INNOVATION140 Consulting, LLC

"Innovative Solutions for Today's Contracts"
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The "Not So Quarterly" Newsletter

Greetings All! Welcome Back to Another Newsletter with a new look. A lot has changed in the last several months for the Federal Contracting Arena. Here are just a few Hot topics to watch out for in the future as some gotchas!

So, What's Up For This "Not So Quarterly" Period?
On May 16, 2016, the DoD, GSA, and NASA issued their Final Rule, amending the Federal Acquisition Regulation (FAR) to add a new subpart - 4.19, "**Basic Safeguarding of Covered Contractor Information Systems**," a corresponding contract clause (FAR 52.204-21) and changes to FAR Part 7, "Acquisition Planning," and FAR Part 12, "Acquisition of Commercial Items," for the "basic safeguarding of contractor information systems that process, store, or transmit Federal contract information." (***See***, **81 F.R. 30439-30447 (May 16, 2016))**. The premise of this Final Rule is **to provide a a basic level of safeguarding for any contractor's information system, not necessarily the information itself**. Thus, the Rule is clear in stating that **"The [new] clause does not relieve the contractor of any other specific safeguarding requirement** specified by Federal agencies and departments as it relates to covered contractor information systems generally or other Federal requirements for safeguarding Controlled Unclassified Information (CUI). . . ." (***Id.,*** p. 30439, "Summary"). In addition, the Rule's "Background" sets forth the concept that this Final Rule is but another coordinated step to strengthen the protections of information systems. (***Id.***, p. 30440)

Alright, so why should you be concerned about this latest Final Rule at all? First, the Rule is applicable to all acquisitions including those below the Simplified Acquisition Threshold, including commercial items other than commercial off the shelf (**COTS**) **items**. DoD, on the other hand, makes a distinction in what it requires by assuming that **any DoD contractors, at any level, who handles "Covered Defense Information," including COTS-providing** DoD contractors are required to follow DFARS clause 252.204-7012, "Safeguarding Covered Defense Information and Cyber Incident Reporting." **Thus, an automatic disconnect between the regulations. Recommendation** — follow the more stringent version of the requirements and let your Contracting Officer know about it - early - to help protect your company. **Second,** the new FAR clause at 52.204-21(b)(1), requires fifteen (15) minimum security controls for a "covered contractor information system." As noted in a Hogan Lovells' Report, issued on May 19, 2016 (**"Final Rule Implements New Baseline Cybersecurity Requirements for Federal Contractors")**, the writers present a helpful side by side comparison of what the new FAR clause sets out for security controls against the specific and derived references found in the NIST SP 800-171, "Protecting Controlled Unclassified Information in Nonfederal Information Systems and Organizations." For those of you who have been following our Newsletters, just implementing the SP 800-171 criteria at its face as a moderate confidentiality level for controlled unclassified information, is generally not enough to be compliant with the underlying NIST SP 800-53 requirements. Furthermore, many DoD **contractors at any tier** should have already started working under the weight of the (four, to date) DFARS clause(s) 252.204-7012, to become **fully compliant with DoD's own 160+ security controls by December 2017** for not only their information systems, **but also the information contained within, transmitting through, etc., that fit the definition of "covered defense information."** These DoD contractors are at least arguably ahead of the curve for a change. However, for purposes of this Final Rule, and **Third, there is no apparent transition time related to being compliant with FAR clause 52.204-21, the minimum 15 security controls, and the other changes made by this Final Rule.** Thus, for **any contractor, now** entering the new world of basic safeguarding of contractor information systems **as other than a strictly COTS-provider, would have to be 100% compliant with the fifteen (15) minimum security controls before you start your proposal preparation for a new solicitation. Thus, the recommendation is to speak with your Contracting Officer**, **not your Technical Point of Contact (TPOC)**, **early and often about this situation.**

As a result of these potential impacts to your daily operations, there is the **real possibility of conflicts between primes and their subcontractors**, as to how they: **(1) handle compliance under the FAR clause 52.204-21,** due to the flow-down requirements at "Subcontracts," which requires implementation of the security controls for other than COTS items where "the subcontractor **may have Federal contract information** residing in or transiting through its information system;" **(2) use of FAR 52.244-6, "Subcontracts for Commercial Items,"** that has also been modified to include references to FAR 52.204-21 related to flow-downs; **and (3) the lack of any reporting instructions or even certifications for any potential, non-compliances found or corrective actions to be taken.** While leaving primes and subcontractors to negotiate their own agreements, it opens both parties up to what the Government will ultimately determine to be what **a "prudent business person would employ" to strengthen the protection of it's information systems** (***Id.***, p. 30440) and create even more inconsistency between how one implements SP 800-171 and SP 800-53, and how it is determined to be compliant.

Thus, its highly recommended to "document, document, document." While future cybersecurity "auditors" may disagree about how your company applied the prudent business person rule, at least you have a contemporaneous record that sets out your process and your analysis at the time and please, by all means, keep it up to date into the future. **Be sure to call in your team now — to include IT, Security, Contracts, and Legal personnel — to get started on the right path to compliance. Don't do it alone.**

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Another Hot topic is the General Services Administration's (GSA's) approach to Transactional Data Reporting. On June 23, 2016, GSA issued its Final Rule related to Transactional Data Reporting ("GSA TDR") that in essence amends the General Services Administration Acquisition Regulation (GSAR) to include clauses that require vendors to report transactional data from orders placed against certain Federal Supply Schedule (FSS) contracts, Government-wide Acquisition Contracts (GWACs), and Government-wide Indefinite-Delivery, Indefinite-Quantity (IDIQ) contract, in a pilot program. (***See,* 81 F.R. 41104 (June 23, 2016)** for more information).

Transactional data refers to the information generated when the Government purchases goods or services from a vendor and includes specific details, such as descriptions, part numbers, quantities, and prices paid for the items purchased. GSA has apparently experimented with collecting this transactional data through some of its contracts and has found it instrumental for improving competition, lowering pricing, and increasing transparency. Accordingly, GSA is now prepared to test these principles on a broader base of its contracting program, which it maintains supports the Government's shift towards "category management" by allowing it to centrally analyze what it buys and how much it pays, and thereby, identifying the most efficient solutions, channels, and sources to meet its mission critical needs.

There are currently ten (10) first-tier, or Level 1 categories accounting for approximately 2/3 of total contract spending equal to $270 Billion for: Information Technology (IT); Professional Services; Security and Protection; Facilities & Construction; Industrial Products and Services; Office Management; Transportation and Logistics Services; Travel and Lodging; Human Capital; and Medical. The Special Item Numbers (SINs) affected can be found at GSA's Interact Web-page: **https://interact.gsa.gov/document/breaking-gsa-issues-final-transactional-data-reporting-tdr-rule-federal-register**.

Some of the areas to be aware of: (1) The Office of Federal Procurement Policy (OFPP) introduced a new vision for federal purchasing to fundamentally shift managing individual purchases and prices across thousands of procurement units **to buying as one through category management. (2) The initiative entails grouping commonly-purchased goods and services into centrally coordinated categories, that: (a) optimize existing contract vehicles** (including replacement or elimination of duplicate or underperfor**ming contracts) to riving more optimal use of contract vehicles; (b) improve data collection efforts and analysis** to drive improvements in categories of spend to increase savings and reduce duplication: **(c) leverage industry/commercial intelligence and key partner relationships; (d) maximize customer insights and relationships** to bring more to spend under management and improve offerings and value; **and (e) grow and share expertise.(See, 81 F.R. 41104 (June 23, 2016)**, p. 41106) **(3) The presumption of GSA is that any data reporting will become less burdensome and less complex** from what many contractors have had to deal with under the Commercial Sales Practices (CSP) disclosures and GSAR Price Reductions Clause (PRC) basis of award tracking requirements.

The Final Rule will be implemented through the inclusion of GSAR clauses, 552.238-74, "Industrial Funding Fee and Sales Reporting," Alternate I, and 552.238-75, Price Reductions, Alternate II, which eliminates the basis of award tracking customer requirement. In addition, GSAR provision 552.216-75, "Transactional Data Reporting," will be used for all new Governmentwide Acquisition Contracts (GWACs) and Governmentwide IDIQs.

Unfortunately, it appears that not all SINs will be addressed in this pilot program even for those Level 1 categories identified, as rollout appears to be over the next three years according to GSA's **Transactional Data Reporting (Tdr) Final Rule, External Q&A Document, Dated June 22, 2016 - Final**. Furthermore, GSA has indicated in its External Q&A Document that it will not add any SINs until the pilot program is completed and assessed as to results at the three (3) year mark.

Thus, it is highly likely that current and future FSS contractors, and even possibly GWAC and Governmentwide IDIQs holders, will have to track information and make disclosures based upon the requirements imposed by the Commercial Sales Practices (CSP) disclosures and Price Reductions Clause (PRC) basis of award tracking requirements, as well as potentially using the TDR reporting requirements as implemented in this Final Rule. ***(Id.)*** For further information on this topic and some other areas to watch out for under this Final Rule, consider Morrison Foerster, LLP's article, "Top Takeaways Concerning GSA's Final Rule On Transactional Data Reporting," by Tina D. Reynolds, updated July 6, 2016, at **wwww.mondaq.com**.

In addition, Pepper Hamilton, LLP, has not only provided their Webinar charts on the Firm's recent discussion of "Transactional Data Reporting (TDR): Now That the Rule Is Finally Here, What Should GSA Schedule Contractors Do?" but also copies of the Final Rule, the changes to the GSAM as noted above, and the recording of the Webinar itself. Pepper Hamilton's information can be found at their Web-site at: **http://www.pepperlaw.com/events/transactional-data-reporting-tdr-now-that-the-rule-is-finally-here-what-should-gsa-schedule-contractors-do-2016-07-26**.

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Who would think that the National Parks Service would have to fight for its own trademarks? As the National Park Service (NPS) enjoyed its 100th Birthday on August 25, 2016, it finds itself embroiled in a trademark lawsuit, going on since September 2015, with Delaware North, also known as "DNC Parks & Resorts at Yosemite, Inc." Delaware North has been the concessionaire for "YOSEMITE NATIONAL PARK" since the early 1990s, and when the NPS announced that it would no longer work with Delaware North, but award a contract to Aramark, a new concessionaire, the troubles began. Delaware North demanded that Aramark pay $44 million in order to acquire the right to use various Yosemite-related trademarks, or otherwise refrain from using them in connection with the sale of goods and services. The NPS has subsequently pulled T-shirts saying "YOSEMITE NATIONAL PARK" from its gift shops and has even changed the name of the infamous Ahwahnee Hotel to the "Majestic Yosemite Hotel," pending the case. This fight is being quoted, by Julia Huston, a Trademarks Attorney at Foley Hoag, LLP, as being "one of the most controversial trademark disputes of all time – whether a private party can own trademarks for YOSEMITE NATIONAL PARK and other iconic names associated with the national parks." (You can reach, the article, **"Happy Birthday, National Parks! Would You Like Your Trademarks Back?"** by clinking on the link here or on www.mondaq.com.)

It appears, unfortunately, that the contract between NPS and Delaware North may be part of the issue as to who can own the trademarks. The points provided by Ms. Huston in her article, **in protecting one's trademarks, can and should be considered in protecting your other forms of intellectual property** —

"1. Be very careful not to unintentionally give away your trademark rights in your contracts, and when at all possible, cast the relationship as one of licensor and licensee (with you obviously being the licensor).
2. If you become aware that your vendor (or concessionaire, or distributor, or really anyone at all) registers your trademark in its own name, you should immediately file a petition for cancellation with the Trademark Trial and Appeal Board, and under no circumstances allow the registration to pass the five-year mark and become incontestable under the trademark laws. If the registration becomes incontestable, you may still have grounds for cancellation, however they are much more limited.
3. It goes without saying that the same advice applies to domain names as well as trademarks."

As often has been said in Innovation140's Newsletters, *your intellectual property is one of your most important assets. Be sure to protect it at all times and especially, in your contracts*. Always keep your professional and legal advisors close to assist you.

Other Big News was issued on June 16, 2016 from the Supreme Court of the United States. Beware — it may not just affect the immediate case or the Agency involved.
The case that was decided is the **Kingdomware Technologies, Inc. v. the United States, (Case No. 14–916)** and it represents the battle over the Veterans Administration's (VA's) "Rule of Two," which began in 2006, when Congress passed the Veterans Benefits, Health Care, and Information Technology Act of 2006 (the "VA Act"). The VA Act includes a provision requiring that the VA is to restrict competitions to veteran-owned firms, so long as the "Rule of Two" is satisfied. The VA Act states, in part, at **38 U.S.C. § 8127(d)**:

> "(d) Use of Restricted Competition.— Except as provided in subsections (b) and (c), for purposes of meeting the goals under subsection (a), and in accordance with this section, a contracting officer of the Department ***shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the*** contracting officer has a reasonable ***expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price*** that offers best value to the United States." (Emphasis added)

There are two exceptions in the statute at Subsections (b), "Use of Noncompetitive Procedures for Certain Small Contracts," and (c), "Sole Source Contracts for Contracts Above Simplified Acquisition Threshold," both of which allow the VA to make sole source awards to veteran-owned companies under certain circumstances. **There is nothing, however, in the statute that provides any exception for orders off the GSA Schedule or any other government-wide acquisition contract.**

Unfortunately, that is the rub for the VA. The VA has often taken the position that it could order off the GSA Schedule, without first applying the Act's Rule of Two and some of the underlying cases have supported its position until now. (***See***, the Blog **Victory! SDVOSBs Win In Kingdomware Supreme Court Decision**, for additional information on the case by Steven J. Koprince, Managing Partner, Koprince Law LLC)

As of June 16, 2016, there is a unanimous (8-0), Supreme Court decision that has stated, in part, that: "***On the merits, we hold that §8127 is mandatory, not discretionary. Its text requires the Department to apply the Rule of Two to all contracting determinations and to award contracts to veteran-owned small businesses***. The Act does not allow the Department to evade the Rule of Two on the ground that it has already met its contracting goals or on the ground that the Department has placed an order through the FSS [Federal Supply Schedule]."

Pretty strong words from the Supreme Court and likely to throw at least two agencies into considering the immediate impacts to their own statutory and regulatory positions. Those agencies are the Small Business Administration and the General Services

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Administration. In fact, on June 23, 2016, before the United States Senate Committee on Small Business and Entrepreneurship Hearing Entitled "Beyond the Bench: Ramifications of the Supreme Court Kingdomware Decision," Mr. A. John Shoraka, Associate Administrator, Office of Government Contracting and Business Development, stated, in part, in his testimony that:

> "The Kingdomware decision may have government-wide procurement implications because previously the Government Accountability Office (GAO) and lower courts have held the statutory rule of two does not apply to orders placed under Schedule contracts. . . . Since the Kingdomware decision is silent on the construction of the Small Business Act, it is unclear what impact the ruling has beyond VA and its use of the VA statute. SBA will be conferring with the Department of Justice, the SBPAC, GSA (as managers of the Federal Supply Schedules), the Federal Acquisition Regulatory Council, and others to discuss if any changes to regulations are needed."
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> **(See**, Mr. Shoraka's Written Testimony, at Events & Hearings, 6/23/2016, **A. Shoraka Writtent Testimony**, pp. 3-4.)

Mr. Jeffrey Koses, Senior Procurement Executive, for GSA, in his July 14, 2016 Blog, anticipated questions on whether the Supreme Court's decision would affect FSS task and delivery orders or whether it would affect every agency. His answer was "no, not at this time." Mr. Koses went on to say, in part:

> "That's because 'Rule of Two' is a term used for both the VA and U.S. Small Business Administration (SBA) statutes and regulations – but they're different rules with the same name. At this time, the Supreme Court decision applies only to VA contracting rules and is specific to Veterans Affairs and to VA awarded contracts. Unless there is a regulatory change, agencies other than the VA should recognize that there has been no policy change in regard to the discretionary nature of FSS set-asides."
>
> (***See***, **https://gsablogs.gsa.gov/gsablog/tag/fas/,** dated July 14, 2016, "Supreme Court takes on "Rule of Two": what the decision means for set-asides on Federal Supply Schedules")

It'll be interesting to see how all of this settles out with the Rule of Two, as it relates to the rest of the Government agencies. At least for now, the Veteran's Administration should be competing their upcoming solicitations amongst veteran-owned small businesses, unless there is an expressed, statutory exemption, under the VA Act.

Additional Food for Thought:
Recommend an interesting Blog posted for "The Lectern" on January 25,2016, for Federal Computer Week (FCW.com) at **"Post-award contract management: Trying to figure out what is happening on the ground**," by Dr. Steve Kelman, a Professor of Public Management at Harvard's Kennedy School of Government, the former Administrator of the Office of Federal Procurement Policy (OFPP), and a long-time, Author/Blogger. Dr. Kelman applauded ***ASI Government (ASI)*** for providing everyone, free of charge, ASI's "Post-Award Contract Administration Toolkit."

While ASI has not generally had clients in the private sector, the company responded to Dr. Kelman's Blog requests to assist in improving post-award contract management for the Federal community — both inside and outside of the Government. As such, ASI states on its Web-page that: "In an effort to support the discussion on improving contract management, we've made these resources available to the greater community."

You will find, when you arrive at ASI's Web-page for the Toolkit that there are currently, six reports and two Webinars, and hopefully more in the future, that generally go "Back to Basics" on post-award contract management topics, with guides to managing contract modifications and to monitoring and evaluating contract performance." (**Id.**) The Toolkit can be reached at **https://www.asigovernment.com/ideas-insights/post-award-contract-administration-toolkit/.** The resources are a tad, "FAR-heavy" and legalistic as Dr. Kelman alluded to in his Blog, but the documents and Webinars provide additional insights into how both sides can improve post-award contract management through mutual understanding.

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Thanks For Joining Us On Our New And Improved Web-Sitep. Please Feel Free To Share Our Newsletters, Blog Posts, Etc With Your Colleagues.

As Always — Remember — The Federal Contracting Arena Is A Team Sport; Pick Your Partners Wisely And Don't Be Afraid To Ask For Assistance From The Professionals!

Until Our Next "Not So Quarterly Newsletter," Regards!

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