

THE NEWSLETTER FROM THE BDO GOVERNMENT CONTRACTING PRACTICE

BDO KNOWS: GOVERNMENT CONTRACTING



THE CHALLENGES GOVERNMENT CONTRACTORS FACE MAINTAINING A COMPLIANT SUPPLY CHAIN RISK MANAGEMENT FOR CONTRACTORS, PART 1

By **Julia Bailey**

As government contractors expand their supply chains across international borders, supply chain risk management is gaining the attention of the industry and U.S. regulators alike.

Heightening regulation across industries requires contractors to effectively monitor their supply chains from end to end and manage risk each step of the way. The stakes have never been higher: Penalties for non-compliance can be devastating to operations.

New rules and restrictions continue to develop and evolve, escalating the responsibility defense contractors have

to closely govern their own, as well as their subcontractors', supply chains. For example, as part of its efforts to stem the flow of counterfeit electronics in its supply chain, the Department of Defense (DOD) issued a Final Rule in 2014 that requires DOD contractors to establish a risk-based counterfeit electronic parts detection and avoidance system in 12 enumerated areas. The rule was introduced partly as the result of an investigation commissioned in 2011 by the Senate Armed Services Committee, which found approximately 1,800 cases of suspected counterfeit electronic parts in military equipment over a two-year period. In August of this year, DOD amended this rule further to instruct contractors on how to implement these systems while

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adding substantive sourcing restrictions. As production and procurement grows more globalized and complex, it's as critical as ever for prime and subcontractors to secure their supply chains against an array of ever-evolving compliance risks.

Read on for an overview of the Contractor Purchasing System Review, which governs contractor systems for working with subcontractors. As mentioned above, we'll then look more closely at the new counterfeit parts rules and examine how the existing country of origin restrictions fit into contractors' supply chain risk management efforts. In Parts 2 and 3 of the series, we'll also examine human trafficking rules, export controls and other compliance hurdles government contractors might face in managing their supply chain.

WHAT IS A CONTRACTOR PURCHASING SYSTEM REVIEW, AND WHAT ARE THE RISKS?

A Contractor Purchasing System Review (CPSR), defined in FAR 44.101, evaluates the effectiveness and efficiency of a contractor's system for purchasing materials and services, as well as the contractor's compliance when engaging and managing subcontractors. A CPSR can be triggered at any point when a contractor's sales to the U.S. federal government exceed \$25 million during the following 12 months (excluding competitively awarded fixed-price contracts and sales of commercial items pursuant to FAR Part 12).

Unsatisfactory findings from the CPSR could pose substantial risks to a contractor. Based on the results of the CPSR, the Administrative Contracting Officer (ACO) can grant, withhold or withdraw approval of contractor's procurement system. If approval is withheld or withdrawn, the contractor must submit a corrective action plan. In the meantime, their ability to conduct business could be materially affected until the deficiencies are corrected.

During the CPSR, purchasing systems under defense contracts are evaluated according to 24 criteria outlined in DFARS 252.240-7001(a). If the purchasing system is deemed significantly deficient by the contracting

officer in one or more of the 24 criteria, the system will be deemed "unacceptable" according to DFARS 252.244-7001, and the contractor will then have 45 days to fix the problem or submit a corrective action plan. The government may also include contract clauses that allow the CO to withhold payments up to 10 percent of amounts due until deficiencies are corrected.

To minimize risk of deficiencies, review the 24 criteria listed in DFARS 252.244-7001(c) and in FAR 44.202-2 and 44.303, and use them as a checklist to evaluate your purchasing system and ensure it would be deemed adequate during a CPSR. Items to evaluate include—but are not limited to—the following:

- i. Inclusion of appropriate flow down clauses
- ii. Appropriateness of types of subcontracts used
- iii. Methods of evaluating subcontractor responsibility and past performance
- iv. The documentation, systems and procedures the contractor has established to protect the federal government's interests
- v. Policies and procedures pertaining to small business subcontracting programs
- vi. Compliance with Cost Accounting Standards (if applicable) in awarding subcontracts
- vii. Planning, award and management of major subcontracts

NEW COUNTERFEIT PARTS LEGISLATION

As touched on briefly above, on August 2, 2016, the DOD published amendments to its rule, "The Detection and Avoidance of Counterfeit Electronic Parts," DFARS (Case 2014-D005). These amendments enhance the original rule published on May 6, 2014 and codified in DFARS 252.246-7007. The new rule aims to ensure that DOD contractors and subcontractors obtain electronic parts from trusted suppliers. The new rules are also designed to give authority to contractors to identify and use additional trusted suppliers (subject to certain conditions).

The rule applies to all DOD sources of electronic parts, including contractors and subcontractors, by mandatory flow down, including sources of commercially available off-the-shelf (COTS) items and small businesses. For additional specifics on the scope of the Rule, please see [page 9](#) for our Regulatory Update.

The government reviews contractors' compliance with the Counterfeit Electronic Parts rule through the CPSR, and if it identifies a "significant deficiency"—i.e., a shortcoming in the system that materially affects the ability of DOD to rely on the purchasing system—the government can disapprove the contractor's purchasing system or withhold payment.

Under DFARS 231.205-71, costs incurred in remedying the use of counterfeit or suspected counterfeit electronic parts are expressly unallowable, unless the contractor's system for detecting and avoiding counterfeit electronic parts has been reviewed and approved, or the counterfeit or suspect counterfeit electronic parts are government-furnished, and the contractor provides notice within 60 days of becoming aware of the counterfeit or suspect counterfeit electronic part.

The new rule specifies a number of actions a prime contractor may take to mitigate risk, including:

1. **Relief when flow down is rejected:** The rule specifies actions that may be taken when counterfeit prevention clauses are rejected by, for example, COTS electronic assembly manufacturers. Prime contractors are now given relief by notifying the contracting office in instances when flow down is rejected by a subcontractor; allowing contractor inspection, testing and authentication of the part; and making documentation of inspection, testing and authentication available upon request.
2. **Contractor-approved suppliers:** Where parts are unavailable from original sources, prime contractors may use "contractor-approved suppliers." This means a contractor may use a

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supplier that does not have a contractual agreement with the original component manufacturer for a transaction, but that has been identified as trustworthy by a contractor or subcontractor.

3. **Notice:** DOD contractors and subcontractors that are not the original component manufacturer are now required to notify the contracting officer if it is not possible to obtain an electronic part from a contractor-approved supplier; i.e., if parts are obtained from non-contractor-approved suppliers due to non-availability, refusal to accept flow down clauses or inability to accept that parts are new. The notice must be in writing and backed by appropriate documentation upon request.
4. **Traceability:** The rule establishes contractor responsibility for inspection, testing and authentication if traceability is not possible. The contractor must maintain documentation of either traceability or the inspection, testing and authentication of these parts.
5. **Industry Standards & Processes:** For those instances where the prime contractor obtains electronic parts from sources other than a contractor-approved supplier, the contractor is responsible for inspection, test and authentication in accordance with existing applicable industry standards.

COUNTRY OF ORIGIN RESTRICTIONS

Related to identification and elimination of counterfeit or suspected counterfeit parts, several statutes and regulations restrict the government's purchase of foreign products, supplies or services. Key restrictions that can pose risks and significantly impact contractors' supply chain management include the Buy American Act (BAA) and the Trade Agreements Acts (TAA).

- ▶ **The BAA** restricts, but does not prohibit, the acquisition of supplies that are not "domestic end products." The BAA uses a two-part test to determine whether a manufactured end product is "domestic": (1) the end product must be

"manufactured" in the United States, and (2) the "cost of its components" produced or manufactured in United States must exceed 50 percent of the cost of all components. The BAA applies to contracts for supplies for use within the U.S. that are above the "micro-purchase threshold," currently \$3,000 (except acquisitions under TAA). A waiver from these rules may be obtained if domestic product is 25 percent more expensive than identical foreign-sourced product, if the product is not available domestically in sufficient quantity or quality, or if it is in the public interest.

- ▶ **The TAA** generally restricts the government's purchase of products and services to only "U.S.-made" or "designated country" end products and services. Under the TAA, a "U.S.-made" end product is one that is either: (1) "mined, produced or manufactured in the United States" or (2) "substantially transformed in the United States into a new and different article of commerce with a name, character or use distinct from that of the article or articles from which it was transformed." "Designated country end product" is similarly defined—the end product is wholly the growth, product or manufacture of a designated country, or was "substantially transformed" in a designated country.

The TAA applies to most acquisitions of supplies and services with an estimated value of more than \$204,000 and to contracts for construction that exceed \$7,864,000, although some trade agreements have different dollar thresholds, and some procurements are exempt from the TAA.

Country of origin provisions are implemented through the government's solicitation provisions and contract clauses. Provisions under TAA require the offeror to certify the delivered end products are either U.S.-made or designated country end products, and to identify those, if any, that are not. Similar provisions apply under the BAA. Non-compliance can result in improper certifications of compliance, leading to federal government or qui tam actions under the civil False Claims Act. Criminal or fraud

proceedings can also lead to administrative actions for suspension or even debarment from government contracting.

To minimize risk, address country of origin requirements prior to submitting a proposal or, at the latest, before the contract is awarded. Where the TAA applies and the end product is not wholly the product of the United States or a single designated country (but is sourced from more than one country), contractors should determine where substantial transformation occurred in light of applicable rulings from the Bureau of Customs and Border Patrol, or seek a country of origin determination from Bureau of Customs. Because making these determinations can be complicated and consequences for non-compliance can be severe, engaging outside guidance is strongly advised.

A reseller should consider obtaining a representation or certification from its supplier as to the end product's country of origin. Prime contractors should be alert for red flags and consider taking other steps to demonstrate reasonable reliance. Likewise, suppliers should be attentive to the accuracy of such representations to avoid potential liability to the contractor and the government. Some prime contractors also require suppliers to agree to indemnify them for liability due to allegedly false certifications.

Stay tuned for Parts 2 and 3 of this series, where we'll take a magnifying glass to the many pieces of the complex puzzle contractors and subcontractors face when managing their supply chains.



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TIPS FOR PHARMACEUTICAL MANUFACTURERS: REACTING AND RESPONDING TO AN OIG REVIEW

By Susan Dunne



The magnitude of government spending on drugs increases the pressure on Congress to demonstrate frugality, and consequently, Congress puts pressure on law enforcement agencies to scrutinize pharmaceutical manufacturers' compliance with federal pricing requirements.

Pharmaceutical manufacturers typically conduct business with the federal government through commercial contract vehicles and a complex array of rebate, reimbursement and statutory programs established to put limits on pharmaceutical pricing. The array of relevant programs controlling federal pricing include:

- ▶ The Department of Veteran Affairs (VA) Federal Supply Schedule (FSS) contract,
- ▶ The 340B Drug Discount Program (for purchases by certain federally funded safety net providers),
- ▶ The Medicaid Drug Rebate Program (MDRP),
- ▶ Medicare Part B, and
- ▶ the Veterans Healthcare Act (VHCA) statutory price ceiling requirement for drugs sold to the VA, DOD, PHS and the Coast Guard.

Some requirements are general to federal commercial business, like the disclosure and price tracking requirements of the VA FSS contracts, and many more are specific to the nature of pharmaceutical business, like the many price-type calculation submissions required for MDRP and Medicare Part B. The common thread among the compliance requirements the pharmaceutical industry faces? Management and categorization of transactional pricing data.

Because of the special focus on this industry, more is required of pharmaceutical manufacturers than other industries that choose to avail themselves of the federal marketplace for their commercial items. Pharmaceutical pricing scrutiny begets a need for more transparency in pharmaceutical pricing practices, as well as sales and marketing practices. This can lead manufacturers to implement measures to reduce costs, develop alternative means for delivering drug benefits and, of course, ensure an effective compliance program is in place.

On the other hand, this scrutiny also translates into the government prioritizing funds for Offices of Inspector General (OIG) to increase the number and focus of contract and compliance reviews. These reviews are often called OIG "audits," but the term is misplaced, as these reviews do not entail

all the details associated with "audits." Pharmaceutical manufacturers are reviewed by a host of federal entities: the Department of Health and Human Services (HHS) and its Center for Medicaid and Medicare Services (CMS) (i.e., MDRP, Medicare Part B), the Office of Pharmacy Affairs (OPA) (i.e., 340B) and the VA for both the statutory (i.e., VHCA) and contractual obligations (i.e., the FSS contract and any BPAs thereunder).

EXPECTATIONS

In general, when the OIG conducts a review, manufacturers must be able to produce an audit trail and establish the ability to reproduce all price-type submissions. For pharmaceutical manufacturers, that includes myriad pricing calculations and submissions for MDRP, Medicare Part B (where applicable), 340B and VHCA. Manufacturers should be able to demonstrate their calculations are current, accurate, complete and in accordance with the manufacturer's understanding of its obligations and the business-related choices it makes under the law, as documented in their company policy documents.

It's critical—and expected by the government—that manufacturers have a documented set of policies and procedures that they demonstrably follow. Therefore, manufacturers must maintain adequate documentation of relevant accounting transactions and decisions. Documentation of decisions that affect pricing calculations must account for the factors and causes that contribute to each decision. Customer classification should be clear and accurate. An OIG review can even be triggered by anomalies created when a manufacturer decides to either include previously excluded or exclude previously included customer classes. Finally, it is expected that manufacturers have all records available, electronic and hard copy, to support all submitted calculations since the inception of the three-year recalculation rule.

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GOALS OF AN OIG REVIEW

Once a manufacturer is notified of an impending OIG review, key stakeholders associated with the relevant federal programs (depending on the scope of the OIG review) should meet and discuss their goals for the review. Goals might include the following:

- ▶ Understand the OIG review process
- ▶ Gain insight into strategic logistical considerations
- ▶ Gain insight into effective and consistent communication
- ▶ Share legally approved information
- ▶ Refocus efforts in record retention and documentation
- ▶ Enhance business practices
- ▶ Gain additional perspectives

Just as a manufacturer establishes goals for a successful review, so too does the relevant agency. Typically, OIG's goals may be as follows:

- ▶ Ensure statutory and regulatory compliance
- ▶ Understand manufacturer's methodologies
- ▶ Confirm compliance of manufacturer's systems/process
- ▶ Ensure process supports timely and accurate submission
- ▶ Confirm regulatory consistency in foundational data
- ▶ Assess compliance environment
- ▶ Understand the states' disputes resolution process
- ▶ Gain insight into reimbursement rates
- ▶ Prevent revenue leakage

Because the agency and manufacturer's goals for the audit might diverge, best practices to prepare for the review include effective, consistent and clear communication with the government team, effective upfront negotiation regarding the pool of relevant data required for review and development of an effective work plan to manage the review process.

WHAT COULD GO WRONG?

The most common manufacturer concern during the review is that often OIG reviews take longer than expected and expend more of the manufacturer's resources.

Manufacturers undergoing a review should anticipate factors that could impact review timing. For instance, they should consider the accessibility of relevant data pools, the availability of resources to compile the data and respond to on-the-spot requests, the accuracy (and reproducibility) of the data, and how well it supports the submitted calculations and/or disclosures. Manufacturers should also be cognizant of the availability of relevant upstream stakeholders, who may not be aware of the potential review and their associated roles. Planning and prioritizing availability for these additional resources can be crucial to ensuring a speedy and smooth review process.

HOW TO MITIGATE DELAYS AND OTHER INTERFERENCES

Consistent communication with OIG representatives can help the process run smoother and mitigate delays. Manufacturers should have a key point of contact or manager charged with overseeing the review process. Funneling all communication through this individual allows for reasoned, efficient responses to OIG requests. It is also important to get IT involved upfront to ensure appropriate priority for the response. The review is essentially a data-driven effort, and its success or failure can hinge on IT preparation. The point of contact should also act as a project manager and coordinate the timeline of responses to ensure they are efficient and thorough. Finally, it is crucial that the point of contact and other various upstream stakeholders in the pricing process reach a consensus on the critical dependencies of the review's various elements.

WHAT CHALLENGES CAN ARISE DURING A REVIEW?

The review manager should anticipate—and communicate as needed to individuals in the organization who might be unfamiliar with the process—the compliance challenges among the company's various programs. OIG may lack a full understanding of the complexity of the manufacturer's commercial pricing data, as well as the expectations and requirements of commercial operations. Companies can manage this disconnect by

anticipating the issues that are likely to arise and managing the risks accordingly.

Common challenges include:

- ▶ Lack of clarity on net price and what constitutes a price concession
- ▶ Data isn't always available at the necessary level of detail
- ▶ Inclusion and exclusion of Class of Trade (COT), contract, transaction type reason codes and price per unit
- ▶ Tight turnaround—responses are required within 30 or 45 days
- ▶ Lagged transactions
- ▶ Variation across programs
- ▶ The nature of programs impairs the ability to be conservative
- ▶ Guidance is often incomplete, unclear and constantly evolving

PREPARATION LEADS TO SUCCESS

The more business a manufacturer conducts with the government through commercial contract and rebate programs, and the longer a manufacturer participates in these federal programs, the more likely it is an OIG review will occur. The cost of non-compliance is very high, not only financially, but also to the company's reputation; the cost of compliance should be factored into the equation when deciding to sell pharmaceuticals and do business with the federal government. Manufacturers should ensure a robust compliance program is in place prior to encountering a review notice. Once a review is on the table, manufacturers should waste no time in naming a project manager, reviewing their process, ensuring data is accessible and accurate, and coordinating and communicating with the relevant stakeholders to ensure appropriate priority.

The best response to an OIG audit is summed up in just one word: preparation, preparation, preparation.



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SO YOU BOUGHT AN INTERNET DOMAIN: IRS CHIEF COUNSEL OFFERS CLARITY SURROUNDING TAX TREATMENT OF DOMAIN ACQUISITIONS

By Alison Torres, Brendan Sullivan and Ryan O'Farrell

In today's business environment, a strong internet presence with a streamlined website is vital for survival.

For many businesses, online market share growth requires the acquisition of applicable domain names for better competitive positioning. Until recently, there had not been any direct IRS guidance on the proper tax treatment of costs incurred—outside of the acquisition of a trade or business—to acquire, create or facilitate the acquisition of internet domain names. In Chief Counsel Advice (CCA) 201543014, released in Fall 2015, the IRS addresses whether domain names are a capitalized cost under IRC §263(a) or deductible as a trade or business expense under IRC §162. The CCA then addresses whether domain names are amortizable intangibles under IRC §197. According to the CCA, this second determination depends on the nature of the domain name and its use by the taxpayer.

In looking at case law, the CCA notes that a domain name is a form of intangible asset. It then cites the Treasury Regulations under IRC §263(a), which provide that the amounts paid to acquire, create, enhance or facilitate the acquisition of an intangible asset are to be capitalized, including amounts paid to another party for any intangible asset in a purchase (or similar transaction). As such, it concludes that costs associated with the acquisition of domain names are to be capitalized as an intangible asset rather than deducted under IRC §162.

The real substance of the CCA is in determining the how domain names fall within IRC §197, given the exceptions under IRC §197 for intangibles not acquired in the acquisition of a trade or business. Here, the CCA focuses on how domain names could constitute either: (i) a trademark under

IRC §197(d)(1)(F) or (ii) customer-based intangibles under 197(d)(1)(c)(iv).

First, under the Regulations, a trademark includes any word, name, symbol or device adopted and used to identify goods or services and distinguish them from those provided by others. If a domain name were registered as a trademark, the CCA notes that it would clearly be amortizable under §197. However, the CCA also notes that most domain names are not registered. While non-generic domain names are generally used to identify a particular good, service and/or business associated with the website, identification alone is not enough to meet the definition of a trademark under §1.197-2(b)(10) unless the name also distinguishes the goods or services from those provided by others. As a result, the CCA concludes that a non-generic domain name that name both identifies and distinguishes the taxpayer's goods or services from those provided by others may qualify as a trademark under IRC §197(d)(1)(F).

Alternatively, under Treasury Regulation §197(d)(6), a customer-based intangible includes any composition of market, market share or other value resulting from the future provision of goods or services pursuant to contractual or other relationships in the ordinary course of business with customers. As such, the CCA concludes that capitalized costs paid to acquire either a non-generic domain name that does not function as a trademark or a generic domain name are amortizable under IRC §197(d)(1)(c)(iv) as customer-based intangibles if the acquiring taxpayer uses the domain name in its trade or business to provide goods or services through a website that is already constructed and maintained by the acquiring taxpayer.

Lastly, the CCA warns that if a taxpayer acquires a domain name before a website has



been constructed and no goods or services have been offered, then the domain name does not meet the definition of an IRC §197 intangible. In this case, the domain name would be an intangible subject to IRC §167 treatment. As a result, the taxpayer may only deduct amortization for the intangible if the taxpayer can show that the domain name has a limited useful life. However, since a domain name is usually intended to be used over an unknown period of time, the IRS believes no deduction under IRC §167 would be available.

By and large, this CCA provides guidance for a taxpayer who has acquired domain names outside of the acquisition of a trade or business in order to better position their trade or business in the online marketplace. However, unclear positions still remain. In particular, the CCA notes further factual development is needed to determine if domain names actually meet the definition of a trademark. Moreover, the IRS states that the analysis may differ if the domain names are purchased for reasons not discussed or outside of the secondary market.

- 1 Kremen v. Cohen, 337 F.3d. 1024, 1029 (9th Cir. 2003).
- 2 Treas. Reg. §1.263(a)-4(b)(1), and Treas. Reg. §1.263(a)-4(c)(1).
- 3 Treas. Reg. 1.197-2(b)(10).
- 4 Treas. Reg. §1.197-2(b)(10).
- 5 Treas. Reg. §1.167(a)-1(b).



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4 QUESTIONS FOR NAVIGATING EARNED VALUE MANAGEMENT REQUIREMENTS FOR BARDA CONTRACTS

By Dave Scott

Picture this scenario: Company X is an established bio-pharmaceutical organization working with a group of scientists to develop a medical countermeasure for a newly recognized virus growing in prevalence worldwide. Currently, they are screening new technologies that could help fight off the virus infection.

Company X is not familiar with the government contracting landscape and is interested in partnering with the Biomedical Advanced Research and Development Authority (BARDA), which operates within the Office of the Assistant Secretary for Preparedness and Response in the U.S. Department of Health and Human Services (HHS). BARDA provides funding for the development and manufacture of vaccines, drugs and diagnostic tools for public health and medical emergencies.

Company X is considering submitting a proposal for a BARDA contract, but the management team is hesitant to take on the financial compliance and project controls requirements, including implementation of an Earned Value Management System (EVMS). They're unsure of the return on investment in addressing the complex requirements.

A thorough consideration of the following questions will help them evaluate their readiness to move into the BARDA contracting space and identify the benefits they can derive from implementing a BARDA-compliant EVMS.

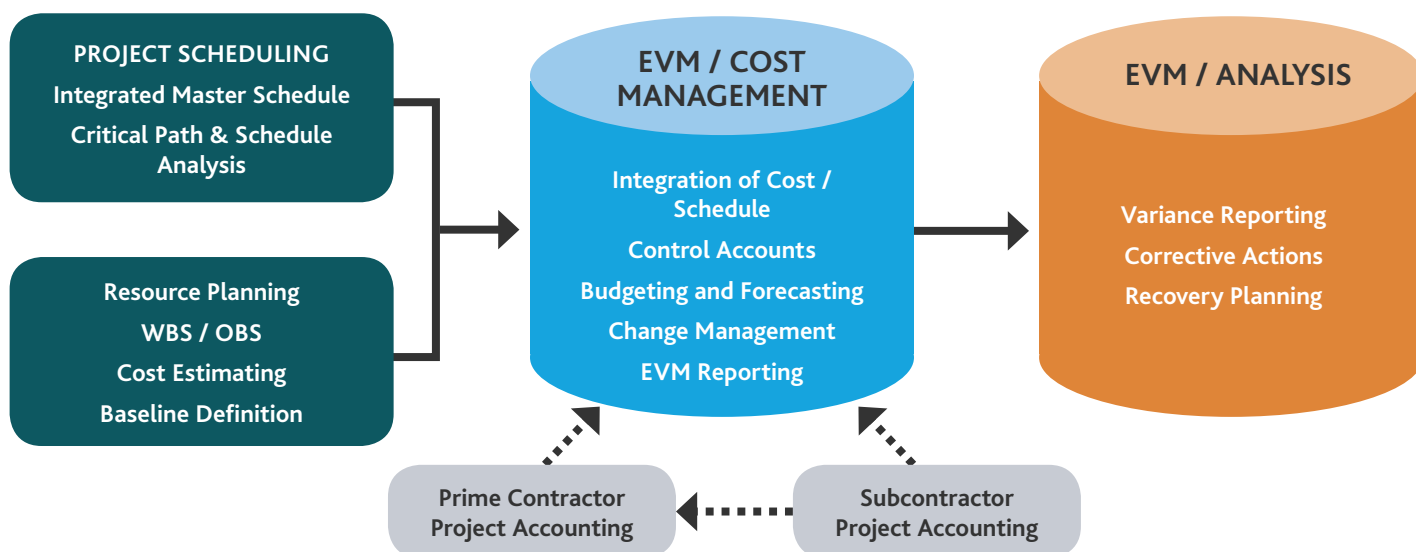
1. WHAT IS AN EVMS, AND WHY IS IT USEFUL?

An EVMS is composed of people, processes, policies and tools that comprise an overall business system for planning and controlling a project's scope, cost and schedule. EVM

helps contractors analyze past project performance to better plan and control future project deliverables. In addition, BARDA research and development contracts over \$25 million in total lifecycle value (including options) require contract performance reporting based on EVM.

The EVMS design incorporates the BARDA contractor's current project management and scheduling capabilities, as well as the organization's finance and accounting systems and processes. The EVMS may be implemented in a traditional "in-house" fashion. They would need to license the EVM software, configure the system and hire and train personnel. Alternatively, they may consider a fully outsourced EVMS solution.

EVMS FUNCTIONAL ARCHITECTURE



BARDA CONTRACTS

BARDA SEVEN PRINCIPLES OF EVM



1 Plan all work scope to completion.



2 Break down the program work scope into finite pieces.



3 Integrate program work scope, schedule and cost objectives into a performance measurement baseline against which accomplishments can be assessed, and control changes to the baseline.



4 Use actual costs incurred and recorded in accomplishing the work performed.



5 Objectively assess accomplishments at the work performance level.



6 Analyze significant variances, forecast impacts and prepare an estimate at completion.



7 Use earned value information in the company's management processes.

The BARDA EVMS implementation guide requires contract performance and variance analysis reporting based on EVM and in accordance with these seven principles.

2. WHAT ARE THE BARDA EVM REQUIREMENTS?

Federal Acquisition Regulations (FAR) and HHS Acquisition Regulations (HHSAR) requirements for EVM were developed principally for construction or information technology (IT) projects. However, BARDA has developed tailored EVM language and guidelines known as the BARDA Seven Principles of EVM.

These principles allow flexibility in an EVMS structure, but still meet the spirit of the EIA-748 EVMS standard, which is stipulated by FAR and HHSAR. They add discipline in implementation and operations and provide the same reporting data outlined by the Office of Management and Budget (OMB).

3. WHAT ARE SOME CHALLENGES IN IMPLEMENTING AN EVMS?

Implementing a BARDA-compliant EVMS is often challenging for a number of reasons, including:

- ▶ Familiarizing management and project teams with EVM as a project management discipline
- ▶ Licensing EVM software, maintaining the IT infrastructure and training personnel
- ▶ Transforming a proposal into a project plan, schedule and accurate time-phased performance measurement budget
- ▶ Developing BARDA EVM artifacts and EVMS process flow documentation
- ▶ Reporting direct and indirect costs at the element of cost and work package levels
- ▶ Integrating monthly subcontractor project status and cost data into the EVMS
- ▶ Objectively statusing project performance, managing baseline changes and management reserve
- ▶ Performance measurement baseline reviews and contract performance reporting

Internal EVMS implementations may take between six months to a year to complete. However, Company X will be required to begin submitting monthly EVM reports within 120 days of contract award.

4. WHAT VALUE MIGHT ORGANIZATIONS DERIVE FROM OUTSOURCING THEIR EVMS IMPLEMENTATION?

While internal EVMS implementations may expose a company to risk, another option is an outsourced EVMS solution.

An outsourced EVMS can offer the following benefits:

- ▶ Lower cost of compliance
- ▶ A rapid response to meet the BARDA EVM reporting requirements
- ▶ Knowledgeable EVM professionals with BARDA experience, enabling them to focus on successfully executing their project
- ▶ Improved project performance as a result of disciplined project scheduling and cost management
- ▶ A BARDA-trusted approach for forecasting future funding requirements and supporting contract modifications

Company X considered these questions and their options. They successfully proposed and were awarded a BARDA contract with a lifecycle value of over \$100 million. As a result of the many potential benefits, they chose to outsource their EVMS implementation, which resulted in strong customer satisfaction and the award of additional contract options.



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REGULATORY UPDATES

PROPOSED DFARS

[Pilot Program for Streamlining Awards for Innovative Technology Projects](#)

Key Details: The Department of Defense (DOD) has published a proposed rule that would amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement exceptions from the certified cost and pricing data requirements and from the records examination requirement for certain awards to small businesses or nontraditional defense contractors. The exceptions would apply to contracts, subcontracts or modifications of contracts or subcontracts valued at less than \$7.5 million awarded to a small business or nontraditional defense contractor pursuant to a technical, merit-based selection procedure (e.g., broad agency announcement) or the Small Business Innovation Research (SBIR) Program. The exceptions would end October 1, 2020.

[Procurement of Commercial Items](#)

Key Details: DOD is proposing to amend the DFARS to implement sections of the National Defense Authorization Acts (NDAA) for Fiscal Years (FY) 2013 and 2016 relating to commercial item acquisitions. The rule provides changes as followed:

- ▶ Definitions of “market prices,” “market research,” “nontraditional defense contractor,” “relevant sales data” and “uncertified cost data” are added.
- ▶ DFARS 212.102, Applicability, is amended to instruct contracting officers on the treatment of prior commercial item determinations and nontraditional defense contractors.
- ▶ DFARS 212.209, Determination of Price Reasonableness, is added to provide a hierarchy of data for contracting officers to consider when making determinations of price reasonableness.
- ▶ DFARS subpart 212.72, Limitation on Conversion of Procurement from Commercial Acquisition Procedures, is added.
- ▶ DFARS 215.402, Pricing Policy, is amended to provide information regarding the contracting officer’s responsibility for determining if the information provided by the offeror is sufficient to determine price reasonableness.
- ▶ DFARS 215.403-1, Prohibition on Obtaining Certified Cost or Pricing Data

(10 U.S.C. 2306a and 41 U.S.C. chapter 35), is amended to provide a reference to 212.102 regarding prior commercial item determinations.

- ▶ DFARS 215.404-1, Proposal Analysis Techniques, is amended to supplement the proposal analysis procedures identified in the FAR.
- ▶ DFARS 234.7002, Policy, is amended to incorporate the revisions in Section 852 of the NDAA for FY 2016.
- ▶ DFARS 239.101, Policy, is amended to incorporate the revisions in Section 855 of the NDAA for FY 2016.
- ▶ DFARS provisions 252.215-70XX, 252.215-70YY and 252.215-70ZZ are added.

FINAL DFARS

[Detection and Avoidance of Counterfeit Electronic Parts; Further Implementation](#)

Key Details: DOD has issued a final rule amending the DFARS to include a requirement of the NDAA for Fiscal Year 2012. This requires all defense contractors and subcontractors to have sources of electronic parts.

Effective: August 2, 2016

[New Qualifying Countries-Japan and Slovenia](#)

Key Details: DOD has issued a final rule amending the DFARS to add Japan and Slovenia as qualifying countries. The agreements remove discriminatory barriers to procurements of supplies and services produced by industrial enterprises of the countries to the extent mutually beneficial and consistent with national laws, regulations, policies and international obligations. These agreements do not cover construction or construction material.

Effective: August 2, 2016

[Allowable Costs Related to Counterfeit Electronic Parts](#)

Key Details: DOD has issued a final rule amending the DFARS to amend the allowability of costs of counterfeit electronic parts or suspect counterfeit electronic parts and the cost of rework or corrective action that may be required to remedy the use or inclusion of such parts. Effective August 30, 2016, such costs are not allowable unless:

- ▶ The contractor has an approved operational system to detect and avoid counterfeit and suspect electronic parts;
- ▶ The counterfeit or suspect parts were provided to the contractor as government property in accordance with FAR Part 45, or were obtained by the contractor in accordance with the regulations described in Section 818 of the NDAA for FY 2012; or
- ▶ The contractor discovers the counterfeit or suspect parts and notifies the government within 60 days of the discovery.

Effective: August 30, 2016

[Audit Agreements with France, Germany, Netherlands, and United Kingdom](#)

Key Details: DOD has issued a final rule that amends the DFARS to specify the countries with which DOD has audit agreements. Those countries are the United Kingdom, Netherlands, France and Germany.

Effective: August 30, 2016

[Instructions for Wide Area WorkFlow Repairable Receiving Report](#)

Key Details: DOD issued a final rule amending the DFARS to add instructions for utilizing the Wide Area WorkFlow (WAWF) Repairable Receiving Report (RRR). The objective of the rule is to provide instruction for the use, preparation and distribution of the WAWF RRR, which differentiates between the deliveries of new government assets (new procurements) and the return of government property that is repaired or overhauled.

Effective: September 29, 2016

FINAL FAR

[Technical Amendments](#)

Key Details: DOD, GSA and NASA are issuing a final rule that makes amendments to the Federal Acquisition Regulation (FAR) in order to make editorial changes. These changes include minor revisions to the definition of “Commercial and Government Entity (CAGE) code,” amongst other various technical edits.

Effective: July 14, 2016

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REGULATORY UPDATES

[FPI Blanket Waiver Threshold](#)

Key Details: DOD, GSA and NASA are issuing a final rule amending the FAR to increase the blanket waiver threshold for small dollar-value purchases from Federal Prison Industries (FPI) by federal agencies. On March 3, 2016, FPI's Board of Directors adopted a resolution increasing the blanket waiver threshold for small dollar-value purchases from FPI by federal agencies from \$3,000 to \$3,500. The increase coincides with the increase in the micro-purchase threshold. This final rule amends the FAR to reflect the threshold increase from \$3,000 to \$3,500. No waiver is required to buy from an alternative source below \$3,500. Customers may, however, still purchase from FPI at, or below, this threshold if they choose.

Effective: August 15, 2016

[OMB Circular Citation Update](#)

Key Details: DOD, GSA and NASA are issuing a final rule amending the FAR to update outdated Office of Management and Budget (OMB) Circular citation references. On December 26, 2013, the Office of Management and Budget (OMB) published new guidance at 2 CFR 200, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (OMB Uniform Guidance). This became effective on December 26, 2014, after federal agencies adopted the guidance as a set of binding regulations. OMB's Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards supersedes and streamlines requirements from OMB Circulars A-21, A-87, A-89, A-102, A-110, A-122 and A-133, and the guidance in Circular A-50 on Audit Follow-up. This final rule replaces OMB citations in the FAR to the circulars cited above that have been replaced by this new OMB Uniform Guidance, and cross-references to new terminology in the OMB Uniform Guidance. This rule also creates a definition with an abbreviated title in FAR Section 2.101 for FAR citations to this OMB Uniform Guidance.

Effective: August 15, 2016

[Revision to Standard Forms for Bonds](#)

Key Details: DOD, GSA and NASA are issuing a final rule to amend five Standard Forms prescribed by the FAR for contracts

involving bonds and other financial protections. The revisions are aimed at clarifying liability limitations and expanding the options for organization types. This finalizes the proposed rule, which addressed concerns that surety bond producers may be adversely affected by differing federal agency views on the proper type of organization to indicate on these Standard Forms when the subject business was a limited liability company (LLC), an increasingly prevalent form of business in the construction industry. The proposed rule added a box labelled "Other: (Specify)" to the "Type of Organization" block on each of the five forms (SFs 24, 25, 25A, 34, and 35) in order to expand the range of business types to include not just LLCs, but others, as they evolve.

Effective: August 15, 2016

[Fair Pay and Safe Workplaces EO](#)

Key Details: Federal Acquisition Circular 2005-90 contains one final rule implementing President Barack Obama's executive order on Fair Pay and Safe Workplaces, which is intended to improve contractors' compliance with labor laws. Effective October 25, 2016, this final rule amends the FAR to require federal contractors and subcontractors to report such violations and agency contracting officers to consider this information during a source selection decision. For more details, read our client alert on this rule [here](#).

Effective: October 25, 2016

[Small Business Subcontracting Improvements](#)

Key Details: DOD, GSA and NASA are issuing a final rule amending the FAR to implement regulatory changes made by the Small Business Administration, which provide for a government-wide policy on small business subcontracting. Among its changes, this final rule requires prime contractors to:

- ▶ Make good faith efforts to utilize their proposed small business subcontractors during performance of a contract to the same degree the prime contractor relied on the small business in preparing and submitting its bid or proposal
- ▶ Assign North American Industry Classification System codes to subcontracts (NAICS)

- ▶ Resubmit a corrected subcontracting report within 30 days of receiving the contracting officer's notice of report rejection
- ▶ Provide the socioeconomic status of the subcontractor in the notification to unsuccessful offerors for subcontracts
- ▶ Not prohibit a subcontractor from discussing payment or utilization matters with the contracting officer

Effective: November 1, 2016

AGENCY SUPPLEMENTS TO THE FAR – FINAL RULES

[Civil Monetary Penalty Inflation Adjustment, DOD Interim Final Rule](#)

Key Details: On November 2, 2015, the President signed into law the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Act), which further amended the Federal Civil Penalties Inflation Adjustment Act of 1990. The 2015 Act updates the process by which agencies adjust applicable civil monetary penalties (CMP) for inflation to retain the deterrent effect of those penalties. The 2015 Act requires that the head of each agency must adjust each CMP within its jurisdiction by the inflation adjustment described in the 2015 Act not later than July 1, 2016, and not later than January 15 of every year thereafter. Accordingly, DOD must adjust the level of all civil monetary penalties under its jurisdiction through an interim final rule and make subsequent annual adjustments for inflation.

Release: May 26, 2016

[Small Business Government Contracting and National Defense Authorization Act of 2013 Amendments, SBA Final Rule](#)

Key Details: The Small Business Administration (SBA) has published a wide-ranging final rule that implements several changes mandated by the NDAA of FY 2013, including changes to limitations on subcontracting in small business contracts, SBA's regulations concerning the non-manufacturer rule and affiliation rules, and the treatment of joint ventures between small businesses. The rule also aims to clarify

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REGULATORY UPDATES

the tests for a finding of affiliation by identity of interest, the ostensible subcontractor rule and SBA's method of calculating annual receipts for revenue-based size standards, among other questions.

Effective: May 31, 2016

[Unenforceable Commercial Supplier Agreement Terms, GSA Proposed Rule](#)

Key Details: GSA is proposing to amend the General Services Administration Acquisition Regulation (GSAR) to implement standard terms and conditions for the most common conflicting Commercial Supplier Agreement terms, to minimize the need for the negotiation of the terms of Commercial Supplier Agreements on an individual basis. The proposed rule will add provisions to contracts making certain conflicting or inconsistent terms in a Commercial Supplier Agreement unenforceable, so long as an express exception is not authorized elsewhere by federal statute. GSA is also proposing to amend the GSAR to modify the order of precedence contained in the Commercial Items clause (52.212-4) to make clear that all of the terms of the GSAR clause control in the event of a conflict with a Commercial Supplier Agreement unless both parties agree to specific terms during the course of negotiating the contract. Both of the above changes will be accomplished by revising guidance and clauses contained throughout the GSAR. Interested parties should submit written comments to the Regulatory Secretariat Division on or before August 1, 2016 to be considered in the formation of the final rule.

Effective: May 31, 2016

[Cooperative Agreements with Commercial Firms, NASA Final Rules](#)

Key Details: This final rule implements the requirements of Section 872 for recipients and NASA staff to report information that will appear in the Federal Awardee Performance and Integrity Information Systems (FAPIS). Pursuant to Section 872, NASA will consider information contained within the system about a non-federal entity before awarding a grant or cooperative agreement to that non-federal entity. Some of the major elements of the rule are:

- ▶ NASA is to report information in FAPIS about:
 - Any termination of an award due to a material failure to comply with the award terms and conditions,
 - Any administrative agreement with a non-federal entity to resolve a suspension or debarment proceeding; and
 - Any finding that a non-federal entity is not qualified to receive a given award, if the finding is based on criteria related to the non-federal entity's integrity or prior performance under federal awards and it is anticipated that the total federal funding will exceed the simplified threshold during the period of performance.
- ▶ Recipients that have federal contract, grant and cooperative agreement awards with a cumulative total value greater than \$10,000,000 must enter information in FAPIS about certain civil, criminal and administrative proceedings that reached final disposition within the most recent five-year period and that were connected with the award or performance of a federal award.

Effective: June 3, 2016

[Transactional Data Reporting, GSA Final Rule](#)

Key Details: GSA will include clauses for reporting transactional data for the Federal Supply Schedule (FSS) contracts. Transactional data refers to the information generated when the government purchases goods or services from a vendor. The clauses will be introduced in phases by the GSA. After this change, any participating vendors will no longer be subject to the existing Commercial Sales Practices and the Price Reductions clauses. These clauses may also apply to new GWACs and government-wide IDIQ contracts without existing transactional data requirements.

Effective: June 22, 2016

[Federal Civil Penalties Adjustment Act Amendments, Department of Veterans Affairs Interim Final Rule](#)

Key Details: Due to the Federal Civil Penalties Inflation Adjustment Act

Improvements Act, the Department of Veteran Affairs is required to declare the increase in penalties made. The maximum civil monetary penalty was increased from \$10,000 to \$21,563. The fraudulent claims penalty was increased from \$5,500 to \$10,781.

Effective: June 22, 2016

[Technical Amendments, GSAM Final Rule](#)

Key details: GSA is making technical amendments to the GSAR by making revisions to GSAR Case 2010-G511, Federal Supply Schedules: Purchasing by Non-Federal Entities, a previously published final rule that amended the GSAR with regard to purchasing by state and local governments and other qualified organizations through its FSS program. Since that rule was published, further revisions were made to the affected regulations. Therefore, GSA is making conforming changes to correct 48 CFR parts 538 and 552.

Effective: July 6, 2016

[Small Business Mentor Protégé Programs, SBA Final Rule](#)

Key Details: SBA is amending its regulations to implement provisions of the Small Business Jobs Act of 2010, and the NDAA for FY 2013. Based on authorities provided in these two statutes, the rule establishes a government-wide mentor-protégé program for all small business concerns, consistent with SBA's mentor-protégé program for participants in SBA's 8(a) Business Development (BD) program. The rule also makes minor changes to the mentor-protégé provisions for the 8(a) BD program in order to make the mentor-protégé rules for each of the programs as consistent as possible. The rule also amends the current joint venture provisions to clarify the conditions for creating and operating joint venture partnerships, including the effect of such partnerships on any mentor-protégé relationships. In addition, the rule makes several additional changes to the current 8(a) Office of Hearings and Appeals and HUBZone regulations concerning, among other things, ownership and control, changes in primary industry, standards of review and interested party status for some appeals.

Effective: August 24, 2016

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REGULATORY UPDATES

[Various Administrative Changes and Clauses to the USAID Acquisition Regulation, AIDAR Final Rule](#)

Key Details: The U.S. Agency for International Development (USAID) is issuing a final rule amending the Agency for International Development Acquisition Regulation (AIDAR) to maintain consistency with federal and agency regulations and incorporate current and new USAID clauses into the regulation. The highlights of the changes are as follows:

- ▶ Sections 722.810 and 752.222-71 are added to encourage all USAID contractors performing and recruiting entirely outside the United States to develop and enforce employment nondiscrimination policies with regard to race, color, religion, sex (including pregnancy and gender identity), sexual orientation, marital status, parental status, political affiliation, national origin, disability, age, genetic information, veteran status or any other conduct that does not adversely affect the performance of the employee.
- ▶ New part 729, subpart 729.4, Sections 729.204-70 and 752.229-70 require contractors to report the amounts of foreign taxes assessed by a foreign government on commodities financed with U.S. foreign assistance funds. The reporting is used to require the countries to reimburse the taxes or duties imposed on U.S. foreign assistance funds and for certain reporting to Congress.
- ▶ Sections 731.205-43 and 752.231-72 are added to mitigate the risk of inappropriate spending, as mandated by Executive Order 13589, "Promoting Efficient Spending," dated November 9, 2011. Contractors are required to obtain USAID written approval prior to committing costs related to USAID-funded conferences that meet the criteria provided in Section 731.205-43. Further guidance provides that costs associated with a conference, meeting the criteria in the subpart, are unallowable when the required prior written approval for such costs is not obtained.

- ▶ New Section 752.7036 directs contractors to register with the Implementing Partner Notices (IPN) Portal, where USAID uploads contract modifications that affect multiple awards and provides notices to contractors.
- ▶ Section 752.7037 is added to promote child safeguarding when implementing USAID programs. The clause complements the USAID Counter Trafficking in Persons (C-TIP) Code of Conduct by expanding the range of actions prohibited by USAID to include abuse, exploitation or neglect of children.

Effective: August 25, 2016

[Clarification of Award Fee Evaluations and Payments, NFS Final Rule](#)

Key Details: NASA published a final rule amending the NASA Federal Acquisition Regulation Supplement to clarify NASA's award fee process by incorporating terms used in award fee contracting, guidance relative to final award fee evaluations, release of source selection information and the calculation of the provisional award fee payment percentage in NASA end-item award fee contracts.

Effective: August 31, 2016

[Participation by Disadvantaged Business Enterprises in Procurements under EPA Financial Assistance Agreements, EPA Final Rule](#)

Key Details: A final rule is being issued by the EPA to revise the Disadvantaged Business Enterprise program. The revisions will improve the utility, minimize burden and clarify requirements that were subject to questions for financial assistance within the program. All of these regulations are in accordance with the federal laws that govern the DBE program.

Effective: October 26, 2016

AGENCY SUPPLEMENTS TO THE FAR – PROPOSED RULES

[Contractor Business Systems: Definition and Administration, Withdrawal of DEAR Proposed Rule](#)

Key Details: The Department of Energy (DOE) is withdrawing a proposed rule that would have amended the DOE Acquisition Regulation to define contractor business systems as an accounting system, estimating system, purchasing system, earned value management system or property management system.

[Incremental Funding of Fixed-Price, Time-and-Material or Labor-Hour Contracts during a Continuing Resolution, DTAR Proposed Rule](#)

Key Details: A proposed rule issued by the Department of the Treasury would amend the Department of Treasury Acquisition Regulation (DTAR) to provide acquisition policy for incremental funding of fixed-price, time-and-material or labor-hour contracts during a continuing resolution. Specifically, this proposed rule would establish procedures for using incremental funding for fixed-price, time-and-material and labor-hour contracts during a period in which funds are provided to Treasury under a continuing resolution. Heads of contracting activities may develop necessary supplemental internal procedures as well as guidance to advise potential offerors, offerors and contractors of these policies and procedures.

[Contractor Financial Reporting of Property, NFS Proposed Rule](#)

Key Details: NASA has updated the NASA Federal Acquisition Regulation Supplement policy regarding property financial reporting to specify that all contractors with custody of NASA PP&E with a value of \$10 million or more report this information on a monthly basis to NASA.

SIGNIFICANT ACCOUNTING & REPORTING UPDATES

FASB Issues Guidance on Eight Cash Flow Classification Issues

In August 2016, the FASB issued ASU 2016-15 to clarify whether the following items should be categorized as operating, investing or financing in the statement of cash flows: (i) debt prepayments and extinguishment costs, (ii) settlement of zero-coupon debt, (iii) settlement of contingent consideration, (iv) insurance proceeds, (v) settlement of corporate-owned life insurance (COLI) and bank-owned life insurance (BOLI) policies, (vi) distributions from equity method investees, (vii) beneficial interests in securitization transactions and (viii) receipts and payments with aspects of more than one class of cash flows. The new standard takes effect in 2018 for public companies. For all other entities, the amendments in this update are effective in 2019. If an entity elects early adoption, it must adopt all of the amendments in the same period.

FASB Issues ASU on Credit Losses on Financial Instruments

In June 2016, the FASB issued ASU 2016-13, which (i) significantly changes the impairment model for most financial assets that are measured at amortized cost and certain other instruments from an incurred loss model to an expected loss model, and (ii) provides for recording credit losses on available-for-sale (AFS) debt securities through an allowance account. The update also requires certain incremental disclosures. The update takes effect in 2020 for SEC filers and in 2021 for all other entities, including public business entities other than SEC filers. Early adoption is permitted for all entities beginning after December 15, 2018, including interim periods within those fiscal years.

AICPA Requests Feedback on Revenue Recognition Implementation Issues

The AICPA's Financial Reporting Executive Committee (FinREC) has issued several working drafts of accounting issues related to the implementation of Accounting Standards Update (ASU) No. 2014-09, *Revenue from*

Contracts with Customers. The working drafts aim to provide industry-specific considerations and illustrative examples in each implementation area for entities in various industries, including aerospace and defense. Once finalized, the AICPA plans to

include them in a new revenue recognition guide currently in development.

Below is a recap of the issues identified to date by the Aerospace and Defense Revenue Recognition Task Force:

ISSUE	STATUS
Issue #1-1: Acceptable Measures of Progress	Finalized. Will be included in the 2017 AICPA Guide, Revenue Recognition.
Issue #1-2: Accounting for Contract Costs	Finalized. Will be included in the 2017 AICPA Guide, Revenue Recognition.
Issue #1-3: Variable Consideration	Finalized. Will be included in the 2017 AICPA Guide, Revenue Recognition.
Issue #1-4: Contract Existence and Related Issues for Foreign Contracts with Regulatory Contingencies and Unfunded Portions of US Government Contracts	Finalized. Will be included in the 2017 AICPA Guide, Revenue Recognition.
Issue #1-5: Transfer of Control on Non-U.S. Federal Government Contracts	Finalized. Will be included in the 2017 AICPA Guide, Revenue Recognition.
Issue #1-6: Separation / Segmentation	Submitted to AICPA Revenue Recognition Working Group.
Issue #1-7: Not yet assigned	
Issue #1-8: Contract Modifications, Unpriced Change Orders, Claims	Submitted to FinRec to be re-discussed.
Issue #1-9: Options, including Loss Options and Loss Contract Guidance	In process.
Issue #1-10: Disclosures	In process.
Issue #1-11: Not yet assigned	
Issue #1-12: Significant Financing Component	Finalized. Will be included in the 2017 AICPA Guide, Revenue Recognition.
Issue #1-13: Not yet assigned	
Issue #1-14: Accounting for Offset Obligations	Out for Exposure. Comments on the working drafts were due September 1, 2016.
Issue #1-15: Not yet assigned	
Issue #1-16: Allocating the Transaction Price	Finalized. Will be included in the 2017 AICPA Guide, Revenue Recognition.
Issue #1-17: Not yet assigned	
Issue #1-18: Not yet assigned	
Issue #1-19: Commercial – Accounting for NRE	Questions have been submitted to the FASB Transition Resource Group.
Issue #1-20: Impact of Contract Termination Rights and Penalties on Contract Term	Out for Exposure. Comments on the working drafts were due September 1, 2016.

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SIGNIFICANT ACCOUNTING & REPORTING UPDATES

SEC Requests Comments on Management, Certain Security Holders and Corporate Governance Disclosure Requirements

In August 2016, the SEC published a request for comment on the disclosure requirements of Subpart 400 of Regulation S-K, which relate to management, certain security holders and corporate governance matters. The request is part of the *Disclosure Effectiveness Initiative*, a broad-based staff review of the SEC's disclosure rules designed to improve the disclosure regime for both companies and investors. The request follows the SEC's proposal to eliminate redundant and outdated disclosure requirements in July 2016, the concept release on Regulation S-K, published in April 2016, and the request for comment on the effectiveness of certain financial disclosure requirements of Regulation S-X, published in September 2015. The request will also inform the Commission's study on Regulation S-K, which is required by the Fixing America's Surface Transportation (FAST) Act. The request for comment can be found on the SEC's website. Comments should be provided within 60 days following publication of the request for comment in the Federal Register.

SEC Proposes to Eliminate Outdated and Redundant Disclosure Requirements

The SEC's July 2016 proposed amendments to eliminate redundant and outdated disclosure requirements as part of its *Disclosure Effectiveness Initiative*. The proposal follows the SEC's request for comment on the effectiveness of certain financial disclosure requirements of Regulation S-X, published in September 2015 and the concept release on Regulation S-K, published in April 2016. The amendments were also proposed in response to a FAST Act mandate, which requires the SEC to eliminate provisions of Regulation S-K that are duplicative, outdated or unnecessary disclosures for all filers.

The proposal acknowledges that certain disclosure requirements in Regulations S-K and S-X have become outdated, redundant, overlapping or superseded in



light of developments in U.S. GAAP, IFRS, other SEC disclosure requirements and changes in the information environment. The changes are intended to simplify the overall compliance process, but not change the mix of information provided to investors. For example, some of these proposed changes include:

- ▶ Eliminating the income tax rate reconciliation disclosure requirement in S-X 4-08(h)(2), as such disclosure is required by ASC 740-10-50-12.
- ▶ Eliminating the requirement to provide a computation of earnings per share in S-K 601(b)(11), as such disclosure is required by ASC 260-10-50-1a.
- ▶ Deleting S-K 101(b), which requires disclosure of segment financial information, restatement of prior periods when reportable segments change and discussion of segment performance that may not be indicative of current or future operations. Such disclosures are similar to those required by ASC 280 and S-K 303(b).
- ▶ Deleting S-K 201(d), which requires disclosure of the securities authorized for issuance under equity compensation plans. Although U.S. GAAP requirements are not identical to those contained in S-K 201(d), they provide disclosures about the nature and terms of equity compensation arrangements, which result in reasonably similar disclosures.
- ▶ Eliminating the requirement in S-K 503(d) and related forms to provide a ratio of

earnings to fixed charges when an offering of debt securities is registered. The Commission believes this requirement is no longer relevant and useful.

The proposal also solicits comments on:

- ▶ Certain disclosure requirements, which may overlap with U.S. GAAP, but provide incremental information. The SEC plans to use the feedback received on these areas to determine whether to retain, modify, eliminate or refer them to the FASB for potential incorporation into U.S. GAAP.
- ▶ Where disclosures appear in an SEC filing. The proposal would result in the relocation of certain disclosures within a filing. The SEC is seeking feedback on how the relocations may affect the prominence or context of certain disclosures.

The proposal can be found on the SEC's website. Comments should be provided within 60 days following publication of the release in the Federal Register.

SEC Proposes Amendments to Smaller Reporting Company Definition

In June 2016, the SEC proposed rules which would increase the financial thresholds in the smaller reporting company (SRC) definition. The proposal would expand the number of companies eligible for the scaled disclosures

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SIGNIFICANT ACCOUNTING & REPORTING UPDATES

permitted by Regulation S-K and Regulation S-X. The financial thresholds in the definition of accelerated and large accelerated filer and their related filing requirements would remain unchanged.

Under the proposal, a company with less than \$250 million of public float (or less than \$100 million in annual revenues, if the company has no public float) would qualify as a SRC. The proposed financial threshold for re-entering SRC status is less than \$200 million of public float (or less than \$80 million in annual revenues, if the company has no public float).

The current definitions of accelerated and large accelerated filer contain a provision that excludes registrants that qualify as SRCs. The proposal would eliminate that provision, while maintaining the financial thresholds in the definitions of accelerated filer (i.e., \$75 million of public float) and large accelerated filer (i.e., \$700 million of public float). Therefore, companies with public floats of at least \$75 million, but less than \$250 million, that qualify as SRCs under the amended definition would still be subject to the accelerated filing requirements, including the accelerated timing of filing periodic reports and the requirement to provide the auditor's attestation of management's assessment of internal control over reporting required by Section 404(b) of the Sarbanes-Oxley Act of 2002. However, those companies would be allowed to take advantage of the scaled disclosure system available to SRCs.

Rule 3-05 of Regulation S-X requires financial statements of businesses acquired or to be acquired. Rule 3-05(b)(2)(iv) allows registrants to omit such financial statements for the earliest of three fiscal years required if the net revenues of the business to be acquired are less than \$50 million. The Commission has not proposed to amend this threshold.

The proposal can be found on the SEC's website. Comments should be provided within 60 days after the release is published in the Federal Register.

BDO WELCOMES NEW PROFESSIONALS TO GOVERNMENT CONTRACTING PRACTICE

BDO's Government Contracting practice is pleased to announce that **Susan Dunne** and **Aaron Raddock** have joined the firm's McLean, Va. office. Ms. Dunne joins the Commercial Pricing practice as a managing director, and Mr. Raddock joins the Government Contracts & Grants Advisory Services practice as a director.



Ms. Dunne has more than 20 years of experience and an extensive background working with pharmaceutical

manufacturers and other government contractors to ensure compliance with their regulatory and contractual requirements. Before joining BDO, Susan was a practicing attorney in the Washington, D.C. area, where she spent 12 years servicing clients in litigation matters and matters related to government contracts. Over the past 15 years, Susan has focused on consulting with pharmaceutical and device manufacturers on all their interactions with federal pricing programs, including Medicaid, Medicare, 340B Drug discounts and the Veterans Health Care Act and VA FSS contracting. Susan will focus on developing the Commercial Pricing practice's capabilities in the life sciences industry. She looks forward to working with commercial healthcare manufacturers to assist them with regulatory and federal contract compliance.

"Susan brings a unique viewpoint to our practice, and we're pleased to welcome her to the team," said Chris Carson, National Government Contracting practice lead. "As we continue expanding our practice's capabilities in the pricing space, we're confident Susan's extensive experience and knowledge in contractual and regulatory matters will be an invaluable asset."



Mr. Raddock brings more than 10 years of consulting experience working with government contractors, higher

education institutions and nonprofits. He has advised clients across industries including defense, healthcare, technology, research and development and more on a wide range of business issues and regulatory compliance challenges. In this role, Aaron will continue to leverage his experience in the areas of Federal Acquisition Regulation, Cost Accounting Standards, GSA/VA Schedule pricing and other regulatory compliance matters, while expanding the litigation support and labor law compliance capabilities of the practice. Aaron has authored a number of articles and books on topics ranging from the Service Contract Act to fraud.

"We're thrilled to bring Aaron aboard and are confident he will be a trusted advisor to our clients," said Eric Sobota, National Leader, Government Contracts and Grants Advisory Services. "His experience will be instrumental in our continued efforts to grow our practice, build out new services and capabilities and maintain our high standard of client service."

PEerspective in GOVERNMENT CONTRACTING

A FEATURE EXAMINING THE ROLE OF PRIVATE EQUITY IN THE GOVERNMENT CONTRACTING SPACE.



Government agencies are increasing their investments in cloud computing, especially

for web hosting, backup support and collaboration. A recent MeriTalk report, titled "Destination Cloud: The Federal and SLED Cloud Journey," found that 82 percent of public sector cloud adopters plan to increase investment in cloud computing platforms in 2017, and there will be a twofold increase in the use of cloud platforms over the next five years.

This opens up opportunities for PE firms with an eye on the government contracting sector. Apollo Global Management will acquire Rackspace, which provides cloud-computing services to both enterprises and governments, in a take-private deal valued at \$4.3 billion set to close by the end of this year. This represents a 38 percent premium to the company's stock price before rumors of a deal began to circulate, but is well under the firm's peak market value in 2013, according to *Bloomberg*. The deal follows Rackspace's inability to compete with its larger-scale web-hosting competitors Amazon, Google and Microsoft, and will enable it to focus on long-term growth and enhancing its product offerings, *Bloomberg* reports.

While cloud spending is up, security remains a top concern, and cyber attacks from foreign states and illegal hacker groups continue to grab headlines. As agencies grapple with how to store and transfer sensitive data, they are increasingly turning to private cloud solutions. Department approaches can vary—the DOD prefers to build applications for the cloud from the ground up, rather than shift existing apps to the cloud, whereas the Department of Commerce assesses the suitability of each tool for the cloud on a case-by-case basis, *FedTech Magazine* reports.

Even with a private cloud, shared hosting facilities, jurisdictional hazards and leased telephone lines mean the risks of leaks and intrusions cannot be completely mitigated. Cloud Constellation—a startup that secured series A funding in March 2016—believes the answer is a neutral space-based cloud storage network, relying on satellites rather than terrestrial lines to deliver mission-critical data.

Given the severity of the security challenge, cybersecurity remains a hot area for PE investment, especially as technology companies divest their government-focused cyber tech divisions. Intel, for example, is refocusing on its bread-and-butter chip-making business, in part to take advantage of the rise of the Internet of Things. The firm will spin off its cybersecurity arm into a new joint venture with PE firm TPG in a deal worth \$4.2 billion, expected to close in Q2 2017, *Bloomberg* reports. Using funds from its TPG Partners VII fund, TPG will take a majority stake in the new firm, which will be called McAfee, after its trademark security software.

With multiple small vendors providing highly specialized cyber solutions in a fragmented marketplace, *Bloomberg* reports the cybersecurity space may be due for a shakeup, and TPG may seek add-on acquisitions as they build the McAfee cybersecurity business. This could also mean broader consolidation in the cyber sector, which will be of interest to other PE firms.

Sources: *Bloomberg*, *ExecutiveBiz*, *Federal Times*, *FedTech*, *GovCon Wire*, *Investopedia*, *J.F. Lehman & Company*, *Milwaukee Business Journal*, *National Defense Magazine*, *PE Hub*

FUTURE PERSPECTIVES: WHAT'S NEXT FOR GOVERNMENT CONTRACTING INVESTORS

PE firms focused on the defense and aerospace sector are showing increased interest in investing in mid-tier firms with highly specialized technologies after an extended wait-and-see period, according to *National Defense Magazine*. In September, Acorn Growth Companies bought advanced aircraft technology provider Raisbeck Engineering, and JF Lemman acquired The Oldenburg Group's mining and defense units for undisclosed sums. Trident Maritime Systems, a portfolio company of J.F. Lehman, also acquired Callenberg Technology Group from Wilhelmsen Maritime Services. Companies are increasingly evaluating the separate values for their government and commercial businesses, which will present attractive carve-out opportunities for PE firms going forward.

DID YOU KNOW...

According to [Government Executive](#), the Office of Federal Procurement Policy's category management strategy has seen \$2 billion in federal savings over the two years since the strategy was announced.

The Federal Emergency Management Association (FEMA) is moving forward with a new Grants Management Modernization (GMM) program to better coordinate its numerous active grant programs, [reports Washington Technology](#). In 2016, FEMA managed over 40 active grant programs to support the Homeland Security Department.

Lawmakers on both sides of the aisle are arguing that contract competition makes for good government, says [Federal News Radio](#).

Two-thirds of the 23 CFO Act Federal Agencies have a Chief Technology Officer, [a recent report by the Professional Services Council](#) found.

Federal cloud spending grew by 24.8 percent in \$3.3 billion in FY15, up from \$2.6 billion in 2012, according to a [report from analytics firm Govani](#).

MARK YOUR CALENDAR...

NOVEMBER

Nov. 9

Unlocking Potential Advantages of the TDR & the False Claims Act Webinar*
[Online Webinar](#)

Nov. 14-17

Deltex Insight 2016*
Gaylord National Resort & Convention Center
National Harbor, Md.

Nov. 15-15

FAR Workshop
MicroTek – Orlando
Orlando, Fla.

Nov. 17-18

2016 Government Contracts Review and Outlook
Hyatt Regency Mission Bay Spa & Marina
San Diego

DECEMBER

Dec. 5-9

The Master's Institute in Government Contracting
Waterview Conference Center at CEB
Arlington, Va.

Dec. 7-8

Types of Contracts
ABI - American Bankruptcy Institute
Alexandria, Va.

Dec. 12-13

35th Annual Government Contracting Management Symposium
Washington Marriott Wardman Park
Washington, D.C.

JANUARY

Jan. 18-19

Federal Grant Compliance Under The OMB Grant Reform
ABI - American Bankruptcy Institute
Alexandria, Va.

** indicates BDO is hosting or attending this event*

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