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Government Contractor Challenges in 2022 For NASA MSFC Small Business Executive Leadership Team

REDSTONE GOVERNMENT CONSULTING,
INC.

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Contact Information

Redstone Government Consulting, Inc.

501 Madison Street SE, Suite 100

Huntsville, Alabama 35801

Telephone: 256-704-9800

Lynne Nalley, CPA

Director

lnalley@redstonegci.com



Topics

- Whistleblower Clause requirements
- Open FAR and DFAR Cases
- Risks of Independent Contractor Classification
- DCMA/DCAA Business System reviews and compliance

Whistleblower

FAR 52.203-17 Contractor Employee Whistleblower Rights and Requirement To Inform Employees of Whistleblower Rights

- Required in all solicitations and contracts that exceed \$250K.
- Inform employees in writing of employees' whistleblower rights and protection under 41 U.S.C. 4712.
- Flow down to subcontracts.

FAR 52.203-19 – Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements or Statements

- Required in all solicitations except for a personal services contract with an individual.
- Cannot require employee/subcontractor to sign an agreement restricting them from lawfully reporting waste, fraud or abuse.
- Flow down to subcontracts.

Whistleblower

IG scheduled an audit of DoD in August 2021. Report hasn't been issued.

IG's Report of Department of Justice in February 2021 found:

- Contracting officers were not including the clause in the solicitations and contracts.
- When clause included, contracting officers didn't follow up to verify contractors informed employees of Whistleblower protections.
- Contractor's had workers sign NDAs that did not mention the protected disclosures of wrongdoing.

What should Contractor's Do?

- Ensure the clauses are flowed down to subcontracts.
- Inform employees in writing of employee whistleblower rights and protections.
- Establish a policy to address procedure and wording in NDA agreements.
 - Identify how documentation will be maintained to support the notification to all employees.



Open FAR Cases

- FAR Case 2021-020 Limitations on Subcontracting Revisions – (working on the proposed rule)
- FAR Case 2017-019 Policy on Joint Ventures – (FAR staff resolving open issues)
- FAR Case 2020-007 – Accelerated Payments Applicable to Contracts with Certain Small Business Concerns
- FAR Case 2016-002 Applicability of Small Business Regulations Outside the US.
- SBA Proposed Rule 86 FR 60396- Calculation of Number of Employees for SBA Size Standards and Average Annual Receipts for Business/Disaster Loan Small Business

Classifying Workers as Independent Contractors – What’s the Test?



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- Trump Administration Rule – published in Federal Register Jan 7, 2021.
 - This rule would have reaffirmed the “economic reality” test as the primary factor for determining employee status.
- Withdrawn by Biden Admin on May 5, 2021.
- Biden DOL: Secretary Marty Walsh issued the following statement regarding same:
“By withdrawing the Independent Contractor Rule, we will help preserve essential worker rights and stop the erosion of worker protections that would have occurred had the rule gone into effect...Legitimate business owners play an important role in our economy but, too often, workers lose important wage and related protections when employers misclassify them as independent contractors. We remain committed to ensuring that employees are recognized clearly and correctly when they are, in fact, employees so that they receive the protections the Fair Labor Standards Act provides.”
- California’s “ABC Test” expected to be promoted by Biden Administration.

DCAA Contractor Business Systems (CBS)



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6 Business Systems Audits/Reviews

- **DCAA** – Accounting, Estimating, and Material
- **DCMA** – Property, Purchasing, and EVMS
- Responding to GAO Report 19-212, dated February 2019, where the GAO cited:
 - DoD (DCMA & DCAA) does not have a mechanism to monitor and ensure that these reviews are being conducted in a timely manner.
 - DCMA mostly performed its CBS reviews timely; DCAA was not timely & few done since 2013.
- DCAA is significantly behind its “promise” to GAO to complete 285 audits by 9/30/2022.
- DCAA CBS audits have typically taken 1+ years to complete and consumes significant DCAA and contractor resources.
- DCAA auditors may “rush” through audits steps to save time, compress response time for information requests of contractors and development of audit conclusions.

DCAA Contractor Business Systems (CBS)

- ***What to do?***

- Meet with ACO in the beginning – Do you even meet the CBS criteria? Are you required to support multiple CBS at the same time?
- Prepare and coordinate.
- Meet regularly with DCAA & ACO.
- Watch auditor's conclusions & materiality – do you agree?



Questions
