIST 800-171
  - DFARS 252.255-7048: Requires companies to comply with requirements imposed under U.S. export control laws
    - International Traffic in Arms Regulations (ITAR)
    - Export Administration Regulations (EAR)
Economic Sanctions
Economic Sanctions

- Prohibit commercial and financial transactions
  - Where export controls govern things, economic sanctions restrict business with certain parties, people, and places
  - Many sanctions programs target hostile countries and governments.
    - Cuba, Iran, North Korea, Syria, Crimea Region (Ukraine)
    - Limited sanctions on government officials and industries in Russia and Venezuela
  - Other sanctions programs will prohibit (or otherwise restrict) commercial and financial transactions involving specific entities and individuals
    - Terrorist groups, weapons proliferators, narcotics syndicates, criminal organizations, etc.
    - Sanctions extent to any entity that is at least 50 percent owned by one or more sanctions parties, even if that entity is not on a U.S. Government list!
Economic Sanctions

- "Primary" versus "secondary" sanctions
  - Primary sanctions target parties that fall within U.S. jurisdiction
    - U.S. citizens and legal permanent residents (Green Card holders)
    - U.S. companies and their foreign subsidiaries
    - Any person or entity in U.S. territory
    - Any person or entity using the U.S. financial system
    - Certain sales of U.S.-origin products (depending on the sanctions program)
  - Secondary sanctions punish entities that are outside U.S. jurisdiction for conducting business with sanctioned countries or parties
    - Restrictions on trade, travel, foreign exchange, government contracting, opening a U.S. bank account, etc.
    - Designed to make foreign parties chose between doing business with the United States, or with U.S. adversaries
Economic Sanctions

- **Recent Sanctions Trends:**
  - Reinstated sanctions on Iran
    - The Trump Administration’s withdrawal from the Iran Nuclear Accord led to the reinstatement of most secondary sanctions under the Iran Sanctions Act. (Primary sanctions remained in force)
  - **Expanded Sanctions on Russia**
    - Sanctions include both “blocking” measures that prohibit transactions, and “sectoral sanctions” that set limits on debt, financing, and sales in certain sectors (defense, energy, finance)
    - The Combating America’s Allies through Sanctions Act (CAATSA) impose new secondary sanctions on various Russian parties
    - Little evidence of consistent or significant enforcement by the Trump Administration
  - **New Sanctions on Venezuela**
    - Sanctions prohibit most transactions with the Maduro Regime, the Venezuelan energy sector, and most Venezuelan state-owned or state-controlled enterprises
    - Modest exceptions for transactions involving the Venezuelan Opposition
Enforcement Risks
Broad Jurisdiction

- Extraterritorial Enforcement
  - U.S. Government enforcement agencies construe these laws broadly to capture activities undertaken outside the United States
    - Don’t “fire and forget” when it comes to foreign sales and shipments
  - Government contracting officers do not understand – and will sometimes misinterpret – requirements enforced by other agencies
    - Assumptions and miscommunications may jeopardize government contracts, even if a defense contractor does nothing wrong
  - International trade and national security laws are not intuitive – especially for business executives used to working in the commercial sector
    - Sometimes the “right” answer in a commercial context is the wrong answer in a national security setting
Overlapping Authorities

- Each element in the national security ecosystem connects with others
  - U.S. Government enforcement agencies often exercise concurrent jurisdiction or related jurisdiction
    - A routine DCMA, DCAA, or DLA audit can turn into an investigation or enforcement action by several other agencies
  - Violations in one area of the law can trigger legal and contractual risks in others
    - Economic sanctions, export control, and other violations can lead to the loss of U.S. Government contracts, or the inability to renew them
  - System-level challenges require system-level responses
    - Failure to identify and address related risk areas on a comprehensive basis can result in several different agencies pursuing different enforcement actions at the same time
Serious Consequences

- Enforcement agencies seek compliance through deterrence
  - Higher civil and criminal penalties are increasingly common
    - The $8.9 billion DPA with the French Bank BNP Paribas is more than ten times higher than the largest FCPA settlement
    - Penalties between $1 million and $100 million are common in the aerospace, defense, and manufacturing industries
    - Failure to make mandatory CFIUS filings can lead to penalties equal to the value of the foreign investment
  - Growing emphasis on corporate officers and directors
    - Enforcement agencies now pursue cases against officers and directors who are “willfully blind” to illegal conduct in these areas, even if they do not actively participate in it
Compliance Strategies
U.S. Government Expectations

- Defense Contractors need “effective” compliance programs
  - U.S. Department of Justice Guidance
  - Bureau of Industry & Security Guidance
  - Office of Foreign Assets Control Guidance

- Each agency focuses on practical outcomes rather than “paper policies”
  - Demand senior management oversight (and accountability)
  - Emphasize systems-based approaches and multiple layers of defense
  - Focus on auditing, auditing, and more auditing
  - Corporate culture is crucial
“Effective” Compliance Programs

- “Effectiveness” requires clear policies, effective procedures, and reliable personnel
  - Policies should be short, simple, and easy for employees to understand
  - Procedures should be clear, consistent, and create a paper trail that is easy to audit
  - Personnel should be trained regularly on the issues they will encounter in their roles

- Adapt to your company’s role in the National Security ecosystem
  - Use the same tools to address overlapping requirements whenever possible
  - Tailor your compliance strategy to how your company actually does business
  - Don’t ”over-promise” and “under-deliver”
Don’t Panic!

- “Perfection” is not the answer
  - Accidents happen; Many defense contracts will eventually make a mistake in one (or more) of these areas
  - What matters is whether a defense contractor has the processes to prevent mistakes, the strategies to mitigate harm, and the culture to correct errors moving forward
  - “Risk-based” approaches are always better than fear-based” approaches
  - Get professional help when you need it
Thank You.

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