

# Federal Contracts: The Year in Review

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# The American Recovery and Reinvestment Act of 2009—The Stimulus Package

- Increased transparency, reporting requirements and audit requirements
- Recovery, Accountability and Transparency Board
- Buy American Act issues

# Other Important Statutes

- The Weapon System Acquisition Reform Act—New DOD Director of Cost Assessment and Program Evaluation
- Fraud Enforcement and Recovery Act of 2009

# New Executive Orders 13494, 13495, 13496, 13502

- Pro Labor/Unions
- Project Labor Agreements
- Encouraged But Not Mandatory
- Costs to Combat Unions Unallowable

# Contractors Now Required To Use Department of Homeland Security's E-verify System to Guard Against Employment Of Unauthorized Aliens

- Executive Order 12989
- New FAR Rules 22.18 and 52.222-54
- Applies to both Prime and Subcontracts over \$3,000

# The President's March 4, 2009 Policy Memorandum

- Preference for firm fixed price contracts
- Noncompetitive contracts must be fully justified and monitored
- Cost reimbursement contracts are disfavored
- Need to better manage the contracting process

# Federal Acquisition Circular

- FAC 2005-38, Revocation of Executive Order 13201, Notification of Employee Rights Concerning Payment of Union Dues or Fees
- FAC 2005-37
  - Registry of Disaster Response Contractors
  - Limiting length of non-competitive contracts
  - GAO access to contractor employees
  - Limitation of pass-through charges
  - Award fee language revision

# Federal Acquisition Circulars

- FAC 2005-36                      August 11, 2009
  - FedTeDS is dead
- FAC 2005-35                      July 14, 2009
  - Use of project labor agreements for federal construction projects – really just an elimination of Bush Executive Order 13202 and replacing it with Obama Executive Order 13502

# Federal Acquisition Circulars (continued)

- FAC 2005-34                      July 1, 2009
  - Beefs up the past performance system
  - PPIRS is the government-wide performance information repository. Agencies must identify those responsible for procuring interim and final evaluations
  - Prohibits the award of contracts using appropriated funds to any foreign incorporated entity that is treated as an inverted domestic corporation or to any subsidiary of one
  - Clarifies the role of the Inter-Agency Committee on Debarment and Suspension

# Federal Acquisition Circulars (continued)

- FAC 2005-32      March 31, 2009
  - Interim implementation of the Recovery Act—  
Stimulus Package
    - Buy American Act
    - Whistleblower Protection
    - Publicizing contract actions
    - Reporting requirements
    - GAO/IG access

# Federal Acquisition Circulars (continued)

- FAC 2005-31      March 19, 2009
  - Improve the accuracy of Small Business Size Status Reporting
    - Requires periodic re-representation of a small business's size status

# Other Government-Wide Regulations

- October 1, 2008, new Women Owned Small Business Regulations
- New GSA Mentor Protégé Regulation, August 14, 2009

# Pre-Award

- Number of protests set a 10-year high
- Coal not an acceptable bid bond – *Tip Top Construction* case

# Post Award

- Terminations for default
  - Is the A 12 litigation finally over?
  - Terminating for lateness prior to completion date is a no no
  - Abusive profane language not sufficient basis
- A lack of contractual authority is risky in government contracting

# Sovereign Act

- *Conner Bros. Construction Company v. Secretary of the Army*
  - Stop work order involving areas of 75<sup>th</sup> Ranger regimental compound at Fort Benning following September 11<sup>th</sup> attacks
  - Despite clear government delay, it was held to be a sovereign act and no monetary compensation

# Past Performance Evaluation

- Clear right to appeal to the Court of Federal Claims
- No clear right to appeal to the Board of Contract Appeals, but see *Sundt Construction, Inc.*, ASBCA No. 56293

# Releases

- *Bell BCI Company v. United States*
  - If you want a case to show how important releases are, read this one
  - If you want to see a case where the government process was out of control, read this one

# Criminal and Civil Liabilities

- *Daewoo Engineering And Construction Co. v. The United States*
  - Government awarded \$10,000 for False Claim violation and \$50,629,855.88 for Contract Disputes Act violation
  - Daewoo's claims were forfeited under 28 U.S.C. 2514

# Bad Faith?

➤ Lack of good faith and fair dealing does not equate to bad faith

- *San Carlos Irrigation & Drainage District v. United States*

“Incompetence will be sufficient.”

- *Keeter Trading Company Inc. v. United States*

Bad faith and breach damages.