Federal Forecaster

**RELEVANT NEWS FOR ENTITIES & INDIVIDUALS WITH BUSINESS CONCERNS IN THE AREAS OF GOVERNMENT CONTRACTS, GRANTS & TRADE –
WINTER 2010, Vol. VI, No. 1**

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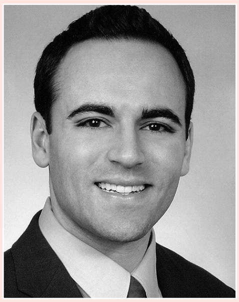
ReedSmith

A WHISTLEBLOWER IN YOUR ORGANIZATION

Under the *qui tam* provisions of the civil False Claims Act, citizens are offered substantial financial incentives to bring suit against government contractors for alleged fraud. These claimants, who “stand in the shoes of the government” in pursuing their claims, are often insiders, especially current and former employees, of the contractor. While it is critical that organizations not take actions in retaliation against whistleblowers, it is also important to consider the circumstances that tend to breed whistle-blowing activity, and create a compliance culture that encourages open discussion and addresses employees’ concerns in a respectful and thorough manner.



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The Lucrative *Qui Tam* Lawsuit

There are many types of whistleblowers, but none has a greater potential for a highly lucrative recovery than a “relator” under the False Claims Act. Under specialized provisions, a private citizen initiates a claim against the alleged false claimant on behalf of the government. If the government decides to intervene in the lawsuit, it will assume primary responsibility for prosecuting the case, though the relator will often remain involved. If the government declines to intervene, which it most often will, the relator will be permitted to continue in his or her action against the contractor. Relators receive a portion of any eventual recovery through judgment or settlement: 15–25 percent if the government intervenes; 25–30 percent if the government declines.

Damages under the False Claims Act, currently set at three times the government’s damages because of the fraud, plus between $5,500 and $11,000 per false claim, can and do add up quickly. According to the nonprofit Taxpayers Against Fraud Education Fund, the government has collected more than $12 billion under the False Claims Act since 1986, including $2.1 billion in fiscal year 2003 alone. In April 2009, NetApp, Inc. paid $128 million to settle a *qui tam* suit. The relator in that case, a former employee, received $19.2 million for his role. While individual recoveries are rarely as lucrative, it is the potential for such a payout that incentivizes many relators to come forward. In addition, recent legislative changes to the False Claims Act (*see Federal Forecaster*, Vol. V, No. 2) have made it even easier to bring and maintain *qui tam* lawsuits.

Is There a ‘Typical’ Relator?

False Claims Act relators vary from case to case and sources for *qui tam* suits are numerous. For example, subcontractors and consultants have brought *qui tam* suits based on their exclusive information regarding alleged fraud. In another example, both OfficeMax, Inc. and Office Depot, Inc. paid multimillion-dollar settlements in *qui tam* actions brought by their competitor, Safina Office Products. However, the majority of *qui tam* cases are brought by employees of contractors. This makes sense—after all, an organization’s employees are most likely to have the type of insider information that typically serves as the basis for a *qui tam* lawsuit.

So, who is the average relator? The stereotype is often of the disgruntled former employee—many contractors would insist that a relator merely had a score to settle with the company. However, as discussed further below, a relator may continue to work for a contractor after bringing a *qui tam* suit, and the company is prohibited from retaliating against him or her. One important common thread seen in many False Claims Act suits is that the relator previously tried to raise his or her compliance concerns internally and felt that upper management and/or his or her superiors were unreceptive to, or actively suppressive of, those concerns. Rarely is it the case that a relator discovered potential fraud and said nothing until filing suit. Much more often, the relator was seen internally as an alarmist, raising problems that no one considered serious at the time. Particularly where the alleged fraud is of a systemic nature, the complaints in *qui tam* suits often spell out in detail the relator’s claimed numerous attempts to have the issue addressed internally, allegedly to no avail.

A relator also has to have a position that allows him or her access to the type of insider information that may provide the basis for a *qui tam* suit. While relators emerge from all parts of an organization, from very senior management to the lowest level, many relators are part of “middle management”—employees who are senior enough to learn about violations, but too junior to prevent or correct them on their own. Relators also often have job functions relating to compliance, or at least job responsibility that requires them to understand the complicated laws and regulations that apply to government contractors.

It is that combination of circumstances—knowledge, access, and un-redressed concerns—that will often be found in a *qui tam* lawsuit.

The Prohibition on Retaliation

It is very important to note that, where an organization has identified a relator or potential relator under the False Claims Act, it is prohibited by statute from retaliating against that person. A relator may not be terminated, suspended, demoted, or otherwise harassed because he or she brought a *qui tam* suit. An employer’s violation of this prohibition gives rise to a private right of action by the relator against the employer. In a successful retaliation claim, the employee may be entitled to reinstatement of employment, two times any back pay owed (plus interest), and other damages such as attorney’s fees.

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Addressing Compliance Concerns Internally

While there is no fool-proof way to avoid *qui tam* suits, prudent contractors have learned that one of the best ways to mitigate the risk of whistle-blowing is to provide employees with open lines of communication for compliance concerns. While the lure of lucrative recoveries under the False Claims Act will continue to draw relators, employees who feel that their concerns are taken seriously and reviewed in a thorough manner may be less likely to seek outside outlets for their grievances. The following are just a few ways that employers can provide internal mechanisms to handle compliance concerns:

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- Employee compliance training sessions, followed by a question-and-answer session in which employees are encouraged to share their concerns
- A hotline for reporting potentially fraudulent activity
- A policy that encourages employees to seek the assistance of an ombudsman or senior manager where their direct supervisor has disregarded their compliance concerns
- A policy that every credible employee compliance concern will be reviewed in a thorough manner by an investigator, who will report his or her findings to the company's audit committee and/or legal department

These measures are also important with respect to the new Mandatory Disclosure Rule (*see Federal Forecaster*, Vol. IV, No. 3), which requires that contractors maintain internal systems to prevent and detect fraud, and make disclosures to the government where there is "credible evidence" of False Claims Act violations. With regard to both the Mandatory Disclosure Rule and the False Claims Act, if a contractor cultivates a culture of sweeping employees' concerns under the rug, it may well face serious liability in the long run.

NEW RULES REGARDING MANUFACTURED PRODUCT 'COMPONENTS' IN DEFENSE PROCUREMENT

On December 24, 2009, the U.S. Department of Defense ("DoD") released a final rule concerning the definition of "components" under the Defense Federal Acquisition Regulation Supplement ("DFARS"). 74 F.R. 68383 (Dec. 24, 2009). The final rule amends DFARS Part 225 to clarify the distinction between foreign acquisition policies that apply only to top-level components of end products and those that apply to both top-level and lower-tier components of end products.

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A "top-level component" is a component that is incorporated directly into an end product. A "lower-tier component" is a component that is incorporated into a component of the end product. The general definition of a component under the Federal Acquisition Regulation ("FAR") is "any item supplied to the Government as part of an end item or of another component." 48 C.F.R. § 2.101. According to the DoD, "the term includes both top-level components and lower-tier components." 74 F.R. 18383 (Dec. 24, 2009). The DoD points out, however, that for purposes of the Buy American Act, the FAR defines "component" as "an article, material, or supply incorporated directly into an end product or construction material." 48 C.F.R. § 25.003. In other words, for Buy American purposes, only top-level components are "components" according to DoD. 74 F.R. 18383 (Dec. 24, 2009).

Previously, Part 225 of the DFARS had defined the term "component" to apply only to top-level components with some limited exceptions. Following enactment of the final rule, DoD has adopted different definitions of "component" for different situations. The applicable definition of "component" depends upon the purpose for which the term is being used. DoD provides the following summary:

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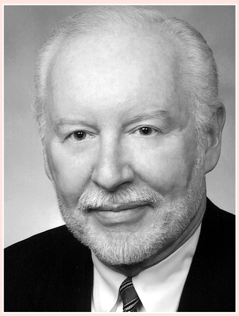
- ***Duty-Free Entry.*** Duty-free entry is not related to evaluation of domestic end products under the Buy American Act and should apply to qualifying country components at any tier.
- ***Restriction on Anchor and Mooring Chain.*** The requirements that the cost of components manufactured in the United States exceed 50 percent of the total cost of components is similar to the Buy American Act component test, in which only top-level components are considered. Therefore, the definition restricting application to top-level components should apply.
- ***Restriction on Acquisition of Forgings.*** The requirement to acquire forging items that are of domestic manufacture is not related to evaluation of domestic products under the Buy American Act and should apply to components at any tier.

This development is worthy of the attention of any DoD contractor that is, or could become, subject to domestic content requirements. Specifically, the final rule modifies the standard DFARS clauses 252.225-7000, 252.225-7013, 252.225-7019, 252.225-7025, and 252.225-7035. Contractors in whose contracts these clauses appear, and especially contractors who have tailored their supply chains to meet these requirements, should re-evaluate the top-level and lower-tier nature of the components in their products to ensure compliance with the revised DFARS definitions.

CORPORATE POLITICAL SPENDING AFTER *CITIZENS UNITED V. FEDERAL ELECTION COMMISSION*… OR, AS P.T. BARNUM PUT IT, "YOU AIN'T SEEN NOTHING YET!"

On January 21, 2010, the Supreme Court ushered in a new dawn on corporate political spending in its decision in *Citizens United v. Federal Election Commissio*n, 558 U.S. ___ 2010. In this decision, the Court held, *inter alia*, that corporations will now be able to use their general treasuries to fund direct political advertising against candidates for local, state or federal office, or what it is termed "express advocacy." This decision reverses decades of statutory and case law that prohibits express advocacy by corporations, out of concerns of the distortive effects that the corporate purse would have on political speech. How corporations react to *Citizens United* when deciding whether and how to fund political advertisements remains to be seen. However, it is clear that corporations, labor unions, and, most likely, trade associations, now face a vastly different regulatory environment. This article discusses the elements of the *Citizens United* decision, including which campaign finance requirements are changed and which remain the same. It also provides a roadmap as to what to expect next, including regulations from the Federal Election Commission ("FEC") and possible responses to the decision from Congress and the Obama Administration.



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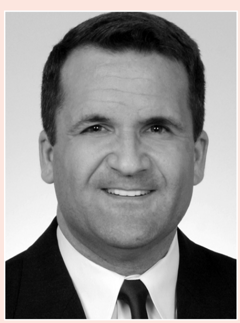
Background on Citizens United

The case concerns a documentary critical of then-presidential candidate Sen. Hillary Clinton, released in 2008 by the nonprofit corporation, Citizens United. The group intended to make the movie available via a "Video on Demand" service and wished to run television and radio advertisements promoting it. However, because those advertisements were scheduled to run within 30 days of a primary election where Sen. Clinton was on the ballot, they ran afoul of federal prohibitions on "electioneering activities" put in place by the *Bipartisan Campaign Finance Reform Act of 2002*, 2 U.S.C. § 441b(c) (known as "BCRA" and also by the names of its Senate sponsors, "McCain-Feingold").



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These prohibitions, as spelled out in subsequent federal regulations, define electioneering activities to include: (1) communications made by either broadcast, cable or satellite (but not the World Wide Web); (2) which refer to a clearly identified candidate for federal office; and (3) are made within 30 days of a primary election or 60 days of a general election. 11 C.F.R. § 100.29(a)(2). They also require corporations to identify themselves in their advertisements. These types of electioneering activities are also referred to as "issue ads" because they discuss candidates in the context of issues without specifically advocating the candidates' election or defeat, and are often done by corporations as a way to evade restrictions on express advocacy.

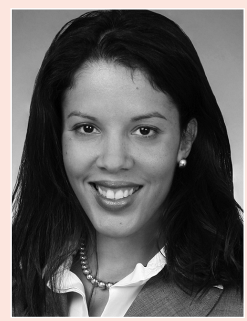
Citizens United sought injunctive relief, which was denied in the D.C. District Court. The Supreme Court then granted certiorari. The case was argued twice before the Court, after it requested supplemental briefs on the question of whether the McCain-Feingold restrictions on electioneering violated Citizens United's First Amendment rights to free speech.

The Supreme Court's Decision

Voting 5–4, the Supreme Court went beyond a statutory interpretation of the electioneering provisions of McCain-Feingold in a sweeping decision addressing corporate political speech. The Supreme Court held:

- McCain-Feingold's prohibitions against express advocacy advertisements by corporations were unconstitutional
- McCain-Feingold's prohibitions against electioneering activities within close proximity of a primary or general election were unconstitutional
- McCain-Feingold's disclaimer and disclosure requirements for electioneering activities in general were constitutional

The Court held that prohibiting corporations from using their general treasury funds to pay for campaign advertisements for or against a political candidate violated First Amendment protections on free speech. These prohibitions were not included by McCain-Feingold but were instead drafted as part of the underlying statute amended by McCain-Feingold, the Federal Elections Communication Act of 1971, 2 U.S.C. § 441b(a), upheld by the Supreme Court in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). The Supreme Court determined it could not analyze McCain-Feingold's electioneering restrictions without looking at First Amendment restrictions on corporate speech, citing the "chilling" effect on free speech when a corporation is forced, in effect, to ask advice from the FEC before issuing an advertisement (page 18 of decision). It used this discussion to reach a conclusion that the broader ban on express advocacy, along with the narrower electioneering restrictions of McCain-Feingold, were unconstitutional and overruled the *Austin* decision. The Supreme Court, however, upheld requirements under McCain-Feingold that a the corporation behind an electioneering advertisement identify itself. 2 U.S.C. § 431(17). It reasoned that disclosure requirements were justified to inform the electorate about those behind an advertisement (pages 51–52 of decision).



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Who is covered by the Supreme Court's decision in *Citizens United*?

The FEC, prior to issuing formal rules, is anticipated to provide "guidance" concerning the reach of *Citizens United*. We have learned, through subsequent conversations with FEC counsel, that it would interpret the scope of *Citizens United* to include both for-profit corporations and nonprofit corporations, such as

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Corporate Political Spending After *Citizens United v. Federal Election Commission…*—continued from page 4

those meeting the definitions of (501)(c)(3) and 501(c)(4) of the Internal Revenue Code. Further, the Supreme Court decision, while directly applying to domestic corporations, may or may not apply to foreign corporations with operations in the United States. Clarification on this application is anticipated by further regulation. In addition, it is probable that the decision would apply to labor unions as well, given that the statute affected applies to labor unions. As for trade associations, it is likely that they would also be included under subsequent rules as the FEC considers them the same as corporations for purposes of regulations. Finally, we note that the *Citizens United* decision applies to all elections on the local, state, and federal levels. Therefore, it should be anticipated as overturning laws that ban corporate political spending currently on the books in 24 states, as well as any criminal prosecutions based on those laws.

What remains the same and what is expected to change?

The *Citizens United* decision affects every election in the country, from Mayor to President. Corporations will be able to fund any type of advertisement directly and no longer have to face the requirement of first establishing a separate segregated fund for this purpose, commonly known as a political action committee or PAC. As a result, there is the potential for an unlimited amount of funding to be spent on elections and have a resulting substantial impact, especially on the state and local level. Additional regulation and guidance from the FEC is needed to both interpret the decision and define its reach. The Reed Smith Public Policy & Infrastructure Practice will monitor these developments and provide updates accordingly.

We do provide this analysis of what is known so far, as follows:

- *Corporations still cannot make direct contributions to political campaigns.* The Court's decision applies to advertisements only. If a corporation wants to make a direct donation to a candidate for office, it must establish a PAC to do so.

  However, we do note the majority's language in *Citizens United* that may indicate a willingness to consider a case challenging this restriction:

  > Differential treatment of media corporations and other corporations cannot be squared with the First Amendment and there is no support for the view that the Amendment's original meaning would permit suppressing media corporations' political speech (page 5 of decision).

- *Disclosure requirements for electioneering communications were kept intact* by the Supreme Court and will likely apply to express advocacy as well. As spelled out by federal regulation, these requirements provide that the communication must include a disclaimer that clearly states "the full name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication, and that the communication is not authorized by any candidate or candidate's committee." 11 C.F.R. § 110.11(b)(3).

- While corporations can advocate the election or defeat of a client, *corporations still face potential restrictions on the amount they can spend on this type of advocacy*, if the ads are done in coordination with a candidate or political campaign. Under federal regulations, any advertisement done in coordination with a political candidate or campaign is considered to be an "in-kind" contribution to a campaign. It is still allowable, but subject to contribution limits (*i.e.*, treated the same as a cash contribution). 11 C.F.R. § 109.22. The FEC is expected to issue rules concerning how express advocacy fits here, but we provide an analysis of the three-part test currently in place to determine if an advertisement is considered independent of a campaign:

  - Payment for the advertisement must be from someone other than a candidate, a candidate's authorized committee, a political party committee or any agent. 11 C.F.R. § 109.2.
  - The advertisement must not republish, disseminate, or distribute in whole or in part campaign materials prepared by a candidate or campaign committee. 11 C.F.R. § 100.29.
  - The advertisement must not be done either at the request or suggestion of the candidate or committee; with the candidate or committee's material involvement; after one or more substantial discussions with the candidate or committee; by using a common vendor to create, produce or distribute the communication; or by a former employee or independent contractor of the campaign committee. 11 C.F.R. § 100.30.

As noted, Reed Smith's Public Policy & Infrastructure Practice expects additional guidance and regulation from the FEC on the rules. However, we also expect legislative response from Congress as well as from the Obama administration. Sen. Charles Schumer (D-N.Y.), the chair of the Senate Rules Committee, has announced that he will hold hearings on the issue and draft legislation that will include, among other things, limits on corporate spending, as well as additional disclosure requirements. In addition, President Obama has announced his disappointment with the decision and his intention to address the issue through legislation. We will monitor these developments and provide updates as warranted.

Conclusion and Some Recommended Actions

Citizens United represents a sea change in campaign finance law. With guidance expected soon from the FEC, corporations, nonprofits and labor unions can already anticipate some of the basic direction to be provided. Although more formal requirements, and perhaps legislation, are yet to come, careful planning of future "advertisements" can now begin. Additionally, affected entities can and should: (1) pay particular attention to any suggested legislation, and take steps to at least monitor these developments; (2) actively seek opportunities to participate in supplying comments, including testimony, when such legislation is being developed; (3) take part in any rulemaking that is announced; and (4) consider initiating "unsolicited" proposals to congressional members. Other strategies are also available, even at this relatively early time. It benefits all those potentially affected to become architects of the coming new age.

NEW DOD RULES ON BUSINESS CONTROLS MAY FORESHADOW MORE THOROUGH AND SEVERE AUDITS

On January 15, 2010, the U.S. Department of Defense ("DoD") released a proposed rule concerning the internal controls and business systems contractors must have. 75 F.R. 2457 (Dec. 24, 2009). Though the general requirements appear familiar—and probably should be redundant with contractors' existing compliance apparatus—once final, this rule may result in a significant change in DoD's ability to impose severe penalties for deficient business controls. Comments on the proposed rule are due on or before March 16, 2010. Contractors affected by the proposed rule would be well-served by submitting thorough and compelling comments regarding how the proposed rule could be changed to enhance predictability in audits and even-handedness in enforcement.

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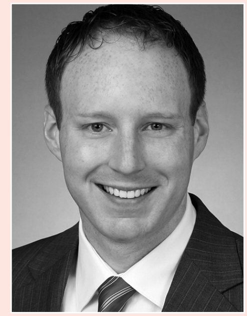
The specific changes the proposed rule would make are these: (1) clarification of the concept of contractor business systems; and (2) implementation of compliance enforcement mechanisms based on this more precise definition of what contractors must have in place, and what will be examined by the Defense Contract Management Agency ("DCMA") and the Defense Contract Audit Agency ("DCAA").

The proposed rule would define "deficiency" as "failure to maintain an element of an acceptable" business system. "Business systems" would be defined to include accounting systems, earned value management systems, estimating systems, material management and accounting systems, property management systems, and purchasing systems. If an audit revealed deficiencies in these systems, contracting officers would be required to notify the contractor, withhold payments, and monitor the contractor's implementation of a remediation plan. The contract clause implementing the proposed rule would be required in any solicitation for the following: (1) cost-reimbursement, incentive type, time-and-materials, or labor-hour contracts; (2) fixed-price contracts with progress payments made on the basis of costs incurred by the contractor or on a percentage or stage of completion; or (3) construction contracts that include



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NEW LAW RESTRICTS EMPLOYMENT ARBITRATION FOR DEFENSE CONTRACTORS AND SUBCONTRACTORS

President Obama signed the Department of Defense Appropriations Act for Fiscal Year 2010 (H.R. 3326) on December 19, 2009. Section 8116 of that Act significantly restricts the ability of defense contractors and subcontractors to enter into or enforce agreements that require employees or independent contractors to arbitrate certain claims.

In particular, section 8116 provides that no funds appropriated under the Act may be spent on any federal contract in excess of $1 million that is awarded 60 or more days after the effective date of the Act, unless the contractor agrees not to:

- Enter into any agreement with any of its employees or independent contractors that requires, as a condition of employment, that the employee or independent contractor agree to resolve through arbitration any claim under Title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention; or
- Take any action to enforce any provision of an existing agreement with an employee or independent contractor that mandates that the employee or independent contractor resolve through arbitration any claim under Title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention.

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Section 8116 also provides that no funds appropriated by the Act may be spent on any federal contract in excess of $1 million that is awarded 180 or more days after the effective date of the Act, unless the contractor certifies that each of its subcontractors with a subcontract worth more than $1 million has agreed not to enter into or seek to enforce any provision of any agreement described above with respect to any employee or independent contractor who is or will be performing work related to the subcontract.

The Secretary of Defense may waive the application of these provisions to a particular contractor or subcontractor for the purposes of a particular contract or subcontract, if the Secretary or the Deputy Secretary personally determines, with a specific explanation, that the waiver is necessary to avoid harm to national security interests of the United States, and that the term of the contract or subcontract is not longer than necessary to avoid such harm.

Congress is considering more sweeping restrictions on arbitration that would apply to every employer. The Arbitration Fairness Act (H.R. 1020, S. 931), which now has 106 cosponsors in the House and 11 cosponsors in the Senate, would prohibit the enforcement of all pre-dispute agreements to arbitrate employment disputes (other than in collective bargaining agreements), civil rights disputes, consumer disputes, or franchise disputes, and would require courts, rather than arbitrators, to decide the validity or enforceability of any such agreement.

New DoD Rules on Business Controls May Foreshadow More Thorough and Severe Audits—continued from page 6

the clause 52.232-27 of the Federal Acquisition Regulation ("FAR"), Prompt Payment of Construction Contracts.

The proposed rule contains long lists of criteria business systems must meet to be "acceptable." For example, with regard to cost-estimating systems, to be acceptable, such systems must: (1) be maintained, reliable, and consistently applied; (2) produce verifiable, supportable, and documented cost estimates that are an acceptable basis for negotiation of fair and reasonable prices; (3) be consistent with and integrated with the contractor's related management systems; and (4) be subject to applicable financial control systems. DoD auditors will evaluate estimating systems to ensure that the systems accomplish these tasks:

- Establish clear responsibility for preparation, review, and approval of cost estimates
- Provide a written description of the organization and duties of the personnel responsible for preparing, reviewing, and approving cost estimates
- Assure that relevant personnel have sufficient training, experience, and guidance to perform estimating tasks in accordance with the contractor's established procedures
- Identify the sources of data and the estimating methods and rationale used in developing cost estimates
- Provide for appropriate supervision throughout the estimating process
- Provide for consistent application estimating techniques
- Provide for detection and timely correction of errors
- Protect against cost duplication and omissions
- Provide for the use of historical experience, including historical vendor pricing information, where appropriate
- Require use of appropriate analytical methods
- Integrate information available from other management systems, where appropriate
- Require management review, including verification that the company's estimating policies, procedures, and practices comply with this regulation
- Provide for internal review of and accountability for the acceptability of the estimating system, including the comparison of projected results to actual results, and an analysis of any difference
- Provide procedures to update cost estimates in a timely manner throughout the negotiation process
- Address responsibility for review and analysis of the reasonableness of subcontract prices

At first blush, this list of attributes seems to address matters of common sense. The "rub" is that the proposed rule would allow the contracting officer to withhold payments reimbursing the contractor for costs incurred, incentive payments, or progress payments based on any deficiencies. In addition, the language used to describe the attributes an estimating system must meet is sufficiently vague that reasonable people could disagree regarding a system's compliance with them. Thus, the proposed rule enhances the risks contractors face in establishing and maintaining their estimating systems.

The proposed rule should be understood in the context of the current public-policy climate. DCAA has come under fire for failing to police contract accounting adequately. A September 23, 2009 report from the U.S. Government Accountability Office accused DCAA of having "[a] management environment and agency culture that focused on facilitating the award of contracts and an ineffective audit quality assurance structure." Moreover, the Obama Administration has made one of its key policies the eradication of waste and abuse in connection with government contracts, and implemented this policy by supporting legislation, such as the Fraud Enforcement and Recovery Act passed in March 2009, which "beefs up" the government's enforcement capability with respect to procurement contracts. Therefore, contractors should expect that auditors and contracting officers will be aggressive, if the proposed rule is passed, in using their new cost-disallowance authority to withhold payments based on deficiencies in business systems. This fact, combined with the subjectivity involved in determining whether a particular business system meets the criteria set forth in the proposed rule, makes the proposed rule worthy of defense contractors' attention.

So what should contractors do? We offer two suggestions for practical steps contractors can take to address the proposed rule. First, consider drafting and submitting comments on the proposed rule. In particular, comments that propose more definite standards or provide a template for the policies and procedures companies can use to implement their business systems would enhance certainty. Alternatively, contractors could propose amendments to the proposed rule that cite to, or incorporate by reference, existing accounting or internal control standards that the contractors' systems already meet. In other words, contractors could submit comments suggesting the proposed rule be modified to include a statement such as, "estimating systems meeting ISOXXXX certification shall be presumed to meet the listed characteristics and this presumption may be overcome only by written findings citing specific facts showing that the systems in question do not meet the standard."

Second, contractors should conduct some level of self-evaluation against the standard proffered by the proposed rule. Create a checklist and evaluate whether existing business systems meet each element. If existing systems are lacking, now is the time to address deficiencies, before the rule becomes final and any deficiencies can be used by contracting officers to withhold payment under certain contracts.

Reed Smith attorneys are actively monitoring developments in the area of government contractor business controls and are available to assist contractors in preparing comments on the proposed rule, evaluating their existing business controls, and taking steps to ensure that their DCAA and DCMA audits are "deficiency free."

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The business of relationships.[SM]

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