



DHG

GOVERNMENT CONTRACTING

2021 Issues in Focus
Webinar Series

EMERGE STRONG: *GovCon Compliance Issues That Matter*

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Emergent Strong: GovCon Compliance Issues That Matter

Change in Administration

Laws and Regulations

Legal Decisions

DCAA Guidance

Change in Administration

Potential impact of new Administration

- **Pendulum swing likely to move towards more regulation**
 - Early indicators are more labor regulation
 - We have been here before . . .
- **FY2021 NDAA and other funding/appropriation bills passed before the end of 2020**
- **More to come . . .**

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Laws & Regulations



Law: Sec. 889 – 2019 NDAA

Sec 889(A) – Prohibits contractors from selling or providing prohibited telecom to the Gov't (August 13, 2020)

Sec 889(B) – Prohibits a contractor from using prohibited telecom – period. That means if a company is currently performing or pursuing federal contracts, they cannot use prohibited telecom whether or not it relates to the performance of a federal contract. (August 13, 2020)

“Covered Telecommunications Equipment or Services” includes equipment or services produced or provided by any of the five companies or their affiliates:

- Dahua Technology Company
- Hangzhou Hikvision Digital Technology Company
- Huawei Technologies Company
- Hytera Communications Corporation
- ZTE Corporation

KEY: 889(B) is very broad and prohibits all use of “Covered Telecom Equipment or Services,” even if not connected to a federal contract

FAR Updates for 889(B)

FAR Clauses Updated:

- **FAR 52.204-24** - Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment
- **FAR 52.204-25** - Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment

Final rule included a **Compliance Guide**

Requires a “reasonable inquiry”

Applies to **ALL** primes performing FAR-based contracts

No flow down requirements but will likely require information from some subcontractors/vendors

No exception for commercial item contracts, small businesses, simplified acquisitions, or micro-purchases.

Key:

Representations began in 2020 – Although in the NDAA – applies to contractors serving all agencies

2020 was a roller coaster of activity for Cyber:

DoD Contractors:

- Start of the year – DFARS 252.203-7012
- Throughout the year – Moving towards CMMC
- Ending the year with the DFARS Interim Rule

Key: Cyber risk is a focus of the government – recent attack highlight the need for continued effort on effective Cyber controls and hygiene.

DFARS CMMC Interim Rule

- Requires contractors who handle CUI to complete a “Basic” cybersecurity self-assessment and score results; submitting to DoD.
- DoD may perform their own higher-level assessment at their discretion.
- Reaffirms CMMC will be clarified in new DFARS rules:
 - **252.204-7019:** Outlines NIST 800-171 self-scoring and results submission to DoD Supplier Performance Risk System (SPRS)
 - **252.204-7020:** Describes requirements for allowing DoD to conduct a higher-level assessment of a contractor, and subcontractor flow-down of self-assessment requirements.
 - **252.204-7021:** Requires contractors to maintain the requisite level of CMMC certification for a contract and make sure all subcontractors maintain the appropriate level of certification.

The CARES Act (March 27, 2020)

Paycheck Protection Program

- **Forgiveable loans for small businesses**
- **Impact to prime contractors and subcontractors**
- **Updates with Consolidated Appropriations Act 2021**

Section 3610

- **Contracting Officer MAY provide reimbursement/payment for standby labor**
- **Limited guidance available**
- **Extended through March 31, 2021**

Key – CARES was stimulus for the US Economy – impact on GovCon is still being evaluated as new guidance and additional programs roll out.

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Legal Decisions

DynCorp Int'l, LLC, ASBCA No. 61950 (Sept 29, 2020)

- In accordance with the 2010 Employment Agreement and 2010 Separation Agreement, DynCorp agreed to pay CEO a \$9.2 million severance (calculated as 2 times the base salary and bonus)
- Defense Contract Audit Agency (DCAA) did an audit in 2018 and determined that, while the severance payment was allowable:
 - CEO was over the statutory cap when he was employed, and that
 - the severance amount should be reduced because the salary and bonus involved in the calculation of the severance were found to be unreasonable by DCAA under FAR 31.205-6 – over the statutory cap.
- ASBCA determined that, while severance payments are not compensation because it isn't "for services rendered" for the "fiscal year", that the severance amounts were still unallowable in so far as the severance is derived from salary and bonus payments over and above the statutory caps then those amounts are unallowable.

KEY: Severance based upon Salary and Bonus numbers makes such Severance subject to the FAR limitations related to same.

Boeing v U.S., 968 F.3d 1371 (2020)

- Boeing consolidated sites and changed some accounting practices
 - These changes created some cost increases and some cost savings for the government
- DCMA Audited and found, per FAR 30.606 that all cost increases were to be refunded to the government and ignored cost savings entirely
- COFC Upheld DCMA's determination based upon FAR 30.606 and noted Boeing waived its argument that FAR 30.606 was unlawful by not challenging the regulation when included in the contract
- FedCir reversed:
 - Rejecting the notion that Boeing could have “waived” its ability to challenge the government’s application of FAR 30.606 when it was undisputed that the contracting officer had no authority to waive the mandatory regulation, and the government could not specify what action Boeing could have taken to challenge the provision prior to entering the contract.
 - The case is now on remand the COFC to determine the validity of FAR 30.606

KEY: When determining the impact of changes to accounting systems, the government must review both additional costs and cost savings, not just costs. Thus, FAR 30.606 may be invalid – currently on remand.

Kellogg Brown & Root Servs, Inc., 973 F.3d 1366 (2020)

- KBR subcontractor First Kuwaiti Co. of Kuwait (“FKTC”) has multiple shipments stopped at the Iraq boarder due to fighting
 - Containers piled up on the boarder, trucks stopped, equipment vandalized/stolen, etc.
- FKTC submitted multiple REAs based upon estimates of how long the trucks should have taken to make deliveries, not actual costs.
 - KBR requested actual costs but then paid the REAs without it
- KO offered by pay \$25M out of the \$50M REA, KBR filed a Claim
- DCAA audited the Claim and rejected all but \$3M due to the lack of supporting information
- KBR Appealed to the ASBCA who upheld DCAA’s determination finding that KBR must use actual costs, not estimates, and that the costs were not proven to be reasonable.
- KBR Appealed to the FedCir who overturned the ASBCA’s ruling that estimates could not be used but upheld the ASBCA’s ruling that KBR failed to prove reasonableness with “meaningful evidence” of he costs
 - There were inconsistencies between the cost model and factual record, failed to disaggregate delay periods, no expert testimony

KEY: Contractor has the burden to prove reasonableness. To show reasonableness of costs, you must provide “meaningful evidence” and fact to support the same. Mere estimates are insufficient

Alloy Surfaces Company, Inc., ASBCA 59625 (April 9, 2020)

- Alloy had a contract for M211 infrared countermeasure decoys and, after performance began, Alloy began automating its manufacturing processes while performing DO 13 under the contract
- New bid requested for DO 14 and Alloy used data from before its automated processes were in place because the DO 13 data was mixed (started before automation and ended after automation) – so difficult to determine the true cost impact
- Gov't was aware of the automation shift and was aware the bid was based upon the unautomated data pre-DO 13
- Gov't later claimed the price for DO 14 was based upon defective pricing as it was all pre-automated costs and demanded \$15.9M
- Case moved to the ASBCA which ruled in Alloy's favor
 - Gov't acknowledged that, during negotiations, the pricing of non-automated jobs was a compromise between the increased efficiency of automation and the inefficiency of increased production – so no prejudice to the Gov't
 - At the time of the agreement the reports for DO 13 were not sufficiently certain to be certified as “cost and pricing data” under the Truth in Negotiations Act so they should not have been used anyway

KEY: In order for information to be considered “cost and pricing data” it must be reasonably certain, not simply estimates. So cannot be “defective pricing”

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DCAA Guidance

Coronavirus Legislation and Regulations

December 11, 2020 – MRD 20-PIC-006

- **Provides auditors with synopsis of the CARES Act, the Families First Coronavirus Response Act (FFCRA) and other DoD Guidance**
- **Provides FAQ for Incurred Cost Submissions and Forward Pricing**

Key: DCAA's guidance is no longer current based on Consolidated Appropriations Act of 2021.

Contractor Information Survey (CIS)

September 29, 2020 – MRD 20-PAS-005

- **The CIS is a tool for obtaining information about a contractor to assist:**
 - understanding the contractor's organizational structure and business;
 - the overall design of the contractor's accounting system; and
 - basic information related to internal
- **CIS is not publicly available**

Key: CIS will primarily be used at smaller contractor locations where they have had little or no audit effort in three to five years

Compensation Caps for 2019 and 2020

August 20, 2020 – MRD 20-PSP-004

Key: DCAA updated this information required to be updated by OMB

BBA Contractor Compensation Caps for Contracts Awarded after June 24, 2014 (FAR 31.205-6(p)(4))	
For Costs Incurred	Cap Amount¹
1/1/2020 – 12/31/2020	\$555,000 ²
1/1/2019 – 12/31/2019	\$540,000 ³
¹ Current FY Cap Amount = Prior FY Cap Amount x Change in Employment Cost Index for all workers [i.e., BLS Table 4. Compensation (Not Seasonally Adjusted) Employment Cost Index for total compensation, for civilian workers, by occupational group and industry. (Twelve Months Ended September 30)]. Source: https://www.bls.gov/web/eci/ecicois.pdf	
² 2020: \$540,000 x (138.1 / 134.4), rounded to the nearest thousand	
³ 2019: \$525,000 x (134.4 / 130.7), rounded to the nearest thousand	

Limited Contractor Access Due to COVID-19

April 10, 2020 – MRD 20-PAS-001(R)

- **provides guidance in response to contractor closures and limited access to contractor records and personnel due to the COVID-19) national emergency**
- **Generally, will result in a scope-limitation and a qualified opinion**
- **Provides FAQs and examples of scope limitations**

Key:
Communication and coordination between auditor and contractor is encouraged until normal operations resume

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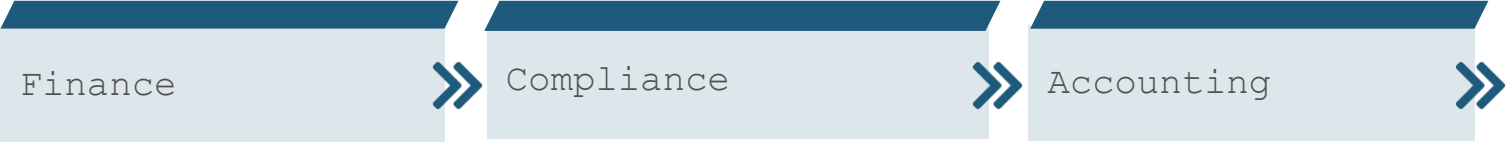
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DHG's Government Contracting practice provides assurance, tax and consulting services to hundreds of government contractors. Our Government Contracting team is dedicated to working with government contractors across Civilian Federal, Department of Defense and Intelligence Agencies. Key statistics about our practice are outlined below:

550+	50+	50%	200+	20+	25+
GOVERNMENT CONTRACTING CLIENTS	GOVERNMENT CONTRACTING PROFESSIONALS INCLUDING 7 PARTNERS	OF THE TOP 10 CONTRACTORS AS CLIENTS	GOV. CON. ASSURANCE CLIENTS	GOV. CON. WEBINARS HOSTED ANNUALLY	KNOWLEDGE SHARE PIECES ANNUALLY

This depth of experience and knowledge is beneficial to our government contracting clients in that our group leaders are fully conversant in the requirements applicable to government contractors. We assign experienced Government Contracting professionals to our service teams so they can efficiently navigate this highly technical environment.

In addition to maintaining core accounting service groups for the government contracting industry, DHG's extensive Government Contract Advisory practice is comprised of former Defense Contract Audit Agency (DCAA) auditors and executives. Our experienced professionals in this area advise clients in various aspects of finance, accounting and compliance related to government contracting.



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Questions?

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