



# 2024 Federal Contracts Symposium

October 22, 2024



# Year in Review: Federal Contracts Case Law Update

## *Speakers:*

Reggie Jones, Partner – Fox Rothschild LLP  
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# **U.S. Supreme Court**

# Key SCOTUS Cases

- *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (2024); and
- *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 219 L. Ed. 2d 1139 (2024)
- What will the effect be of these two decisions on agency rulemaking?
  - Tsunami of litigation, or
  - No change (same stuff, different day)?

# *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (2024)

- *Loper* overturned *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) and the doctrine that originated with it, **Chevron Deference**.
- **Chevron** stood for the proposition that courts should defer to a federal agency's interpretation of a silent or ambiguous statute so long as the interpretation is reasonable.
- In *Loper*, the Court held in a 6 to 3 decision that: "The Administrative Procedure Act requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous; *Chevron* is overruled."

## *Loper – The Facts*

- Challenge to regulation of the National Marine Fisheries Service (The Agency) under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), which incorporates the Administrative Procedure Act (APA).
- Regulation required Atlantic herring fisherman to contract and pay for government-certified third-party observers on fishing trips.
- The Court granted certiorari on two cases involving multiple owners of Atlantic, family-owned commercial herring fisheries or fishing vessels who challenged the agency's rule.

# Loper – The Statute at Issue

Relevant here, a plan may also require that “one or more observers be carried on board” domestic vessels “for the purpose of collecting data necessary for the conservation and management of the fishery.” ... ***The MSA specifies three groups that must cover costs associated with observers:***

- (1) foreign fishing vessels ... (which *must* carry observers) ...;
- (2) vessels participating in certain limited access privilege programs, which impose quotas permitting fishermen to harvest only specific quantities of a fishery's total allowable catch ...; and
- (3) vessels within the jurisdiction of the North Pacific Council, where many of the largest and most successful commercial fishing enterprises in the Nation operate ....

In the latter two cases, the MSA expressly caps the relevant fees at two or three percent of the value of fish harvested on the vessels. And in general, it authorizes the Secretary to impose “sanctions” when “any payment required for observer services provided to or contracted by an owner or operator ... has not been paid.” [All internal citations omitted].

***The MSA does not contain similar terms addressing whether Atlantic herring fishermen may be required to bear costs associated with any observers a plan may mandate.***

# *The Test for Chevron Deference*

- (1) The reviewing court must first determine “whether Congress has directly spoken to the precise question at issue. If, and only if, congressional intent is ‘clear’ that is the end of the matter.”
- (2) “But if the court determines that ‘the statute is silent or ambiguous with respect to the specific issue’ at hand, the court must ... defer to the agency’s interpretation if it ‘is based on a permissible construction of the statute.’” *Loper* at 2254.

## *Loper – The Majority Opinion (C.J. Roberts)*

- Overrules *Chevron* saying that the presumption is incompatible with the APA, which requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority
- “Neither *Chevron*, nor any subsequent decision of the Court attempted to reconcile its framework with the APA. *Chevron* defines the command of the APA that ‘the reviewing court’ – not the agency whose action it reviews—is to ‘decided **all** relevant questions of law’ and ‘interpret statutory provisions.’”
- “*Chevron*’s presumption is misguided because agencies have no special competence in resolving statutory ambiguities. Courts do.”
- “The Court, for its part, has not deferred an agency interpretation under *Chevron* since 2016.”

## *Loper – The Concurrence (J. Thomas)*

- “I write separately to underscore a more fundamental problem: *Chevron* deference also violates our Constitution’s separation of powers, as I have previously explained at length.”
- “*Chevron* compels judges to abdicate their **Article III** ‘judicial Power.’ § 1. ‘[T]he judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws.’”

## *Loper – The Dissent (J. Kagan)*

- Accuses the majority of turning the Court into the country's administrative czar, citing examples involving the Food & Drug Administration and the Public Health Services Act, Fish & Wildlife Services and the Endangered Species Act, and Health and Human Service and Medicare
- Chides the majority for defending its "move as one (suddenly) required by (the nearly 80-year-old Administrative Procedure Act)," enacted in 1946
- Notes that Congress nearly never provides an explicit instruction for dealing with gaps or ambiguities and that Congress could have refuted **Chevron Deference**, but has not done so in *Chevron's* 40-year existence. Instead, Congress has authorized or reauthorized hundreds of statutes knowing full well of *Chevron*

## *Loper – The Dissent (J. Kagan) - Continued*

- Criticizes the majority for relying on Section 706 of the APA, which provides for judicial review of agency action, and claiming that it does not contain a deferential standard of review. The dissent points out that Section 706 also does not include a *de novo* standard of review and, in fact, contains no standard of review at all
- “To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.” 5 U.S.C. § 706
- Also notes that *Chevron* previously upheld in 70 Supreme Court cases and thousands of lower court cases

## *Loper – The Potential Effect*

- **But the Majority Opinion also states that** “[b]y overruling *Chevron*, though, the Court does not call into question prior cases that relied upon the *Chevron* framework. Those holdings of those cases that specific agency actions are lawful—including the Clean Water Act holding of *Chevron* itself – are still subject to statutory *stare decisis* despite the Court’s change in interpretative methodology.”
- **So what about *Brownlee v. DynCorp.*, 349 F.3d 1343, 1354-55 (Fed. Cir. 2003)?**
  - “The FAR regulations are the very type of regulations that the Supreme Court in *Chevron* and later cases has held should be afforded deference. Not only has Congress specifically authorized the FAR, see 41 U.S.C. § 405a (2000), but, in the 1985 Act, it expressly authorized regulations adopting definitions of the statutory terms, such as ‘contractor.’ § 911(a), 99 Stat. at 683 (codified as amended at 10 U.S.C. § 2324(e)(2)) ... Not surprisingly, we have specifically held that the provisions of FAR are entitled to *Chevron* deference.”

# Loper – The Potential Effect

- *Loper Bright* will likely encourage contractors to make new challenges to agency rulingmaking and agency's drag out and heavily paper its rulemaking.
  - See *Radiance Technologies, Inc.*, B-422615, 2024 CPD ¶ 210, Aug 30, 2024 ("Additionally, we find that the protester's references to, and reliance on, *Loper* are fundamentally misplaced. *Loper* involved an agency's interpretation of ambiguous provisions of a statute, as opposed to agency regulations. ... Further, even if the SBA's regulations were ambiguous, the agency's interpretation of its own ambiguous regulations would be entitled to deference under *Auer*, see *Kisor*, *supra*, which was not overturned by *Loper*").
  - **Auer Deference:** *Auer v. Robbins*, 117 S.Ct. 905, 137 L.E.2d 79 (1997)(J. Scalia), involving whether the U.S. Department of Labor's salary-basis test for determining an employee's exempt status reflects a permissible reading of the Fair Labor Standards Act as it applies to public employees.
  - St. Louis police sergeants sued the Board of Commissioners, who found the sergeants to be "exempt" employees" under the FLSA, and therefore not entitled to overtime.

# *Percipient.ai, Inc. v. United States*, 104 F.4th 839, 851 (Fed. Cir. 2024)

- Just three weeks before the U.S. Supreme Court's decision in *Loper*, the Federal Circuit expanded who has standing to file a bid protest.
- The Court ruled that a prospective bidder (candidly, a non-bidder that wanted to be a supplier to the presumptive awardee) could protest the National Geospatial Intelligence Agency's failure to consider the protester's commercial solution in violation of a statutory preference to use commercial products and services.
- The Court ruled for protester based on the expansive language of the Tucker Act permitting protests of "any alleged violation of statute or regulation in connection with a procurement or proposed procurement." Previously, only interested parties could file a protest and even interested parties could not file a protest on a task order award (the Task Order Protest Bar).

# *Percipient.ai, Inc. v. United States*, 104 F.4th 839, 851 (Fed. Cir. 2024)

- “[T]he *Percipient* decision, like *Loper Bright*, emphasized the courts’ primacy in interpreting the law, and so *Percipient* may turn out to have been one of the first decisions which follows *Loper Bright*’s trajectory and opens new lines of challenges to agency procurement decisions, grounded in the courts’ Prerogative to define what the law is.”
- Yukins, *Feature Comment: Assessing Percipient.ai After Loper Bright Enterprises—Potentially a New Trajectory in Government Procurement Law*, 66 The Government Contractor 31, ¶ 331 (August 21, 2024)

# ***Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 144 S. Ct. 2440, 219 L. Ed. 2d 1139 (2024)***

- Widens the window to challenge federal regulations under the Administrative Procedure Act by ruling that an APA claim first accrues when a rule first adversely affects a plaintiff, not when the agency issues the rule
- Issue was whether someone can bring claims challenging regulations decades after rules are issued. The Court framed the question & answer as follows:
  - “We must decide when a claim brought under the Administrative Procedure Act ‘accrues’ for purposes of this provision. The answer is straightforward. A claim accrues when the plaintiff has the right to assert it in court—and in the case of the APA, that is when the plaintiff is injured by final agency action.”

# *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 219 L. Ed. 2d 1139 (2024)

- The applicable statute of limitations, 28 U.S.C. § 2401(a): “[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years *after the right of action first accrues*.” (Emphasis added.) This provision applies generally to suits against the United States unless the timing provision of a more specific statute displaces it.”
- **Majority (6-3)(J. Barrett):** “Held: An APAP claim does not accrue for purposes of § 2401(a)’s 6-year statute of limitation until the plaintiff is injured by final agency action.”
- **Dissent (J. Jackson):** “Today’s ruling is not only baseless. It is also extraordinarily consequential. In one fell swoop, the Court has effectively eliminated any limitations period for APA lawsuits, despite Congress’s unmistakable policy determination to cut off such suits within six years of the final agency action. The Court has decided that the clock starts for limitations purposes whenever a new regulated entity is created. This means that, from this day forward, administrative agencies can be sued in perpetuity over every final decision they make.”



# **Federal Circuit Courts of Appeal**

# Key Federal Circuit Courts of Appeal Cases

- *Oak Grove Techs., LLC v. United States*, No. 2022-1556, 2024 WL 4138392 (Fed. Cir. Sept. 16, 2024)
- *United States ex rel. Jacobs v. JP Morgan Chase Bank, N.A.*, 113 F.4th 1294 (11th Cir. 2024)
- *Yorktown Sys. Grp. Inc. v. Threat Tec LLC*, 108 F.4th 1287 (11th Cir. 2024)

# ***Oak Grove Techs., LLC v. United States, No. 2022-1556, 2024 WL 4138392 (Fed. Cir. Sept. 16, 2024)***

- The Federal Circuit reversed the Court of Federal Claims that had sustained a protest and overturned an Army procurement based on DFARS 215.306 (Exchanges with Offers After the Receipt of Proposals), which provides that “[f]or acquisitions with an estimated value of \$100 million or more, contracting officers should conduct discussions.”
- According to Judge Solomson at COFC, DFARS 215.306 stands for the proposition that an agency should engage in discussions on acquisitions over \$100 million and must justify **not** engaging in discussions where the provision applies, “an interpretation that appeared to be supported by the Army's (successful) argument to the Federal Circuit in *Dell Federal Systems, L.P. v. U.S.*, 906 F.3d 982 (Fed. Cir. 2018), which recognized that “discussions normally are to take place in these types of acquisitions.”

# ***Oak Grove Techs., LLC v. United States, No. 2022-1556, 2024 WL 4138392 (Fed. Cir. Sept. 16, 2024)***

- The Federal Circuit reversed concluding Oak Grove waived the issue by not filing a pre-award protest. “[A] party who has the opportunity to object to the terms of a government solicitation containing a patent error and fails to do so prior to the close of bidding process waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims.”
- For every DOD procurement valued at \$100 million or more where the solicitation contains the standard FAR clause (without the Alternate), every offeror will have to weigh whether to file a pre-award protest of the terms of the solicitation to preserve its rights to challenge the agency's hypothetical refusal to open discussions in the future.

# False Claims Act Recoveries

Some of the largest FCA recoveries occurred after the government stimulated the economy following the financial crisis of 2008

- More than \$2.68 billion in settlements and judgments for FY 2023
- More than \$70 billion in recoveries since 1986 with more than \$39 billion occurring in the last 10 years
- More than 712 New Relator (*Qui Tam*) suits (cases brought by whistleblowers) filed in FY 2023 – averaging 13 new cases a week
- More than \$349 million paid to whistleblowers in FY 2023

# Required Compliance Framework

## **FAR 52.203-13 (Contractor Code of Business Ethics & Conduct)**

- (1) Implement a written code of business ethics. FAR 52.203-13(b)
- (2) Establish an ongoing business ethics awareness and compliance program and
- (3) Establish an Internal control system. FAR 52.230-13(c); and
- (4) Report violations of “federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code” or the “civil False Claims Act.” FAR 52.203-13(b)(3)(i). [The so-called Mandatory Disclosure Rule]

## **Who is covered?**

- Contractors who have contracts expected to exceed \$6 million and which will last 120 days or more. FAR 3.1004(a)
- Subcontractors who have contracts that exceed \$6 million and which will last more than 120 days. FAR 52.203-13(d). Exceptions for small businesses and commercial items.

# False Claims Act Framework

## Essential Elements of an FCA Violation:

(1) Falsity of the claim submitted to the federal government	(2) Scienter ( <i>i.e.</i> , knowledge of the claim's falsity)
(3) Materiality to payment	(4) Causing the government to make a payment

## Penalties:

(1) Civil penalties (after 2/12/2024: \$13,964 to \$27,894 for each false claim)	(2) Three times the amount of damages sustained by the government
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## Who Can Bring an FCA Action?

(1) The US Attorney General	(2) A private party, known as a <i>qui tam</i> relator, in the name of the United States
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## Liability Extends to Anyone Who:

(1) Knowingly presents, or causes to be presented, a false or fraudulent <b><u>claim</u></b> for payment or approval	(2) Knowingly makes, or causes to be made, a false <b><u>statement</u></b> or <b><u>record</u></b> material to a false claim
(3) Knowingly conceals or decreases an obligation to pay money to the government	(4) Participates in a conspiracy to commit (1), (2), or (3)

# ***United States ex rel. Jacobs v. JP Morgan Chase Bank, N.A., 113 F.4th 1294 (11th Cir. 2024)***

- First case to rule that blog posts are considered to be news media and trigger the public disclosure bar that prohibits *qui tam* cases when “substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed ... from the news media [unless opposed by DOJ].” 31 U.S.C. 3730(E)(4)(A)
- *Cf.* the case discussed at last year’s Symposium, *Piacentile v. U.S. Oncology, Inc.*, 2023 WL 2661579 (2<sup>nd</sup> Cir. 2023), which ruled that the FCA’s public disclosure bar required dismissal because the kickback scheme relators alleged had already been revealed in prior suits and relators were not “original sources.”
- Shows that the Circuit Courts will continue to apply a muscular public disclosure bar to dismiss “parasitic” suits.

# *Piacentile v. U.S. Oncology, Inc.*, 2023 WL 2661579 (2d Cir. 2023)

## Original Sources:

(1) Prior to a public disclosure, has voluntarily disclosed to the Government the information on which the allegations or transactions in a claim are based OR

(2) Has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions

AND

(3) Who has voluntarily provided the information to the Government before filing an action under this section.

- Public disclosure bar: Dismissal of False Claims actions that are based "in **any part** upon publicly disclosed allegations or transactions"
- **Applies to relator even if prior disclosure does not identify defendant by name**
- Balance between promoting relator suits and avoiding parasitic claims
- Public disclosure bar does **not** apply if relator is an "original source"
- Research publicly available information when pursuing or defending an FCA claim



# **U.S. Federal District Courts**

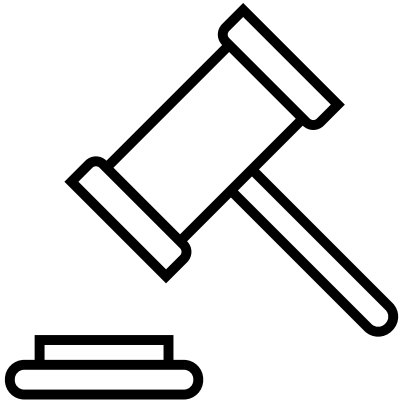
# 2024 Key U.S. Federal District Cases

- *U.S. ex rel. Zafirov v. Florida Medical Associates, LLC, et al.*, No. 8:19-CV-01236-KKM-SPF, 2024 WL 4349242 (M.D. Fla. Sept. 30, 2024)
- *United States ex rel. Sheldon v. Forest Labs, LLC*, No. CV ELH-14-2535, 2024 WL 3555116 (D. Md. July 23, 2024)(appeal filed)

## ***U.S. ex rel. Zafirov v. Florida Medical Associates, LLC, et al.*, No. 8:19-CV-01236-KKM-SPF, 2024 WL 4349242 (M.D. Fla. Sept. 30, 2024)**

- Federal judge appointed by President Trump strikes down as unconstitutional the *qui tam* clause of the civil False Claims Act based on the Appointment Clause of the Constitution because relators are essentially acting as “officers of the United States,” and the relator was not approved by the President, a court, or an agency head.
- Leans heavily on Justice Thomas’s dissent in *U.S. ex. rel. Polansky v. Executive Health Resources, Inc.*, 599 U.S. 419 (June 2023), which we discussed at last year's Symposium.
- Really limits whistleblower suits, but likely an aberration.

# *United States ex. rel. Polansky v. Executive Health Resources, Inc., 599 U.S. 419 (2023).*



- If the government initially declines to intervene in an FCA action, it may still intervene and move to dismiss an action at a later point in time, even over a relator's objection
- Motions to dismiss are assessed under the rule governing voluntary dismissal of suits: Fed. R. Civ. Pro. 41(a)
- The government can intervene and dismiss an FCA action (long after the 60-day seal period) if the action will not vindicate the Government's interests

“Today, we hold that the Government may seek dismissal of an FCA action over a relator’s objection so long as it intervened sometime in the litigation, whether at the outset or afterward.”

## ***United States ex rel. Sheldon v. Forest Labs, LLC, No. CV ELH-14-2535, 2024 WL 3555116 (D. Md. July 23, 2024)***

- Dismissing a *qui tam* case based on failure to prove scienter.
- Progeny of *U.S. ex. rel. Schutte v. SuperValu*, 589 U.S. 739 (2023), which we discussed at last year's Symposium and stands for the proposition that subjective beliefs of the defendant determine civil False Claims Act actions, not objectively reasonable beliefs.

# False Claims Act Framework - *United States ex. rel. Schutte v. SuperValu Inc.*, 598 U.S. 739 (2023)

- Subjective beliefs determine the outcome of FCA actions – **not** “objectively reasonable” beliefs
- Focus on what the defendant **actually thought when** submitting a claim, not what the defendant may have **thought after** submitting a claim
- If there is evidence of actual knowledge of an FCA violation, an “objective, reasonable person” defense will be unsuccessful



“What matters for an FCA case is whether the defendant knew the claim was false.”

# *Yorktown Sys. Grp. Inc. v. Threat Tec LLC, 108 F.4th 1287 (11th Cir. 2024)*

- Ruling that a small business protégé under an approved SBA mentor-protégé team and a joint venture agreement breached its fiduciary duty by terminating the mentor's subcontract with the JV and trying to exclude the mentor from the government contract.



# **U.S. Court of Federal Claims**

# Key U.S. Court of Federal Claims Case

- *Indep. Rough Terrain Ctr., LLC v. United States*, 172 Fed. Cl. 250 (2024)
- *Ekagra Partners, LLC v. United States*, 163 Fed. Cl. 189 (2024)

# *Indep. Rough Terrain Ctr., LLC v. United States*, 172 Fed. Cl. 250 (2024)

- Pre-award protest in which COFC rules that the court has jurisdiction to hear contract disputes flowing from production contracts issued after the initial Other Transaction Authority (OTA).
  - “[N]othing in the OT statutes expressly removes OT follow-on contracts from the purview of this Court’s jurisdiction. The Court holds that it has jurisdiction to review a follow-on production contract that seeks to acquire property or services for the Government, whether the agency issued the follow-on solicitation under OT authority or under FAR authority.”
- Novel because it is the first case to indicate when contracts relating to OTAs can be protested.

# *Ekagra Partners, LLC v. United States*, 163 Fed. Cl. 189 (2024)

- Multi-party post-award protest challenging both tracks of U.S. Customs and Border Protection's procurement related to supporting CBP's data-related endeavors – including leveraging AI and machine learning.
- COFC held that one protester lacked Article III standing because it did not show evidence of an “injury in fact that is concrete, particularized, and actual or imminent.”
  - “As applied to bid protests before this court, the Article III injury in fact inquiry focuses on whether plaintiff has ‘allege[d] facts demonstrating that the government committed prejudicial error.’”
- Protester arguing that an awardee should have been deemed ineligible did not do enough to establish its own injury/entitlement to an award.

**Thank you!**



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# Civil and Criminal False Claims Act Investigations

## *Speakers:*

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Robbie Pratt, Counsel – Fox Rothschild LLP



# You Have a Duty to Report Wrongdoing

***“One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public’s confidence in our justice system.”***

***Former Deputy Attorney General, Sally Quillian Yates  
September 9, 2015***

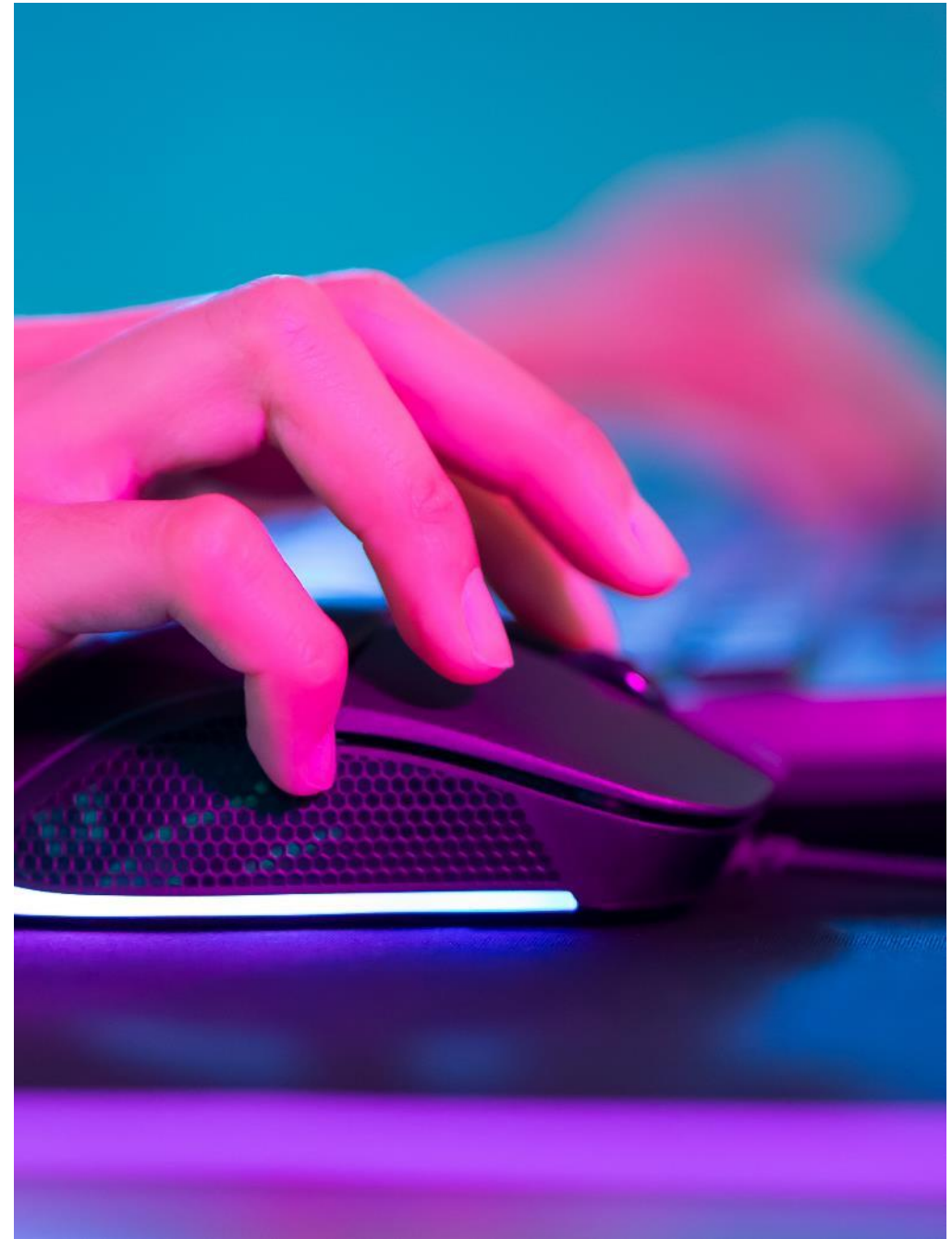
# Timely Disclose Credible Evidence

The Contractor shall timely disclose, in writing, to the agency Office of the Inspector General (OIG), with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed-

(A) A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or

(B) A violation of the civil False Claims Act ( [31 U.S.C. 3729](#) - [3733](#)).

**You have a right  
to investigate to  
determine if the  
evidence is  
credible.**



# Agenda

- Overview of the Internal Investigation
- Key Considerations for Selecting Investigators
- Preparing and Conducting Interviews
- Preserving Attorney-Client Privilege
- Special Care for Whistleblowers
- Written or Oral Reports
- Developing and Managing the Budget
- Considerations with Potential Civil or Criminal FCA Violations

# What Happens During an Internal Investigation?

- Opening the Investigation
- Defining the Investigation's Scope and Procedures
- Information Collection
- Conducting Interviews
- Drawing Conclusions and Making Recommendations
- Closing the Investigation
- Determine whether to make a disclosure

# Should the Company Conduct an Investigation?

- Nature of the allegations or misconduct
- Potential risk or exposure
- Source of the information
- Prior criminal or regulatory matters
- Impact to timely disclosures
- Notice to insurance carrier
- Potential whistleblowers or other third parties

# Key Considerations for Selecting Investigators

- Nature of the allegations
- Seriousness or sensitivity of the issue
- Special expertise in internal investigations
- Credibility with regulators or prosecutors
- Time is of the essence — allocation of resources
- Attorney-client privilege
- Budget constraints

# Preparing and Conducting Interviews

- Identify potential interviewees
- Document review of relevant files
- Conduct interviews close in time
- Generally, conduct highest priority interviews later in the process
- Have a dedicated notetaker during interview
- Proper Upjohn warning
- Remind witnesses they have an obligation to tell the truth
- Ask open ended questions — you want the interview to be conversational

# Preserving Attorney-Client Privilege

- When non-attorneys assist, they should be acting under the direction of counsel for the purpose of providing legal advice to the company
- Be clear when providing business advice versus legal advice
- Treat confidential documents accordingly
- Provide clear Upjohn warnings
- Prefer notetaking over recordings
- Memo from interviews should be mental impressions, opinions and subjective analysis

# Special Care for Whistleblowers

- Whistleblowers have financial incentives to “blow the whistle”
- Make it easy to report internally
- Respond quickly
- Special care when interviewing a whistleblower
- Avoid retaliation
- Be careful with privilege issues in communications with whistleblowers

# Do You Need a Written Report?

- Oral reports should be used when possible
- Federal agency demands it
- Complex factual circumstances
- Document fiduciary duties
- Support for disciplinary actions

# Developing and Maintaining the Budget

- Activities should reflect the investigation plan
- Expert or consultants
- Initial case assessments or research
- eDiscovery costs
- Separate counsel for Officers or Employees
- Preparation of reports and recommendations
- Remediation efforts (policy changes, personnel, additional training)
- Settlement Payments

# Considerations with Potential Civil or Criminal FCA Violations

- Bet the company risks with substantial exposure
- Depending on the wrongdoer, the company may engage separate counsel for the subject of the investigation
- Potential criminal liability
- FCA provides whistleblower protections
- D&O Policies and potential insurance
- Provide guidance early



# Contact

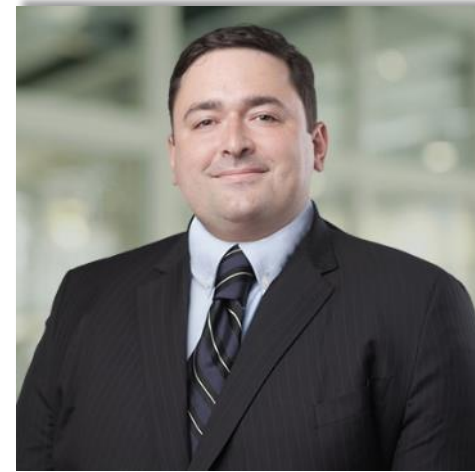


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# Mergers and Acquisitions

## *Speakers:*

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Sarah Rozek, Associate – Fox Rothschild LLP

Courtney Spaeth, CEO – growth[period]

Ryan Foley, Managing Director – FMI Capital Advisors

# M&A Matters To Consider Before Embarking on a Sale or Purchase of a Business

Whether you are a Buyer or Seller, there are special issues you should consider before you enter a term sheet or letter of intent with an interested party (even non-binding letters of intent).

## 1. Structure of Transaction

1. Asset v. Equity /Stock Sale
2. What buyers prefer and what sellers prefer, and why

## 2. Your Current Entity Structure/Special Considerations

1. Are you an LLC, Corporation, S. Corporation?
2. Do you have any special qualifications: size, certifications?

## 3. Due Diligence

1. Special considerations for government contracts
2. Compliance issues
3. Assignment and Novation issues
4. Tax issues

# 1. Structure of Transaction

## 1. Asset Sale

1. Buyer purchases certain assets of the Seller and assumes certain contracts and liabilities
2. Assumes certain contracts, but not all
3. Simpler transaction documents; asset purchase agreement, bill of sale, and assignment documents

## 2. Equity/Stock Sale

1. Buyer purchases the stock or membership interest of the Seller entity, so the entity goes through a change of control/ownership
2. All contracts and liabilities are assumed, except as negotiated by the parties (in limited circumstances)
3. Stock or equity purchase agreement

# Structure of Transaction (Cont'd)

## Asset v. Equity Sales — Considerations for Buyers and Sellers

1. Seller: Typically prefers an equity/stock sale, while a Buyer prefers an assets sale.
2. Buyers favor an assets sale
  1. Liability: because of less liability issues with an asset sale, as they avoid inheriting existing liabilities issues with the Seller entity, especially contract disputes, employee lawsuits, employee benefit issues
  2. More robust/costly due diligence process
3. Sellers favor stock/equity sale
  1. Liability: Buyer takes on all company's contracts, risks, liabilities, employees ... etc.
  2. Practical considerations: Most contracts include assignment provisions that require consent in an "assignment" situation, however, few require consent or notice in a change of control or ownership, so easier assumption of Seller existing contracts

# Structure of Transaction (Cont'd)

## Asset v. Equity Sales — Special Tax Considerations

### 1. Buyer (why an asset sale):

1. Buyer can allocate part of the purchase price to depreciable assets, providing for a post-closing tax benefit
2. Can negotiate the allocation of the purchase price of certain assets and allocating higher values to assets that depreciate quickly and lower values to assets that amortize slowly
3. More flexibility and simpler structure of transaction

# Structure of Transaction (Cont'd)

## Asset v. Equity Sales — Special Tax Considerations

### 1. Seller (why an equity sale):

1. All gain of stock/equity sale is taxed at the lower capital gain rate
2. For an asset sale, Buyer's allocation of purchase price to certain assets may trigger depreciation recapture for the seller, which is considered ordinary income
3. More complex structure in certain circumstances, if Seller is an S. corporation for example, there are certain requirements for ownership of an S. corporation (must be an individual owner not an entity, only certain number of individual owners, no foreign owners ... etc.)
4. May require certain restructuring of transaction or conversion of Seller entity into a different form pre-closing such as F. Reorg.)

## 2. Entity Type and Special Considerations for Parties

### 1. Seller Entity types:

1. Limited liability company ("LLC"). Is it a single-member LLC, or multi-member. Any special tax treatments?
2. Corporations ("Corp.") C. Corp. or S. Corp. How many shareholders/stockholders. Any option holders?

### 2. Special Qualifications of Seller Entity:

1. Provided by U.S. Small Business Administration ("SBA")
2. Allows certified business to access and complete for government contracts, as well as private sector contracts
3. Ability to form joint ventures with other businesses with similar certifications to compete for certain contract

# Special Considerations (Cont'd)

## 1. Special Qualifications of Seller Entity (Cont'd):

1. 8(a) Small Business Certification ("SDB"). Business owners who are "socially or economically disadvantaged."
2. HUBZone Business certification ("HUBZone"). Historically underutilized business zone.
3. Women-owned Small Business ("WOSB"). Must be owned 51% by women who are US citizens.
4. Minority-owned business certification ("MBE"). Must be at least 51% minority owned.
5. B-corporations ("B. Corp"). For profit but driven by a social missions. Typically, uses profits to impact social change.
6. Veteran-owned business ("VBE").
7. LGBTQ+ business certification ("LGBTBE").

# Special Considerations (Cont'd)

## 1. Special Qualifications of Seller Entity (Cont'd)

- How the qualifications affect Buyer
- Is Buyer able to keep qualification post-Closing, especially if Buyer is private equity buyer ("PE")
- Multi-year contract issues
- Future contract awards and profit considerations
- Other issues

# 3. Due Diligence and Disclosure Schedules

1. Process looks the same whether stock or asset sale; however, Buyers tend to conduct a more robust diligence process with stock or equity purchase
2. Due diligence v. disclosure schedules
3. Assignment and change of control provisions
4. Consent issues and timing of Closing
5. Regulatory issues
6. Late disclosure of audits, investigations, or litigations issues
7. Anti-corruption provisions and disclosures
8. Foreign operations of Sellers and tax implications
9. Operations between signing and closing of transactions; obligations to disclose

# Questions?

# Contact



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# Trends in Cost Accounting

## *Speakers:*

Jeffrey DuVal, Partner – HKA

Matthew Popham, Sr. VP, Govt Compliance Director – Leidos

Kristin Torcasi, Sr. VP, Govt Compliance & Internal Audit – CACI

Jim Thomas, Partner, Govt Contracts Lead – HKA

# CAS Coverage

CAS Coverage (Per DCMA-INST 108, Table 1)		
Coverage Type	Application	Coverage requires that the business unit...
Full	<p><b>Applies to contractor business units that:</b>            Receive a single CAS-covered contract award of \$50 million or more; or            Received \$50 million or more in net CAS-covered awards during its most recent cost accounting period.</p>	<p>Comply with all Standards that are in effect on the date of contract award and with any Standards that become applicable because of later award of a CAS-covered contract.            The business unit must submit and maintain a Disclosure Statement of its cost accounting practices.</p>
Modified	<p>If the offeror certifies that it is eligible for and elects to use modified coverage, it may be applied to a CAS-covered contract of:            Less than \$50 million awarded to a business unit that received less than \$50 million in net CAS-covered awards in the immediately preceding cost accounting period.</p>	<p>Comply with CAS 401, 402, 405, and 406.            Note: A contract awarded with modified CAS coverage shall remain subject to modified coverage throughout its life regardless of changes in the business unit's CAS status during subsequent cost accounting periods.</p>

# CAS Applicability Issues

- Exemptions
  - Adequate price competition
  - Commercial items
- Threshold calculation
  - Contract award value
  - Indefinite delivery / indefinite quantity contracts
  - Hybrid contracts
- CAS coverage requirements
  - Contract level
  - Business unit level
  - Home office level
- Intercompany “subcontracts”

# CAS Disclosure Statement Requirements and GAO Cases

- a) Limitation on award of CAS-covered contracts (FAR 30.202 – 6(b))
- b) TRAX International Corporation (B – 420361.8): June 28, 2023
- c) Delphinus Engineering, Inc. (B – 421574): July 5, 2023
- d) Keane Federal Systems, Inc. (B – 280595): October 23, 1998

# Recent Events at the DCAA and the Federal Circuit

## **a) DCAA Report to Congress for FY 23**

- i. Focusing on forward pricing, claims & terminations, business systems, CAS, and TINA audits (ICS audits were about 25% of total audits conducted)
- ii. Continued low sustention rate for ICS audits (32%)
- iii. Web-based software is not available to the public (EZ-Quant no longer used / available)
- iv. Other DCAA activity — floor check audits are no longer mandatory

## **b) DCAA and DCMA guidance on unilateral cost accounting practice (CAP) changes (October 2023)**

## **c) Boeing Company v. United States No, 1:17-cv-01969-PEC dated October 4, 2024 — United States Court of Appeals For the Federal Circuit**

# CAS Board Update

- a) Public comments provided to CASB on coverage alternatives for indefinite delivery vehicle (IDV) contracts**
  - i. Six approaches
  - ii. First approach (order-by-order) — consistent with Section 809 Panel recommendations
  - iii. Other approaches
- b) Noticed of proposed Rulemaking on Conformance of CAS to GAAP for Operating Revenue and Lease Accounting**
  - i. Operating Revenue
  - ii. Lease Accounting
- c) Advance Notice of Proposed Rulemaking (Conformance of CAS to GAAP): Full elimination of CAS 408 and elimination of majority of CAS 409**
- d) Industry concerns about the definition of “increased costs in the aggregate” and actions to protect the government from “payment” of “increased costs in the aggregate”**

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# Innovation Leadership for Federal Contractors with Steve Lerch

Digital Strategist and Former Google  
Executive, President of Story Arc  
Consulting







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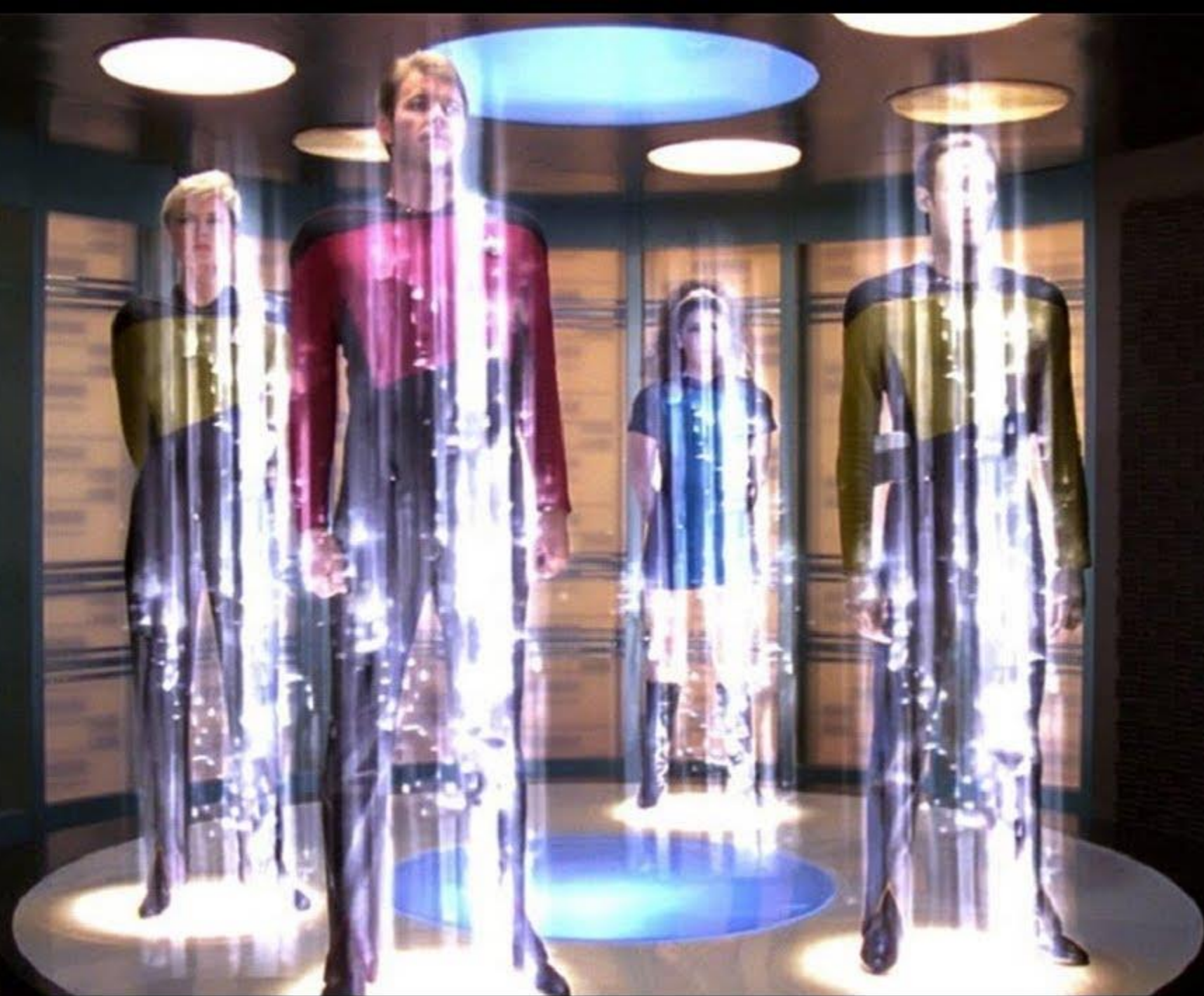
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The logo for Fox Rothschild features the word "Fox" in a dark green, sans-serif font above the word "Rothschild" in the same font. A stylized, curved graphic element, resembling a fox's tail or a wave, is positioned between the two words. This graphic is colored with a gradient from green on the left to orange on the right.





Google

1. Look for Innovation Everywhere
2. Prioritize Iteration and Feedback
3. Embrace Passions, Curiosities, and Skills

Look for Innovation Everywhere

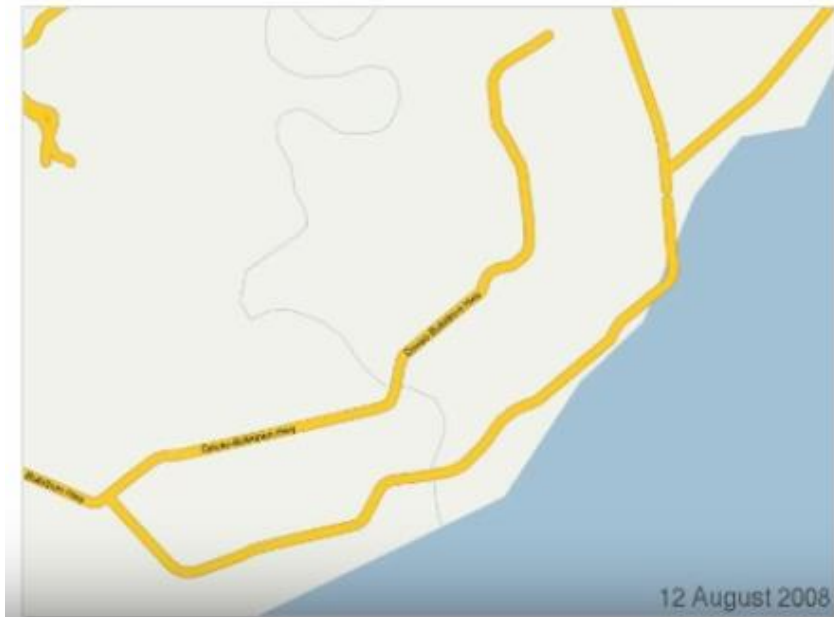
# Richard Montanez





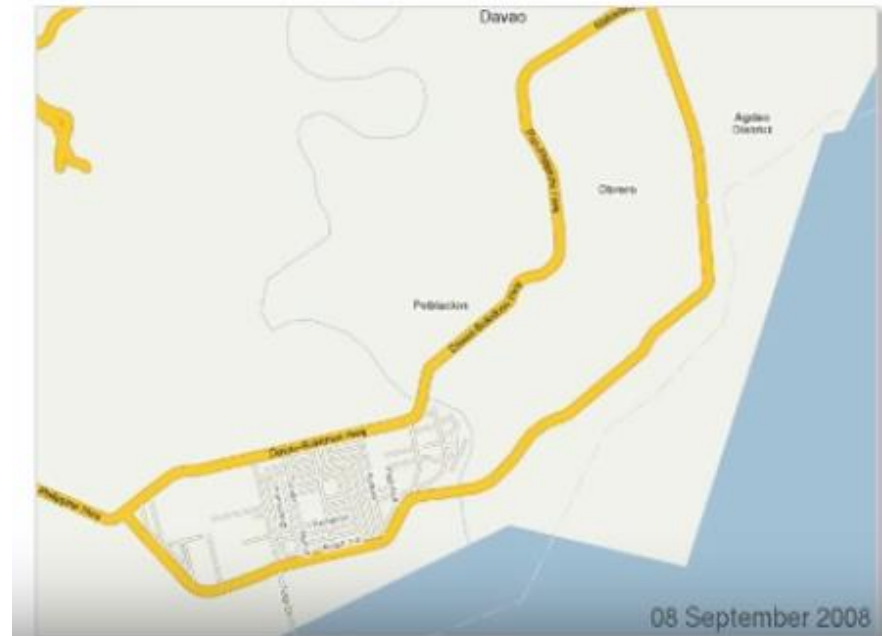
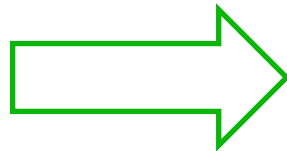
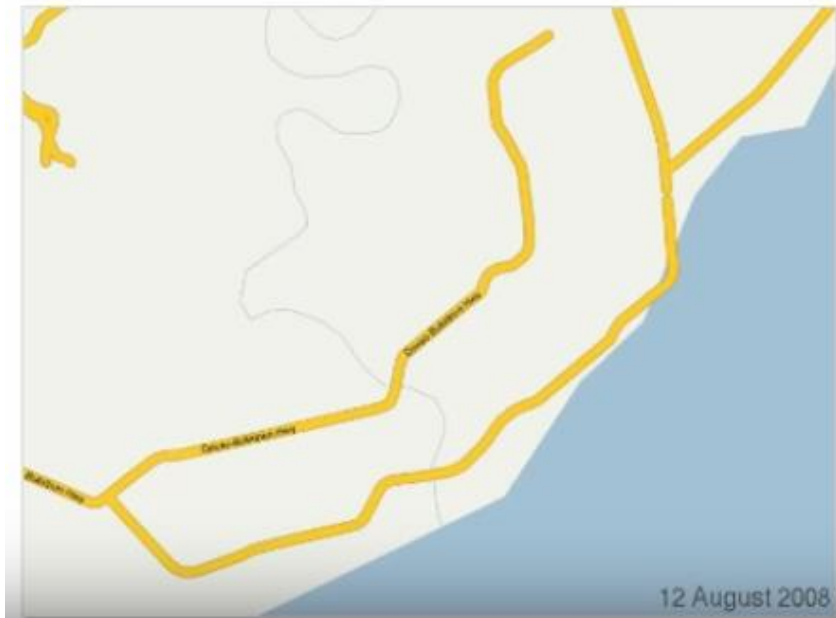
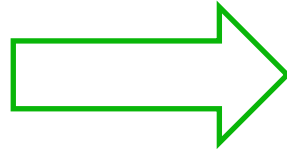


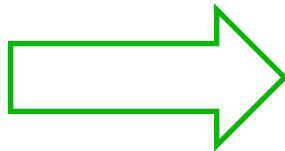
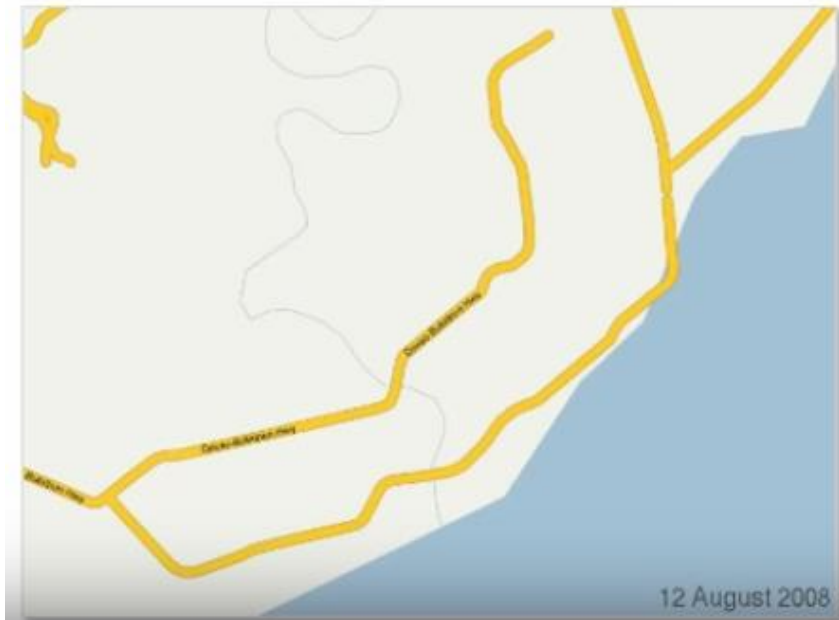
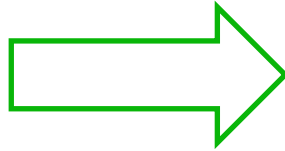
# Google Maps

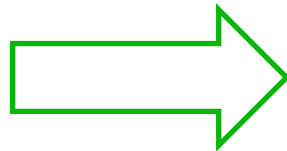
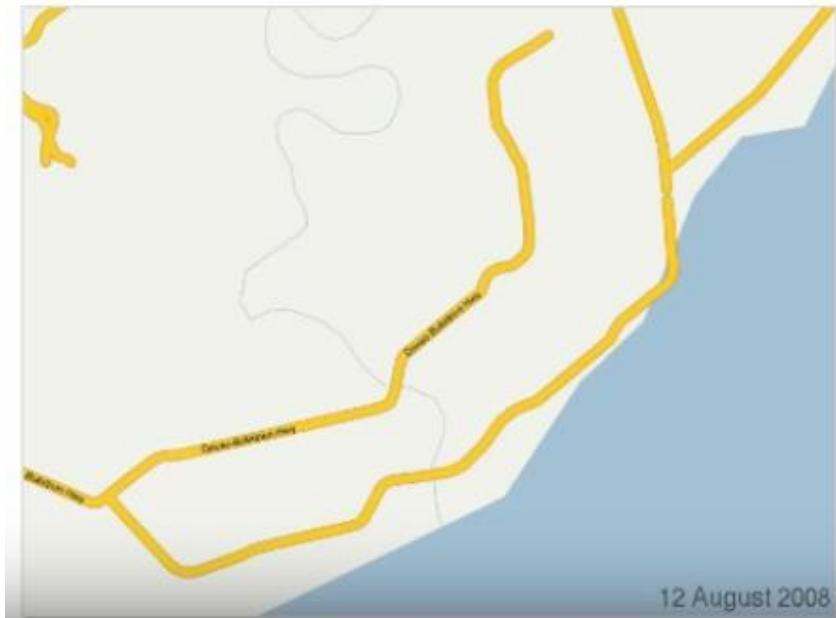
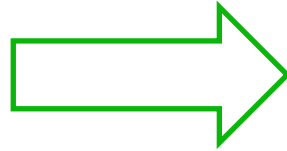


# Google Maps

## 3.5 Years Later

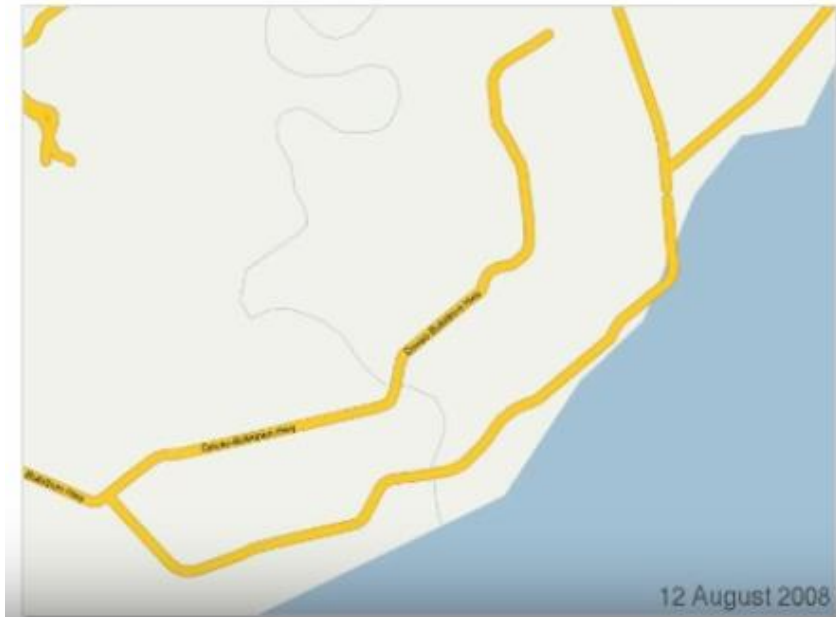








40  
Days



5  
Months





# Look for Innovation Everywhere



Write an email to your leaders, teammates, customers, vendors. Tell them that if they have any random ideas, thoughts, or questions, that you'd love to hear them. Tell them they can be half-baked, unrealistic, unaffordable, have nothing to do with an individual's role, or even potentially impossible, but that you still want to hear them.

# Prioritize Iteration and Feedback

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281



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\$23M



Value of Shutterfly's 2012 purchase of Kodak Gallery

\$50B



Estimated Annual Revenue

# Prioritize Iteration and Feedback

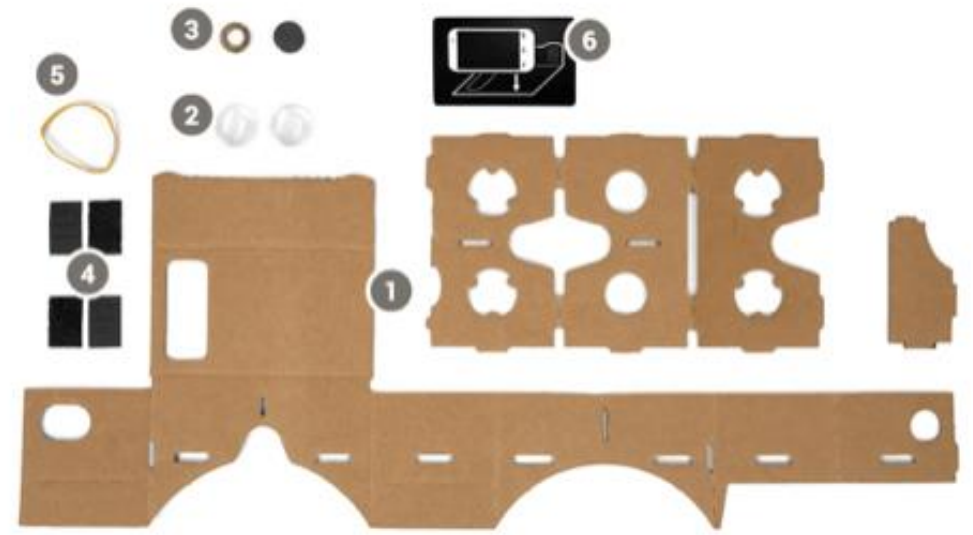


At your next meeting with your team/company/coworkers/boss, explain the Version 1 concept to them and carve out 10 minutes to do a V1 brainstorming exercise. Give everyone 5-10 minutes to come up with a couple ideas of things still stuck on V1, and then spend 5-10 minutes discussing each other's ideas and asking questions. This exercise isn't about offering solutions, it's about finding topics that deserve a little more attention.

# Embrace Passions, Curiosities, and Skills



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Chat with our recruiting assistant



# “The Innovation Mindset in Action: 3M Corporation”

by Vijay Govindarajan and Srikanth Srinivas

“

provides a rich variety of centers and forums to create a pool of practical ideas that are then nurtured into opportunities and provided the necessary resources for success. Scientists go out into the field to observe customers to understand their pain points. Customers also visit Innovation Centers set up specifically for the purpose of exploring possibilities, solving problems, and generating product ideas. Scientists share knowledge and build relationships at the Technical Council, which meets periodically to discuss progress on technology projects, and the Technical Forum, an internal professional society where 3M scientists present papers— just two of 3M’s fruitful forums.

”

# Embrace Passions, Curiosities, and Skills



Schedule a couple coffees, lunches, or video chats with members of your team or employees across the company. Tell them ahead of time that there are two things you'd like to discuss- The skills and expertise you both have that don't really get fully utilized in your role AND the things you both are most passionate or curious about within this company (especially those things outside the scope of your role).

1. Look for Innovation Everywhere
2. Prioritize Iteration and Feedback
3. Embrace Passions, Curiosities, and Skills

rt



# Thank You!

[StevenLerch@gmail.com](mailto:StevenLerch@gmail.com)

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# Bid Protests and Contract Claims

**When to use them and how to make them work**

## *Speakers:*

Doug Hibshman, Partner – Fox Rothschild LLP

Dana Molinari, Associate – Fox Rothschild LLP

Chase Johnson, Vice President, Legal – Anduril Industries

# Presentation Outline

## **Bid Protest Options**

- The truths about bid protests
- Where to protest
- What are my chances?
- Contractor end goals, i.e., why and when to use a protest

## **Contract Disputes Act (“CDA”) Claims**

- What can you claim / What can't you claim
- Essential elements of claims
- Requests for Equitable Adjustment (“REAs”) v. Claims
- Where to appeal
- The how-tos of good claims



# **Bid Protests**

# The Truths – No matter where you protest

- You must have standing to protest
- All challenges to solicitation defects must be raised prior to the submission of bids / proposals or be forever lost
- Protests must allege agency error. Cannot be based on speculation or mere disagreement
- Time is of the essence
- You will likely get some kind of stay
- You will generally get an Administrative Record, but you don't get to see it
- Protests are time consuming and expensive
- Generally, the best you can hope for is corrective action, is it worth it
- How do you win – show mistake, unstated evaluation criteria, failure to document, or leverage corrective action
- You may agitate the agency
- Consider intervening
- Protest success rate is going . . . UP ???

# Where to Protest

- Agency Bid Protests
  - Timing, Who decides, stay length
  - Pros / Cons
- GAO Bid Protests
  - Timing, Who decides, stay length
  - Pros / Cons
- COFC Bid Protests
  - Timing, Who decides, stay length
  - Pros / Cons
- How do you decide the forum?

# The Agency

## Pros

- Comparably inexpensive;
- Procedurally simple;
- Expeditious resolution (within 35 days) *See FAR 33.103*; and
- Second bite at the Apple

## Cons

- No right to discovery in the Agency Protest; and
- While the Agency can provide a “stay” to disappointed bidders, the “stay” do not necessarily continue at the GAO. *See FAR 33.103*

# The GAO

## Pros

- Speedy decision (within 100 days) *See* 31 U.S.C. § 3554(a)(1);
- Automatic Stay; and
- Second Bite at the Apple

## Cons

- Relatively short time-line to file, *see* 4 C.F.R §21.2-5 ; and
- The agencies are only required to share “relevant documents” and not the entire documents that were used to make award decision. Even shared documents are often redacted, making the access to the complete record hard

# The Court of Federal Claims

## Pros

- Enforceable Judgement by impartial judge in a more formal court settings; and
- Less strict deadline to bring a claim.

## Cons

- Proceedings takes comparably longer time;
- Automatic stay is not guaranteed, *see e.g.*, 28 U.S.C. §1491, 41 U.S.C. §7101; and
- The process is comparably more complicated and costly.

# What are my Chances?

Bid Protest Statistics for Fiscal Years 2019-2023

	FY2023	FY2022	FY2021	FY2020	FY2019
Cases Filed[5]	2025 (increase of 22%)[6]	1658 (down 12%)	1897 (down 12%)	2149 (down 2%)	2198 (down 16%)
Cases Closed[7]	2041	1655	2017	2137	2200
Merit (Sustain + Deny) Decisions	608	455	581	545	587
Number of Sustains	188	59	85	84	77
Sustain Rate	31%	13%	15%	15%	13%
Effectiveness Rate[8]	57%	51%	48%	51%	44%
ADR[9] (cases used)	69	74	76	124	40
ADR Success Rate[10]	90%	92%	84%	82%	90%
Hearings[11]	2% (22 cases)	.27% (2 cases)	1% (13 cases)	1% (9 cases)	2% (21 cases)

# Top 3 Grounds for Sustaining Protests in 2023

## Unreasonable Technical Evaluation

- *Phoenix Data Security, Inc. et al.*, B-419956.200 *et al.*, July 10, 2023, 2023 CPD ¶ 172 (sustaining a protest where the record provided by the agency does not support that the evaluations were reasonable).

## Flawed Selection Decision

- *Systems Plus, Inc. et al.*, B-419956.184 *et al.*, June 29, 2023, 2023 CPD ¶ 163 (finding the agency's explanations incomplete and misleading).

## Unreasonable Cost or Price Evaluation

- *TRAX Int'l Corp.*, B-420361.7, B-420361.8, June 28, 2023, 2023 CPD ¶ 162 (sustaining a protest where the agency engaged in unequal/misleading discussions when it failed to discuss costs that the agency considered to be unrealistic).

# Contractor End Goals of Protests

- Balance the chance of success with effort / cost and Agency agitation level
- Some protests are better than others
- What message do you want to send to the Agency?
- Will the Agency hate me? Is Agency retaliation for protests real?
- Some agencies may provide “credit” on the backend for not protesting
- Do protests create friction if you perform the work?
- Can you negotiate your way out of a bid protest?



# The Contract Disputes Act ("CDA")

41 U.S.C. §§ 7101-7109

# What can you claim / Can't you claim?

- Any claim against the United States “founded upon any express or implied contract . . . in cases not sounding in tort.” *See* 28 U.S.C. § 1491
- Can bring claims for:
  - Claims for money damages for extra work, changes, increases in costs, delay damages
  - Claims to set the scope of work / duration of the contract / ensure Agency compliance with Contract specifications
  - Prime contractor / subcontractor / supplier costs
  - CPARS revisions or corrections
  - Termination for convenience costs
  - Misc. monetary and nonmonetary relief
- Can't bring claims for:
  - Disputes prior to award, bid protest issues
  - Torts, like negligence, defamation, battery
  - Consequential damages, like lost contracts, lost profits, business losses
  - Requests to get the government off your back

# Elements of All Claims (and REAs too) (FAR 52.233-1)

- In writing
- Submitted to the CO
- Submitted within 6 years of claim “accrual”
- Demonstrate entitlement to payment
- Provide a “sum certain”
- Include a claim certification over \$100,000
  - The Claim is made in good faith
  - The supporting data are accurate and complete to the best of contractor’s knowledge and belief
  - The amount requested accurately reflects the adjustment for which contractor believes the government is liable; and
  - The person asserting the Claim is duly authorized (such as a CEO or general partner of the contractor having overall responsibility for conduct of contractor’s affairs) to certify the Claim

# REAs vs. Claims – Pick one

- What is your goal with Agency?
- If Agency will negotiate in good faith – consider an REA
  - Same general format as a claim, but no Agency mandatory deadline to respond
  - Can claim attorneys' fees and consultant costs up until file a claim
  - Don't file an REA just to be nice, may never get an answer
  - If an REA fails or no response, convert to a claim
- If Agency won't negotiate or want leverage over Agency – file a claim
  - Agency must respond. Puts them on the clock
  - Can still negotiate
  - Have the right to appeal a denial
  - Lose the ability to claim attorneys' and consultant fees once becomes a claim, but . . .

# Where to Appeal

- Agency time period to decide claims:
  - Under \$100,000 – 60 days
  - Over \$100,000 – 60 days; or notify claimant that the decision will take more than 60 days (within a reasonable period of time)
  - Deemed denial option
- If claim is denied, can appeal to:
  - ASBCA or CBCA within 90 days of denial
  - COFC within 1 year of denial
- Pros / cons of Agency boards vs. COFC

# The How-Tos of Good Claims

- Identify the problems during the contract
- Document all changes as they occur – send letters – 30 days or less rule
- Track all of your impacted costs
- Use consultants where needed – costs / schedule impacts / changed conditions
- Work with the Agency early and often to resolve prior to filing REA or claim
- REAs can work, but consider leverage
- Consider pros / cons prior to picking appeal forum

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# Other Transaction Agreements: Navigating Uncertainty to Grow Your Federal Business

## *Speakers:*

Keeley McCarty, Partner – Fox Rothschild LLP

Mike LaCorte, Partner – HKA

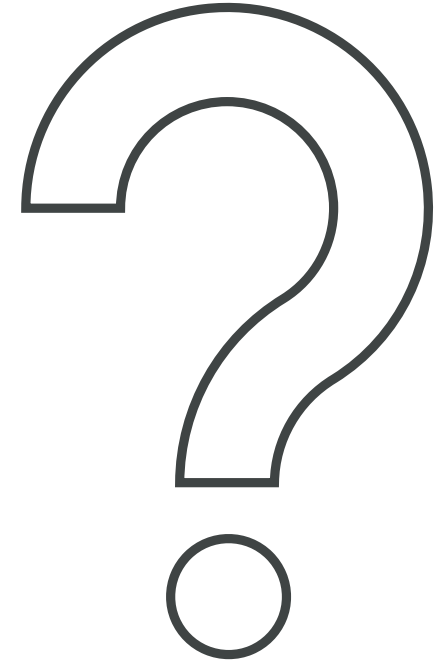
Debra Durham, Vice President & Chief Digital Officer – Serco

Katherine John, Senior Associate General Counsel – ABL Space Systems

# What Is an OTA?

- Other Transaction Agreement
- Not a procurement contract, cooperative agreement, or grant
- *E.g.*, "The Secretary of Defense and the Secretary of each military department **may enter into transactions (other than contracts, cooperative agreements, and grants)** under the authority of this subsection in carrying out basic, applied, and advanced research projects."

10 USC § 4201(a)



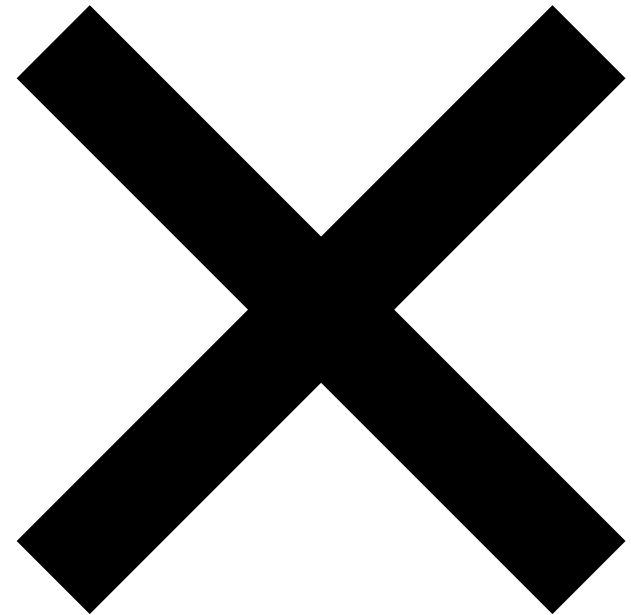
# Advantages of OTAs

- Allow faster, more flexible contracting
- Accelerate research and development of new technologies
- Expand government partnerships to companies that are not traditional government contractors
- Save taxpayer dollars through cost and resource-sharing with private industry



# Laws That Do Not Apply

- Federal Acquisition Regulation
- Contract Disputes Act
- Competition in Contracting Act
- Cost Accounting Standards
- Truth in Negotiations Act
- Bayh-Dole Act
- Rights in Technical Data
- Uniform Regulations



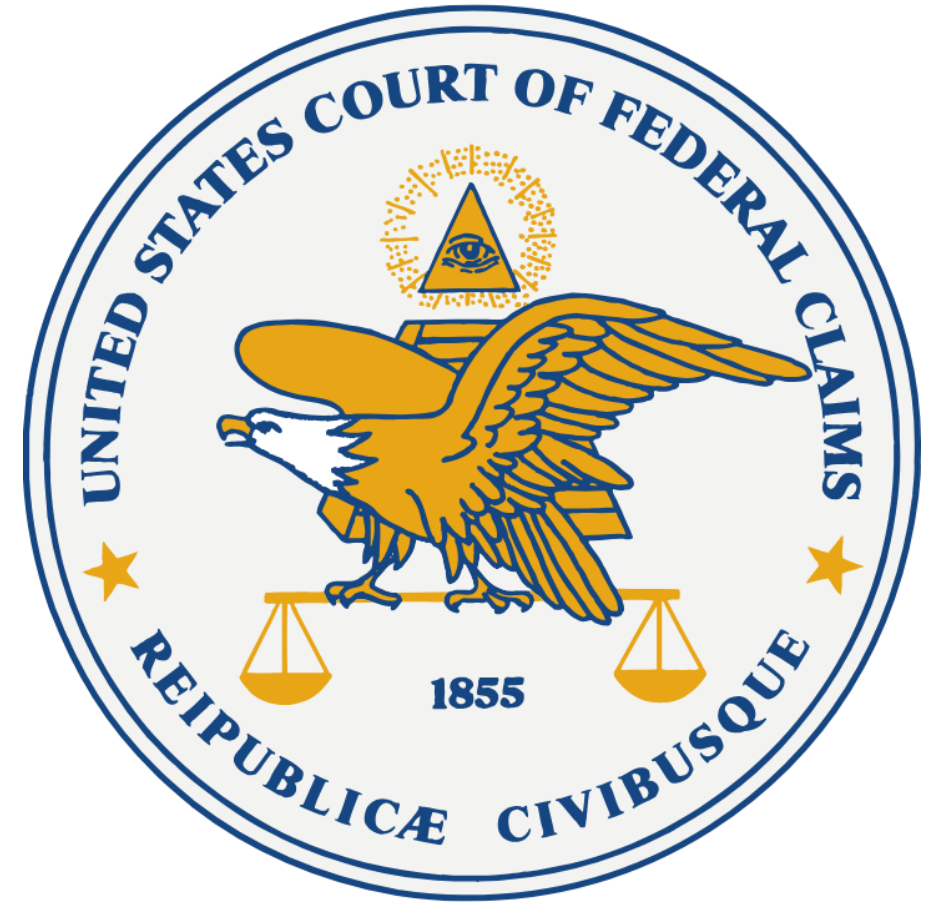
# Laws That Still Apply

- False Claims Act
- Procurement Integrity Act
- Freedom of Information Act
- Anti-Deficiency Act
- Civil Rights Act/Title VI
- Clean Air & Clean Water Acts



# Bid Protests

- Limited protest jurisdiction
- GAO can hear pre-award protests alleging improper use of OTA
  - *Exploration Partners, LLC*, B-298804, Dec. 19, 2006, 2006 CPD ¶ 201
- COFC can hear protests of OTAs “in connection with a procurement or a proposed procurement”
  - *Hydraulics International, Inc. v. United States*, 161 Fed. Cl. 167 (2022)



# Agencies With OT Authority

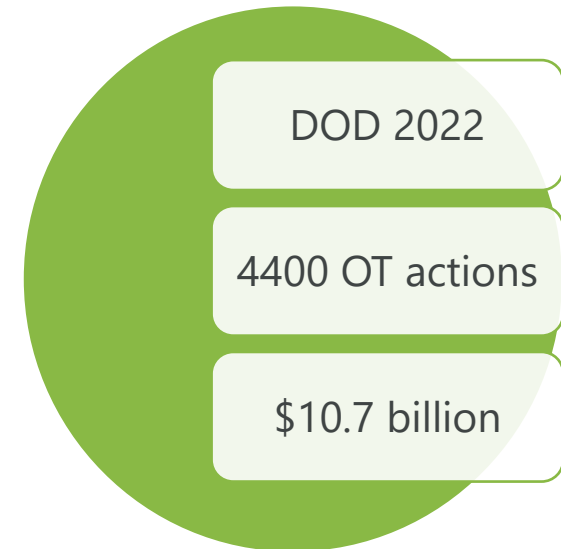
- DOD – 10 USC §§ 4021, 4022
  - Research, Prototype, and Follow-on Production OTAs
- NASA – 51 USC § 20113(e)
  - Space Act Agreements — nonreimbursable, reimbursable, funded, or unfunded
- DOE – 42 USC § 7256(g)
  - Research, Development, and Demonstration Projects
- HHS – Pandemic and All-Hazards Preparedness Act of 2006
  - Research and Prototypes
- DHS – Homeland Security Act of 2002
  - Research and Prototypes
- DOT – Department of Transportation and Related Agencies Appropriations Act of 1996
  - Research and Prototypes

## Sub-agencies with OTA authority:

- FAA
- TSA
- NIH
- DNDO
- ARPA-E

# Solicitation and Negotiation Process

- Some OTA authorizing statutes, including DOD prototype statute, require using competitive procedures to “the maximum extent practicable”
- Consortium Management Firm Model vs. Direct Solicitation Model
- Can be solicited through Request for Project Proposals, Request for White Papers, other solicitations
- Negotiation and award process depends on agency, solicitation method, and AO



# Key Terms for Negotiations

- Intellectual property rights
- Flow-down requirements
- Changes and modifications
- Terminations and accompanying remedies for Government and contractors
- Dispute resolution, including ADR



# Cost Allowability Considerations for OTAs

- Cost allowability rules can vary significantly depending on the OT award.
- Cost allowability may be predicated on, one end of spectrum, the reasonableness of costs incurred or, on the other end of the spectrum, compliance with Federal Acquisition Regulation ("FAR") Part 31 and potentially supplemental FAR.
- Whether an entity is servicing contracts subject to the Cost Accounting Standards ("CAS") may dictate applicable cost allowability standards.
- The Government could require validation of allowable costs through an Incurred Cost Proposal to be developed in accordance with the requirements of FAR 52.216-7.
- Cost allowability standards will drive, in part, the types of records an entity must maintain to support payments under an OT award.

# Business System Considerations for OTAs

- For cost reimbursement awards, some level of project-based accounting and cost allocation capabilities in the accounting system will almost certainly be required.
- Accounting system requirements will be influenced by cost allowability requirements. Does the accounting system need to be configured to facilitate compliance with, for example, FAR Part 31?
- Does the accounting system need to be configured so that data is readily available to determine when funding thresholds (e.g., 75%) are forecast to be exceeded so that timely notification can be given to the customer requesting additional funding?
- If a contractor changes its cost accounting practices, are there provisions akin to those under FAR Part 30 that would require a cost impact analysis to determine if the customer is paying more or less because of the accounting practice change?

# Business System Considerations for OTAs

- There may be billing terms for OT awards that are either infrequently used or not used at all on procurement contracts issued under the FAR. For example:
  - Milestone-based payments where milestones need to be achieved, and a contractor is then reimbursed only for allowable costs incurred to achieve the milestone (as opposed to an agreed to price).
  - Cost sharing billings which are more akin to billings under cost-share agreements issued under 2 CFR 200.
- If fee is billable, what are terms governing fee retainage? (They may be less favorable than comparable FAR based provisions)
- Special provisional billing rates may need to be negotiated with the customer (there may not be an assumption that provisional billing rates used on FAR based on contracts are to be used for OT award billings).

# Other OT Award Considerations

- How great is a contractor's negotiating power if it seeks to change terms or conditions? May be limited if there is a base agreement with multiple potential awardees.
- For contractors servicing contracts with heavy compliance burdens (e.g., large cost-reimbursement contracts issued under the FAR), are established practices overkill to compliantly administer an OT award?
- In the circumstance cost allowability is predicated on reasonableness alone, what level of support is required to determine the allowability of costs (especially subcontractor costs)?
- How are terminations and/or requests for equitable adjustments to be handled? (These may not be governed by FAR provisions covering these issues and therefore, processes may be somewhat undefined)
- Are there cybersecurity requirements applicable to the OT award (e.g., NIST 800-171)?
- What types of data rights does the customer seek? Do they go beyond comparable provisions in the FAR or Supplemental FAR?

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# U.S. AI and Privacy Laws: Managing AI Governance and Strategy

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