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# THE STATE OF GOVERNMENT CONTRACTING 2020

Presenters:

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January 14, 2020

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## **We are Launching our Dentons Academy Webinar Series!**

To provide you with practical analyses of recent decisions, statutes, regulations, trends, and other hot topics impacting the government contracting community.

### **Join us for these Upcoming Dentons Academy Webinars:**

#### Cybersecurity Panel Discussion

Cybersecurity in government contracting (DIBCAC Assessments and CMMC) - Thursday, March 4, 2021, 12 - 1 p.m. ET.

#### Ethics in Government Contracting

Understanding the ethical and compliance rules that apply in the federal government marketplace - Thursday, May 6, 2021, 12 - 1 p.m. ET.

## Presentation Agenda

- Welcome & Course Overview
- Legal Considerations under Section 3610 of the CARES Act
  - Overview of Section 3610
  - Section 3610 Risks and Alternatives
- Overview of the FY19 NDAA Section 889 Prohibition
  - Prohibitions under Section 889
  - Terminology, Exceptions, and Waivers
  - Section 889B Compliance Program
- Major Case Update
  - Notable Government Contract Cases
  - 2021 Forecast

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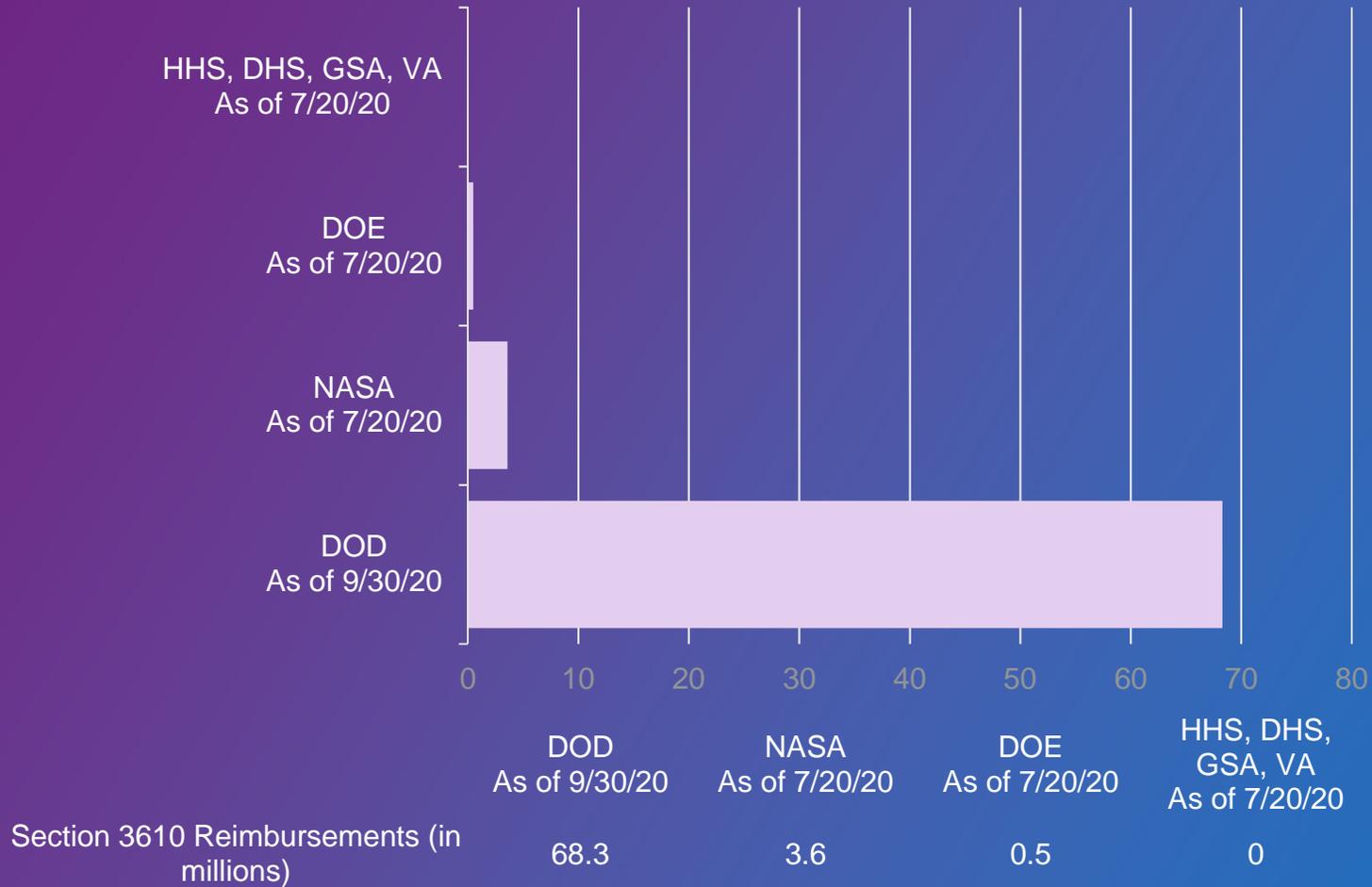
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# Section 3610 of the CARES Act

# Section 3610 of the Cares Act

- Section 3610 provides agencies with the *discretionary* authority to reimburse contractors and their subcontractors for paid leave given to:
  - Contractor or subcontractor employees who cannot perform work due to a facility closure or other restrictions;
  - Employees who cannot telework because their job duties cannot be performed remotely; and
  - The employees are kept at a “ready state.”
- Reimbursement for cost of paid leave is authorized for leave taken after March 27, 2020 and before March 31, 2021.
- Contractors can request the minimum applicable contract billing rates up to an average of 40 hours per week.

# Section 3610 Reimbursements



# Section 3610 Weaknesses

- Agencies have discretion on whether to grant reimbursements.
  - Contractors do not have a legal recourse to enforce Section 3610.
- As identified in a recent DOD audit, COs denied reimbursement requests because:
  - the contractor did not need to be put in a “ready state”;
  - the contractor employee was placed in quarantine after returning from personal travel, but the contracting officer determined that the employee had disregarded DoD travel restrictions for contractor employees;
  - the contractor provided insufficient documentation to support its claims for reimbursement; or
  - there was insufficient funding available.

# Alternate Considerations

- Excusable Delays, FAR 52.212-4(f)
  - Excuses Contractor nonperformance caused by “an occurrence beyond the reasonable control of the Contractor and without its fault or negligence,” like epidemics and quarantine restrictions, in contracts for commercial items.
- Changes clauses
  - FAR 52.243-1, Fixed Price Contracts
  - FAR 52.243-2, Cost Reimbursement Contracts
- Stop Work Order, FAR 52.242-15
  - March 24, 2020 NASA Letter allows offsite contractors to seek adjustments under this clause for COVID-related stop work orders

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# Section 889 of the NDAA for FY 2019

# Section 889A

## The “Procuring” Prohibition

- Interim rule went into effect August 13, 2019.
- Prohibits the federal government from procuring “any equipment, system, or service that uses covered telecommunication equipment or services as a substantial or essential component of any system, or as a critical technology as part of any system,” unless an exception or waiver applies.
- Offerors must represent whether it “will” or “will not” provide covered telecommunications equipment or services to the agency. FAR 52.204-24(d)(1).
  - Additional disclosure information identified in FAR 52.204-24(e)(1) required if offeror represents “will.”
- Must flow down to subcontractors.

# Section 889B

## The “Use” Prohibition

- Interim rule into effect on August 13, 2020.
- Prohibits the federal government from contracting “with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system,” unless an exception or waiver applies.
- After conducting a “reasonable inquiry,” offerors must represent whether it “does” or “does not” use covered telecommunications equipment or services, or use any equipment, system, or service that uses covered telecommunications equipment or services. FAR 52.204-24(d)(2).
  - Additional disclosure information identified in FAR 52.204-24(e)(2) required if offeror represents “does not.”
- Flow down to subcontractors not required under the interim rule.
  - However, flowing down the prohibition and/or obtaining a certification or representation may help mitigate potential risk.

# Terminology, Exceptions, and Waivers

- Terminology
  - FAR 52.204-25(a) defines, among other terms:
    - “Covered telecommunications equipment or services”
    - “Substantial or essential component”
    - “Critical technology”
    - “Reasonable inquiry”
  - Section 889, the interim rules, and regulations do not define the term “use.”
    - Work with counsel to navigate the reasonable inquiry process, and determine if your circumstances as a prime contractor can fall under the plain and ordinary meaning of the term.
- Exceptions (FAR 52.204-25(c))
- Waivers (FAR 4.2104)
  - Ex: Officer of the Director of National Intelligence (“ODNI”) has granted waivers to DoD and USAID until September 2022.

# Section 889B Compliance Program

(85 Fed. Reg. 42,665, 42,669)

- FAR Council expects contractors to implement a risk-based compliance program on the Section 889B prohibition that covers six steps:
  - Regulatory Familiarization
  - Corporate Enterprise Tracking
  - Education
  - Cost of Removal (if the entity independently decides to)
  - Representation
  - Cost to Develop a Phase-out Plan and Submit Waiver Information

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# 2020 Case Update

# Changes to Cost Accounting Practices

## ***The Boeing Co. v. United States*, 968 F.3d 1371 (Fed. Cir. 2020)**

- Boeing made 8 unilateral changes to its cost accounting practices.
- Net effect resulted in decreased costs to DoD.
- Relying on FAR 30.606, the government refused to offset the costs.
- Boeing argued it did not owe DoD because there was no aggregate increased cost
- COFC did not reach the merits, dismissing the case on procedural grounds.
- The Federal Circuit reversed and remanded.
  - Boeing did not waive its challenge to FAR 30.606 by entering into the contract.
  - COFC had jurisdiction over the illegal exaction claim where Boeing alleged the government had demanded and taken its money in violation of CAS.

## **Practical Impact of the *Boeing* case:**

- Remand to COFC likely means that the government will continue to apply FAR 30.606.
- Boeing, however, will have an opportunity to assert its arguments on the merits.
- Possibility that COFC will deal with inconsistencies between the CAS and the FAR.

# Relief During Health Emergencies

## *Pernix Serka Joint Venture v. Dep't of State, CBCA No. 5683 (Apr. 22, 2020)*

- Under a fixed price contract, Pernix delayed performance when World Health Organization declared the Ebola outbreak an international public health emergency.
- Pernix shut down the project, evacuated personnel, and notified government of temporary shut down. After returning to work, Pernix procured medical services for employees.
- Government accepted a revised schedule and issued a modification extending the contract completion date. Pernix submitted a \$1.3M claim for additional costs.
- Board found that the contract placed the risk of increased costs on Pernix.
  - Excusable Delay Clause addressed acts of god, epidemics, and quarantine restrictions. While clause provided additional time for performance, it did not provide additional costs.
  - Pernix failed to identify any clause shifting the risk to the government for any costs incurred due to the unforeseen epidemic.

## **Practical Impact of the *Pernix* case:**

- In the current COVID-19 climate, contractors performing under fixed price government contracts may face similar issues.
- Contractors may be able to recover for additional costs under the changes clause if additional work is directed by the government.

# Changes Clause Notice Requirements

## ***Trade West Constr., Inc., ASBCA No. 61068 (Oct. 8, 2020)***

- Trade West appealed the COFD denying its changes claim for work performed under the contract and rejected by the government.
- Government argued that: (1) it did not change the contract because Trade West effectively volunteered to do the work; and (2) Trade West failed to provide timely notice under the changes clause.
- Board decided the case in favor of Trade West.
  - Government's rejection indicated that Trade West did not volunteer to do the work.
  - Even though Trade West did not provide timely notice under the changes clause, it could still pursue its change order claim.
  - Government also waived objection to contractor's failure to provide notice by failing to raise the objection in the COFD or as an affirmative defense in the appeal.

## **Practical Impact of the *Trade West* case:**

- Contractors should be aware of the time limits prescribed for requesting changes under their contracts.
- Contractors may overcome a failure to provide timely notice if the government would not be prejudiced or if the government fails to raise a timely objection.

# Government Contractor's Data Rights

## *The Boeing Co. v. Secretary of the Air Force*, No. 2019-2147 (Fed. Cir. Dec. 21, 2020)

- Boeing performed contract for development of F-15 Fighter Jet Electronic System.
- Government had unlimited rights to certain data under DFARS 252.227-7013, *Rights in Technical Data*.
- CO challenged the proprietary notice warning third parties of Boeing's rights to the data.
- CO asserted DFARS 252.227-7013(f), *Marking Requirements*, prohibited the notice and directed Boeing to remove the legend in a new data rights package submission.
- Federal Circuit rejected the government's interpretation of the DFARS Clause.
  - Marking procedures under DFARS 252.227-7013(f) apply only when a contractor seeks to assert restrictions on the government's rights.
  - Boeing's third-party legend was not prohibited as a matter of law.

## **Practical Impact of the *Boeing* case:**

- Federal Circuit indicates use of similar legends may be appropriate to protect proprietary data from third parties and prevent loss of rights to data delivered to the government.
- Restrictive markings, however, must not restrict government's rights to the data.

# Notable Government Contractor FCA Matters

## *U.S. Ex Rel. Gordon v. Raytheon Company*, No. 1:18-CV-117 (D. Utah Dec. 16, 2020)

- Relator initiated a reverse FCA action against his employer for allegedly retaining money owed to the government under a firm fixed price contract awarded for Maverick missiles.
  - To address cost uncertainty, parties negotiated a Downward Adjustment Clause.
  - Consistent with Clause, Raytheon notified the government when all subcontract purchase orders were placed but stated a downward adjustment was not needed because costs exceeded Clause's NTE amount.
  - Government sent an email with its position on the matter and attached a spreadsheet sheet reflecting a downward adjustment to the contract price.
  - Relator asserted after this email, Raytheon improperly took a "wait and see" approach.
- Court ruled in favor of Raytheon on a Motion to Dismiss.
  - Relator failed to prove elements of a reverse FCA claim and failed to demonstrate Raytheon had an obligation to pay the government under the Clause.

### **Practical Impact of the *Boeing* case:**

- An unresolved contract dispute likely is not a plausible basis for a reverse FCA action.

# Notable Government Contractor FCA Matters

## *U.S. Ex Rel. CIMZNHCA LLC V. UCB Inc. et al.*, No. 19-2273 (7th Cir. 2020)

- Seventh Circuit established a new standard for deciding whether to permit the Justice Department to dismiss a whistleblower False Claims Act case.
  - Appeal from lower court's denial of the government's motion to intervene.
- Granston Memorandum states the Justice Department may seek dismissal of whistleblower cases, for example, if the case lacks merit.
- Prior to this case there was already a circuit split:
  - DoJ must show dismissal serves "a valid government purpose" (Ninth Circuit Standard).
  - DoJ has "unfettered" discretion to dismiss (D.C. Circuit Standard).
- Seventh Circuit reversed and remanded.
  - Government's motion had to be treated as motion both to intervene and to dismiss.

### **Practical Impact of the *CIMZNHCA* case:**

- New standard widens the previously existing circuit split on government's dismissal.
- Creates additional uncertainty to be potentially resolved in the future by the Supreme Court.

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# 2021 Forecast

## WATCH LIST FOR 2021

- **Enforcement under COVID-19 Relief Legislation**
  - Billions in loans, for example, under the SBA Paycheck Protection Program.
  - Increases likelihood of significant FCA litigation in 2021.
- **Possible Elimination of the EO 13950, Combating Race and Sex Stereotyping**
  - Caused considerable confusion and some challenges for government contractors.
  - On Jan. 6, DOD issued a Class Deviation to implement a nationwide court order enjoining Section 4 of the EO. OFCCP will also no longer implement or effectuate the EO.
- **National Defense Authorization Act for FY 2021**
  - Section 806 replaces key term “significant deficiencies” with “material weaknesses” regarding contractor business systems.
  - Update to the Business Systems Guide Scheduled for Release in 2021.
  - Section 807 creates an accelerated path for DoD Space Systems Acquisitions.
- **New Cybersecurity Regulatory Framework**
  - Implementation of the new cybersecurity clauses.
  - Practical tips to follow in the next Dentons Academy Webinar on March 4, 2021.

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Questions?

# Thank you

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