

ALSTON & BIRD

2018 GovCon
Briefing and CLE



**Avoiding Headlines and Hot Water:
Sustainable and Scalable Government Contracts
Compliance & Ethics Programs in the Trump Era**

**Presented By:
Jeniffer De Jesus Roberts
Katherine Veeder**



Agenda

- Today we will walk you through a number of challenging compliance scenarios which U.S. government prime contractors and subcontractors often face.
- We will pay particular attention to recent developments in the area of government contracts compliance.
- We'll talk through what went wrong, what went right, and the steps contractors can take so that they don't find themselves in the cross-hairs of the U.S. government or on the front page of the newspaper.



Fact Pattern A

Commander Construction, LLC enters into a contract with the Department of Defense to build a command center in Japan to monitor potential cyber attacks originating in Eastern Europe and Asia. Commander Construction will hire 5 Japanese citizens to oversee the project. Commander Construction also will engage a number of subcontractors to aid in the construction of the command center. While Commander Construction regularly does business with the U.S. government, this is Commander Construction's first project overseas.



Scenario 1: Procurement Patty

Procurement Patty is responsible for identifying and engaging all subcontractors on the project. With respect to building and installing the command center's telecommunications system, she plans to use Telecom Titans, a subcontractor Commander Construction has used for other projects in the United States. Due to the existing relationship between Commander Construction and Telecom Titans, Procurement Patty assumes she does not need to run any new diligence on Telecom Titans and does not need to add any new major terms and conditions to the current subcontract between the two companies, originally signed in 2015.



Scenario 1: Procurement Patty (cont'd)

- Are Procurement Patty's assumptions correct?
 - Yes
 - No

- Why?
 - She failed to appreciate that the government contracting-landscape, including the obligations imposed on contractors, is constantly changing.
 - She failed to appreciate the difference between doing business in the United States and outside the United States.



Scenario 1: Procurement Patty (cont'd)

- Instead of assuming that no further diligence or new agreement were required, what should Patty have done?
 - Identify clauses in Commander Construction's prime contract with the Department of Defense to flow down to Telecom Titans.
 - Include the identified clauses in an amended subcontract agreement or consider entering into a new master services agreement with Telecom Titans.
 - Require Telecom Titans to submit representations and certifications.
 - Conduct new diligence on Telecom Titans.



Scenario 2: HR Harriet

HR Harriet, VP of Human Resources at Commander Construction, decides that, in light of the new project, the company should update its Employee Manual and wage practices, which it has not done since 2014.



Scenario 2: HR Harriet (cont'd)

- What are some HR-related government contracting requirements that Harriet should make sure to address in the updated Employee Manual?
 - Prohibition on retaliation for disclosure of compensation information.
 - Expansion of prohibited bases of discrimination.

- Should any changes be made to Commander Construction's wage practices?
 - Where applicable, provide paid sick leave.
 - Where applicable, pay minimum wage.



Scenario 3: Contract Manager Corey and Slacker Steve

Contract Manager Corey approaches Slacker Steve, Commander Construction's general counsel, and says he thinks Commander Construction must implement a human trafficking compliance plan in light of the new project in Japan. Slacker Steve tells Contract Manager Corey that Commander Construction has a human trafficking policy in place which should be sufficient to meet Commander Construction's obligations under the law.

Is Slacker Steve right?

- Yes.
- No.



Scenario 3: Contract Manager Corey and Slacker Steve (cont'd)

- What should Commander Construction implement to meet its obligations under the law?
 - A human trafficking compliance plan, including, among other things:
 - An awareness program
 - A reporting mechanism
 - A recruitment and wage plan
 - A housing plan
 - Procedures to prevent human trafficking in its supply chain
 - A due diligence process for its supply chain.
 - A plan to flow down obligations to subcontractors.
 - A process for submitting the required certification.



Scenario 3: Contract Manager Corey and Slacker Steve (cont'd)

Slacker Steve also says the U.S. government does not really enforce the human trafficking rules and is not focused on human trafficking.

- Is he right on this one?
 - Yes.
 - No.



Scenario 4: Newbie Nancy

Contract Manager Corey takes offense to Slacker Steve and quits. Newbie Nancy then becomes the Contract Manager. Slacker Steve tells Newbie Nancy on her first day of the job that Commander Construction's System for Award Management (SAM) registration is up for renewal and that it must be submitted that day. He says that all Newbie Nancy has to do is sign on to the SAM system with Commander Construction's old login information, certify that everything is correct, and sign her name. He told her not to bother reading the forms – they are all standard, and Commander Construction has been filling them out for years.



Scenario 4: Newbie Nancy (cont'd)

- What is wrong with Slacker Steve's instructions?
 - Changes have been made to the SAM registration process.
 - Contractors must not wait until the last minute to register or update registrations.
 - Contractors must make sure that all representations and certifications are current, accurate, and complete.

- What should Nancy do?
 - Closely review representations and certifications.
 - Engage stakeholders as necessary to accurately complete registration.
 - Repeat process when bidding on new opportunities.
 - Maintain running list of representations and certifications.



Fact Pattern B

Commercial Computer Software, LLC sells computer software to commercial companies. It wants to begin selling its software to the U.S. government. It plans to enter into a contract with the General Services Administration (GSA) as well as bid on upcoming opportunities with the Department of Defense and the Department of Veterans Affairs.



Scenario 5: Lawful Lina

Lawful Lina, Commercial Computer Software's general counsel, has been tasked with negotiating the company's contract with GSA. She expects that GSA, like the company's commercial customers, will sign Commercial Computer Software's end user license agreement (EULA) without any modifications.

- Is Lawful Lina's expectation realistic?
 - Yes.
 - No.



Scenario 5: Lawful Lina (cont'd)

- What EULA provisions should Lina expect to negotiate?
 - Indemnification.
 - Governing law.
 - Automatic renewals.
 - Assignment.
 - Continued performance.
 - End user.



Scenario 5: Lawful Lina (cont'd)

Commercial Computer Software also has tasked Lawful Lina with developing and implementing a state-of-the-art government contracts compliance program prior to executing the GSA contract.

- What steps should Lawful Lina take?
 - Review the GSA solicitation.
 - Review and analyze existing program.
 - Formulate plan to enhance program.
 - Engage relevant stakeholders and identify responsible team.
 - Develop, socialize, and audit program.
 - Establish reporting mechanism.
 - Remain open.

Questions?



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APPENDIX



Attached Reference Materials

Materials Relating to the Kaspersky Ban

- Excerpt from the National Defense Authorization Act, 2018, Pub. L. No. 115-91, Dec. 12, 2017, 131 Stat 1283.
- Federal Acquisition Regulation; Use of Products and Services of Kaspersky Lab, 83 Fed. Reg. 28141, Jun. 15, 2018.
- Daniel Seiden, “Defying Kaspersky Ban Could Trigger Plethora of Punishments,” *Bloomberg Law Federal Contracting News*, Oct. 1, 2018.



Attached Reference Materials (cont'd)

Materials Relating to the Ban on Certain Telecommunications and Video Equipment Technology

- Excerpt from the John S. McCain National Defense Authorization Act, 2019, Pub. L. No. 115-232, Aug. 13, 2018, 132 Stat 1636.

Materials on Safeguarding Covered Defense Information

- Defense Federal Acquisition Regulation Supplement: Network Penetration Reporting and Contracting for Cloud Services, 81 Fed. Reg. 72986, Oct. 21, 2016.
- Jeniffer M. De Jesus Roberts and Katherine Veeder, “Still Looking for Clarity in DOD Information Security Rule,” *Law360*, June 1, 2018.



Attached Reference Materials (cont'd)

Materials on Non-Retaliation for Disclosure of Compensation Information

- Federal Acquisition Regulation: Non-Retaliation for Disclosure of Compensation Information, 83 Fed. Reg. 42570, Aug. 22, 2018.
- Federal Acquisition Regulation: Non-Retaliation for Disclosure of Compensation Information, 81 Fed. Reg. 67732, Sept. 30, 2016.

Materials on the Expansion of the Prohibited Bases of Discrimination

- Federal Acquisition Regulation; Further Amendments to Equal Employment Opportunity, 80 Fed. Reg. 75907, Dec. 4, 2015.
- Federal Acquisition Regulation; Further Amendments to Equal Employment Opportunity, 80 Fed. Reg. 19504, Apr. 10, 2015.



Attached Reference Materials (cont'd)

Materials on Paid Sick Leave

- Federal Acquisition Regulation; Paid Sick Leave for Federal Contractors, 83 Fed. Reg. 42569, Aug. 22, 2018.
- Federal Acquisition Regulation; Paid Sick Leave for Federal Contractors, 81 Fed. Reg. 91627, Dec. 16, 2016.

Materials on Contractor Minimum Wage

- Establishing a Minimum Wage for Contractors, Notice of Rate Change in Effect as of January 1, 2019, 83 Fed. Reg. 44906, Sept. 4, 2018.
- Federal Acquisition Regulation: Establishing a Minimum Wage for Contractors, 80 Fed. Reg. 75915, Dec. 4, 2015.



Attached Reference Materials (cont'd)

Materials on Combating Human Trafficking

- Federal Acquisition Regulation: Combating Trafficking in Persons – Definition of “Recruitment Fees,” 81 Fed. Reg. 29244, May 11, 2016.
- Federal Acquisition Regulation; Ending Trafficking in Persons, 80 Fed. Reg. 4967, Jan. 29, 2015.

Materials on GSA Unenforceable Commercial Supplier Agreement Terms

- General Services Administration Acquisition Regulation; Unenforceable Commercial Supplier Agreement Terms, 83 Fed. Reg. 7631, Feb. 22, 2018.



Attached Reference Materials (cont'd)

Other Ethics and Compliance Materials

- Open FAR Cases.
- Jeniffer M. De Jesus Roberts, “Key Considerations for Establishing an Effective Ethics and Compliance Program,” *BNA Insights, Bloomberg BNA Federal Contracts Report*, May 10, 2016.

ALSTON & BIRD

2018 GovCon
Briefing and CLE



Claims Mitigation and Prosecution Strategies for Government Contractors

Andy Howard
Jessica Sharron

Alston & Bird
Alston & Bird



Agenda

- Key Differences Between Government Contract Claims and Typical Commercial Claims Litigation
 - Mandatory Pre-litigation Process and Administrative Remedies
 - Dedicated Tribunals and the Pros & Cons of Each
 - Mandatory Contract Performance During Disputes
- Common Pitfalls Impairing Government Contract Claims and How They Can Be Neutralized
 - Apparent vs. Actual Authority
 - Patent vs. Latent Defects
 - The Dilemma of the Cumulative Impact Claim
 - ADR: When to Use It and Strategies
 - REAs vs. CDA Certified Claims



Key Differences Between Government Contract Claims and Typical Commercial Claims Litigation



Mandatory Pre-litigation Process and Administrative Remedies

- Commercial Contracts
 - Unless expressly stated in the contract, no pre-litigation process
 - Nothing prevents a contractor from immediately filing a complaint in court
 - Complaints need not be certified/verified
 - Complaints typically are easily amended
 - Complaints must be accurate, but essentially no risk of fraud
 - First “decider” of the claim is a judge or jury



Mandatory Pre-litigation Process and Administrative Remedies

- Government Contracts (Federal)
 - Strict pre-litigation process under the Contract Disputes Act
 - Requires exhaustion of administrative remedies: a certified claim to the Contracting Officer
 - Certified claim must be accurate and complete
 - ✓ A claim is a written demand seeking, as a matter of right, the payment of money in a sum certain [FAR 2.101]
 - ✓ Partially incomplete claim can result in forfeiture of the entire portion
 - ✓ Or worse, result in civil or criminal liability for fraud, and . . .
 - ✓ Possibly contractor suspension or debarment
 - First “decider” of the claim is the Contracting Officer – i.e., the adversary



Mandatory Pre-litigation Process and Administrative Remedies

- Commercial Contracts

- District Court / Trial Court → Court of Appeals / Appellate Court → Supreme Court

- Government Contracts

- Certified Claim → Agency Appeal → Board of Contract Appeals
→ Court of Federal Claims → Court of Appeals for the Federal Circuit → Supreme Court



Mandatory Pre-litigation Process and Administrative Remedies

- Contract Disputes Act [41 U.S.C. § 7101, et seq.]
 - Claim must be in writing
 - Submitted to the Contracting Officer
 - Claims over \$100,000 must be certified by the contractor
 - ✓ Claim is made in good faith
 - ✓ Supporting data are accurate and complete
 - ✓ Amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable
 - ✓ Certifier is authorized to certify the claim



Mandatory Pre-litigation Process and Administrative Remedies

- Contract Disputes Act [41 U.S.C. § 7101, et seq.]
 - Contracting Officer issues a decision
 - ✓ Claims of \$100,000 or less: within 60 days
 - ✓ Claims over \$100,000: within 60 days, decision or notification of timing for a decision
 - ✓ Failure of Contracting Officer to issue a decision in time is a deemed denial
 - Contracting Officer's decision is final unless appealed



Mandatory Pre-litigation Process and Administrative Remedies

- Remedies
 - Monetary damages
 - Declaratory relief
 - Attorneys' fees under Equal Access to Justice Act
 - Specific performance is *not* available
 - Injunctive relief is *not* available
- Judgment Fund
 - Available for payment of judgments and formal settlements



Dedicated Tribunals: Pros & Cons

- Appeals of a Contracting Officer's Final Decision
 - Agency Boards of Contract Appeals
 - ✓ **ASBCA: Armed Services Board of Contract Appeals**
 - ✓ **CBCA: Civilian Board of Contract Appeals**
 - ✓ PSBCA: Postal Service Board of Contract Appeals
 - ✓ GAOCAB: Government Accountability Office Contract Appeals Board
 - ✓ ODRA: Office of Dispute Resolution for Acquisition
 - Court of Federal Claims



Dedicated Tribunals: Pros & Cons

- Agency Boards of Contract Appeals

Pros	Cons
<ul style="list-style-type: none">Agency counsel represents the agencyLess formal rulesMembers must have had at least 5 years of experience in public contract lawReceive government documents soonerArguably less expensiveLack jurisdiction over government counterclaim for fraud	<ul style="list-style-type: none">Agency counsel represents the agencyShorter deadline to appeal (less time to negotiate before the deadline)



Dedicated Tribunals: Pros & Cons

- Court of Federal Claims

Pros	Cons
<ul style="list-style-type: none">• Department of Justice represents the government• Longer appeal deadline: saves the appeal if the 90-day deadline is missed• Greater willingness to resolve a case on dispositive motions	<ul style="list-style-type: none">• Department of Justice represents the government• Department of Justice must approve any settlement• Judges are not required to have government contracts experience• Permits fraud counterclaims by the government• Arguably more expensive



Mandatory Contract Performance During Disputes

- FAR 52.233-1
 - “The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.” FAR 52.233-1
- Significant difference from commercial contracts



Mandatory Contract Performance During Disputes

- Requirement to continue performance is not necessarily absolute
- *Kiewit-Turner*, 15-1 B.C.A. (CCH) ¶ 35820 (Dec. 9, 2014)
 - Contractor permitted to stop work when the government (VA) materially breached the contract
 - ✓ The VA failed to provide a design that could be constructed
 - ✓ The VA did not have sufficient funds to pay for construction of the entire project as designed and had no plans to seek additional funding



Mandatory Contract Performance During Disputes

- Reliance on *Kiewit-Turner* is cautioned
- CBCA did not mention the disputes clause (FAR 52.233-1)
- Repercussions for failing to continue performance can be severe:
 - Default termination
 - Contract damages
 - Impact on future contracting opportunities



Common Pitfalls Impairing Government Contract Claims and How They Can Be Neutralized



Actual vs. Apparent Authority

- Commercial contracts
 - Apparent authority applies
 - “A principal whose actions have given a third party reasonable grounds for assuming that an agent has certain authority is estopped from pleading the agent’s lack of authority.” [*Strann v. U.S.*, 2 Cl.Ct. 782, 789 (1983)]
- Government contracts
 - Apparent authority does not apply
 - Federal agencies are only bound by the acts of those with actual authority



Actual vs. Apparent Authority

- Contracting Officers have actual authority to contractually bind the government
 - However, Contracting Officers can only bind the government to the extent of their warrant – i.e., their designated authority
- Do not confuse the Contracting Officer's Technical Representative with the Contracting Officer
 - Although contractors will more often interface with the Contracting Officer's Technical Representative, he/she has little to no authority to bind the government



Actual vs. Apparent Authority

- Potential relief through ratification
 - Ratification is “the act of approving an unauthorized commitment by an official who has the authority to do so.” [48 C.F.R. § 1.602-3]
 - Unauthorized commitment is “an agreement that is not binding solely because the Government representative who made it lacked the authority to enter into that agreement on behalf of the Government.” [48 C.F.R. § 1.602-3]
 - Subject to certain limitations, the head of the contracting activity, unless a higher-level official is designated by the agency, may ratify an unauthorized commitment



Patent vs. Latent Defects

- Ambiguity is a question of law
 - [*Cmty. Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575 (Fed Cir. 1993)]
- Ambiguity exists when there is more than one reasonable interpretation of contract terms or requirements
 - [*Lockheed Martin IR Imaging Sys., Inc. v. West*, 108 F.3d 319 (Fed. Cir. 1997)]



Patent vs. Latent Defects

- Patent Ambiguities
 - Glaring errors or patently obvious conflicts
 - ✓ [*Control, Inc. v. United States*, 294 F.3d 1357 (Fed. Cir. 2002)]
 - Obvious omission, inconsistency, or discrepancy of significance
 - ✓ [*Beacon Constr. Co. v. United States*, 314 F.2d 501 (Ct. Cl. 193)]
 - Contractor has duty of inquiry; otherwise recovery is barred
 - ✓ [*States Roofing Corp.*, ASBCA No. 54854, 08-2 BCA 33,912]



Patent vs. Latent Defects

- Latent Ambiguities
 - Non-obvious conflict that comes to light under the circumstances of the parties' performance
 - Contract is construed against the government, provided the contractor's interpretation is reasonable and the contractor relied on that interpretation when preparing its bid
 - ✓ [*Hunt Constr. Group, Inc. v. United States*, 281 F.3d 1369 (Fed. Cir. 2002)]



Patent vs. Latent Defects

- Latent Ambiguities (cont.)
 - Failure to demonstrate pre-bid reliance precludes recovery
 - ✓ [*Fruin-Colnon Corp. v. United States*, 277 F.3d 1426 (Fed. Cir. 1990)]
 - Pre-bid interpretations:
 - ✓ Material takeoffs
 - ✓ Technical proposals
 - ✓ Subcontractor interpretation imputed to contractor
 - [*Froeschle Sons, Inc. v. United States*, 891 F.2d 270 (Fed. Cir. 1989)]



The Dilemma of the Cumulative Impact Claim

- Also called disruption claims or ripple effect claims
 - “[T]he unforeseeable disruption of productivity resulting from the ‘synergistic’ effect of an undifferentiated group of changes.”
 - ✓ [*Centex Bateson Constr. Co.*, VABCA No. 4613, 99-1 BCA 30,153 (1998)]
- Different from delay claim
 - Delay = costs of not being able to work
 - Cumulative impact = costs of not working as efficiently as planned
 - ✓ [*U.S. Indus., Inc. v. Blake Constr. Co., Inc.*, 671 F.2d 539 (D.C. Cir. 1982)]



The Dilemma of the Cumulative Impact Claim

- Elements of proof
 - Excessive number of changes has resulted in a fundamental alteration of the contract
 - Claim is not waived by prior changes
 - Causal link between changes and inefficiency
 - Reasonable establishment of damages
- Methods of proof
 - Measured mile
 - Quantum meruit
 - Industry costing manuals (e.g., Mechanical Contractors Ass'n of Am.)



The Dilemma of the Cumulative Impact Claim

- Success of claims often determined by whether the contractor preserved its right to disruption damages in underlying previous changes
- But waiver may be inapplicable if disruption was not reasonably foreseeable at the time of waiver



ADR: When to Use It and Strategies

- Agencies encouraged to use ADR “to the maximum extent practicable” [FAR 33.204]
- Many agencies have agency-specific ADR programs that may be viable means of amicable dispute resolution
- COFC and BCAs have ADR programs for resolving contract claims short of full-blown litigation



ADR: When to Use It and Strategies

- Types of available ADR
 - Mediation
 - Settlement Judge
 - Mini Trial
 - Expedited Summary Proceeding w/Binding Decision
- ADR is an option even before a dispute is formalized in a CDA “claim”



REAs vs. CDA Certified Claims

- CDA Claims
 - Formal written demands for a change in contract terms or other relief
 - Claims exceeding \$100,000 must be certified by a corporate official for truth and accuracy
- REAs
 - Generally, no formal process dictated by statute or regulation in the FAR
 - Contemplated by Changes clauses, e.g., 52.243-1 (fixed price) and 52.243-3 (cost reimbursable)
 - Most commonly submitted when parties do not agree a change has occurred or cannot agree on the impact of the change



REAs vs. CDA Certified Claims

- Benefits of REAs
 - Less contentious than a CDA “claim”
 - No certification requirement
 - Certain costs of preparing REA could be recovered as additional contract administration costs

Questions?



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The background of the slide is a composite image. The left half is a blue-tinted, semi-transparent view of a cockpit interior with various control panels and screens. The right half is a black and white close-up of a soldier wearing a helmet and goggles, looking forward with a focused expression.

DEFENSE & GOVERNMENT MARKET UPDATE

October 2018

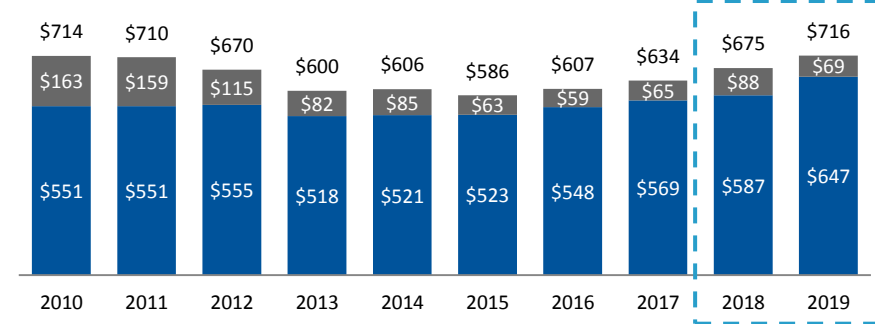
- **Market optimism** surrounding prioritization of defense spending and national security
- Public company valuations at **10-year highs**
- Significant market **consolidation** and portfolio reshaping
- **Highly competitive** contracting environment with increased protests
- **Easing contracting pressure** on pricing and set-aside mandates
- Increasing use of **non-traditional contract** structures
- **Active M&A** environment with diverse buyer interest
- **Disparate valuations** and creative deal structures

U.S. DEFENSE BUDGET OVERVIEW

- The Bipartisan Budget Act of 2018 authorizes defense spending of **\$675B** in 2018 and **\$716B** in 2019, representing a significant **23%** and **27%** increase over previously set budget caps, respectively
- The 2019 Defense budget is the **largest budget in U.S. history** and earmarks significant additional spending on large platforms including :
 - a refresh of its fleets of fighters (F-35), bombers (B-21) and tankers (KC-46)
 - funding for the fourth Ford-class aircraft carrier (CVN 81), the addition of four DDG 51 Flight III ships, and the procurement of the lead Columbia-class SSBN

U.S. NATIONAL DEFENSE BUDGET FY10-19

(\$ in billions)



DEFENSE BUDGET THEMES

Category	Focus Areas
Space Systems	<ul style="list-style-type: none"> ▪ Resiliency of DoD space systems ▪ Global Positioning System ▪ C4ISR / satellites
Ground Systems	<ul style="list-style-type: none"> ▪ Missile defense interceptors ▪ Electronic warfare
Naval Vessels	<ul style="list-style-type: none"> ▪ Virginia-class and Columbia-class submarines ▪ Surface fleet expansion
Aviation	<ul style="list-style-type: none"> ▪ F-18 Super Hornet Fighter ▪ F-35 Joint Strike Fighter ▪ KC-46 Pegasus Tanker Program
Weapons	<ul style="list-style-type: none"> ▪ Missiles and munitions ▪ Long-range artillery
R&D	<ul style="list-style-type: none"> ▪ Hypersonics ▪ Artificial intelligence ▪ Unmanned systems

TOP 10 DEFENSE PROGRAMS

Program	FY17 Spending	FY18 Request
F-35	\$11.3 billion	\$10.8 billion
Virginia Submarine	\$5.3 billion	\$5.5 billion
DDG-51 Ship	\$3.5 billion	\$4.0 billion
KC-46 Tanker	\$3.3 billion	\$3.1 billion
P-8A	\$3.3 billion	\$1.6 billion
B-21	\$2.2 billion	\$2.9 billion
V-22	\$1.8 billion	\$1.0 billion
Aegis	\$1.6 billion	\$1.6 billion
E-2D	\$1.4 billion	\$1.1 billion
GMD	\$1.2 billion	\$1.4 billion

CHANGING COMPETITIVE LANDSCAPE

DEFENSE PRIMES

DEFENSE TIER II

PUBLIC GOVERNMENT SERVICES

PE-BACKED GOVERNMENT SERVICES

ENGINEERING & CONSTRUCTION

DIVERSIFIED COMMERCIAL

BAE SYSTEMS



Booz | Allen | Hamilton

ALION | BYLIGHT
Lighting the Path

AECOM

accenture | ASGN
Incorporated

BOEING



CACI

constellis | DynCorp
SECURE SUCCESS INTERNATIONAL

FLUOR

Belcan | **CGI**



KeyW@re

Guidehouse | IAI

KBR

GENERAL DYNAMICS



leidos

IAP | LINQUEST
Ingenuity and Purpose CORPORATION

CONDUENT | Deloitte.



ManTech

LGS | MAG
INNOVATIONS AEROSPACE

JACOBS

LOCKHEED MARTIN

perspecta

nci | NOVETTA

PARSONS

IBM | ICF

MAXAR
TECHNOLOGIES

SAIC

OGSYSTEMS | PAE
OWN THE OUTCOME

TETRA TECH

NORTHROP GRUMMAN



VECTRUS
TRUE TO YOUR MISSION

Peraton | SalientCRGT

MAXIMUS | NTT DATA

Raytheon

THALES



TYTO | VT
ATHENS Group

WSP

serco | **UNISYS**

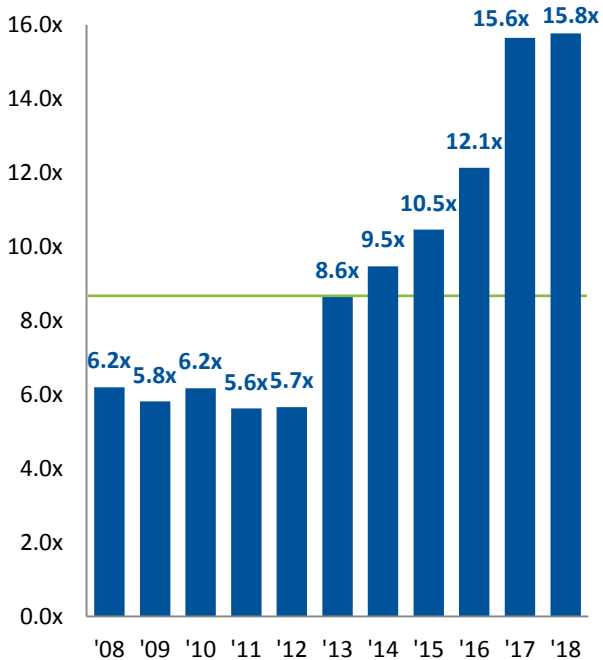
PUBLIC COMPANIES TRADING AT 10-YEAR HIGHS

Public valuations at 10-year highs driven by budget outlook, investor optimism, shareholder-friendly cash deployment, and industry consolidation

(Enterprise Value / LTM EBITDA)

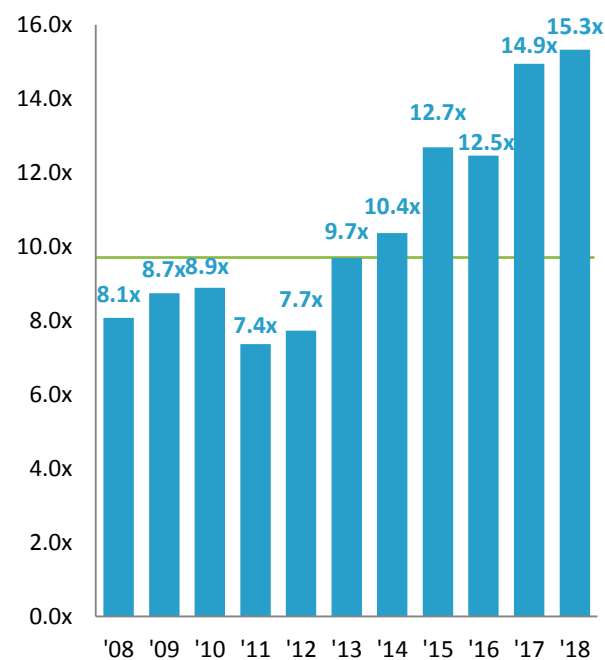
PRIMES

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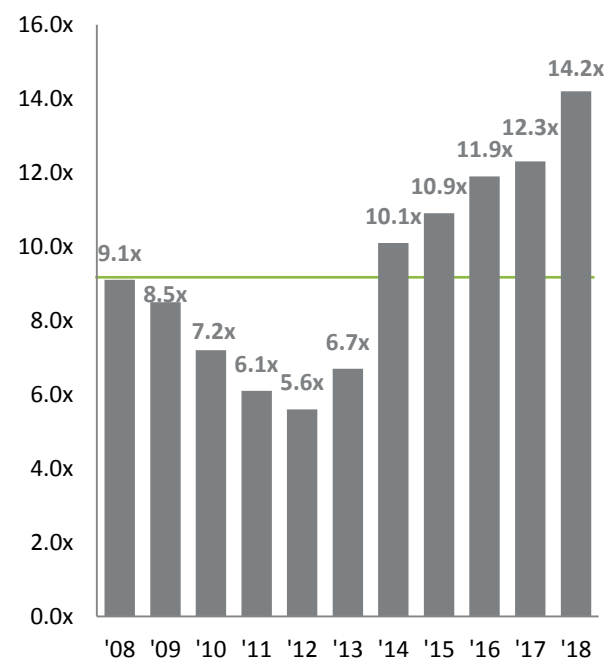
DEFENSE ELECTRONICS

Median: 9.7x



GOVERNMENT SERVICES

Median: 9.1x



PRIMES

BAE SYSTEMS

BOEING

GENERAL DYNAMICS

LOCKHEED MARTIN

NORTHROP GRUMMAN

Raytheon

DEFENSE ELECTRONICS

AV

Ball

COBHAM

CUBIC

HARRIS

KRATOS

LS

MAXAR

mercury systems

THALES

QINETIQ

Ultra Electronics

Viasat

GOVERNMENT SERVICES

Booz | Allen | Hamilton

CACI

KeyW

leidos

ManTech

perspecta

SAIC

Source: CapitalIQ, Latest SEC filings, Baird proprietary database, as of 10/23/2018

Primes: LSE:BA., BA, LMT, GD, NOC, RTN

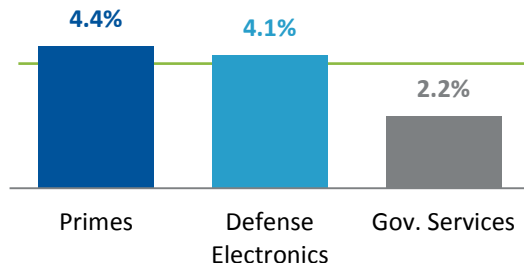
Defense Electronics: AVAV, BLL, COB, CUB, HRS, KTOS, LLL, MAXR, MRCY, HO, QQ., ULE, VSAT

Government Services: BAH, CACI, KEYW, LDOS, MANT, PRSP, SAIC

COMPARATIVE PUBLIC COMPANY METRICS

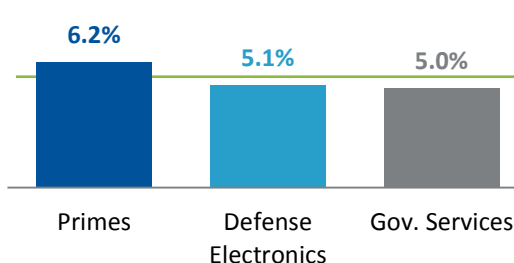
HISTORICAL REVENUE GROWTH, 2015 – 2018

Median: 4.0%



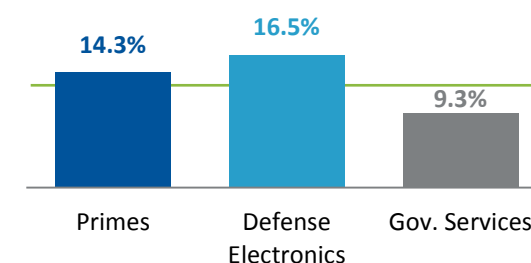
PROJECTED REVENUE GROWTH, 2018 – 2019

Median: 5.6%



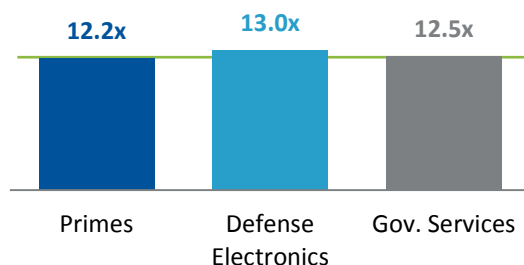
2018 EBITDA MARGINS

Median: 13.8%



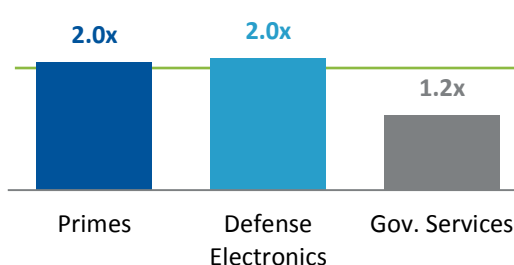
EV / 2019 EBITDA

Median: 12.4x



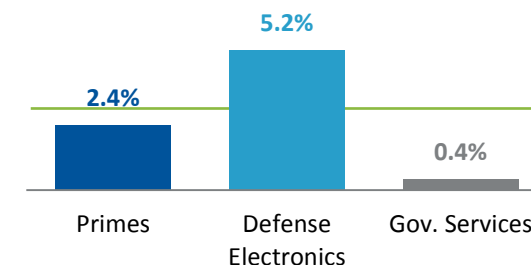
EV / 2019 REVENUE

Median: 1.8x



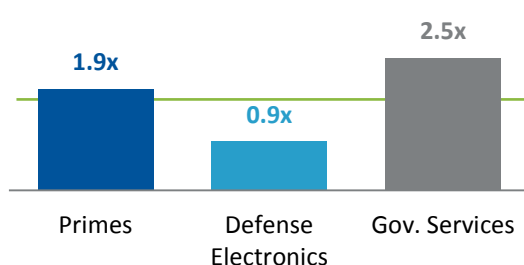
R&D AS % OF LTM REVENUE

Median: 2.9%



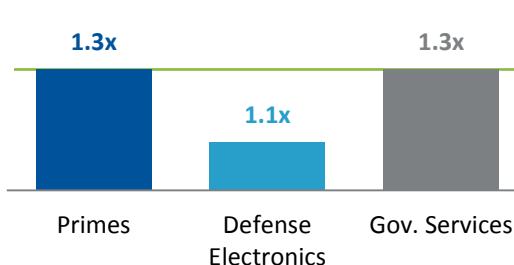
BACKLOG / LTM REVENUE

Median: 1.8x



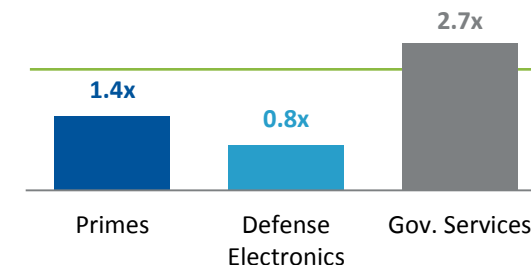
LTM BOOK TO BILL RATIO

Median: 1.3x



NET DEBT / LTM REVENUE

Median: 2.4x



Source: CapitalIQ, Latest SEC filings, Baird proprietary database, as of 10/23/2018

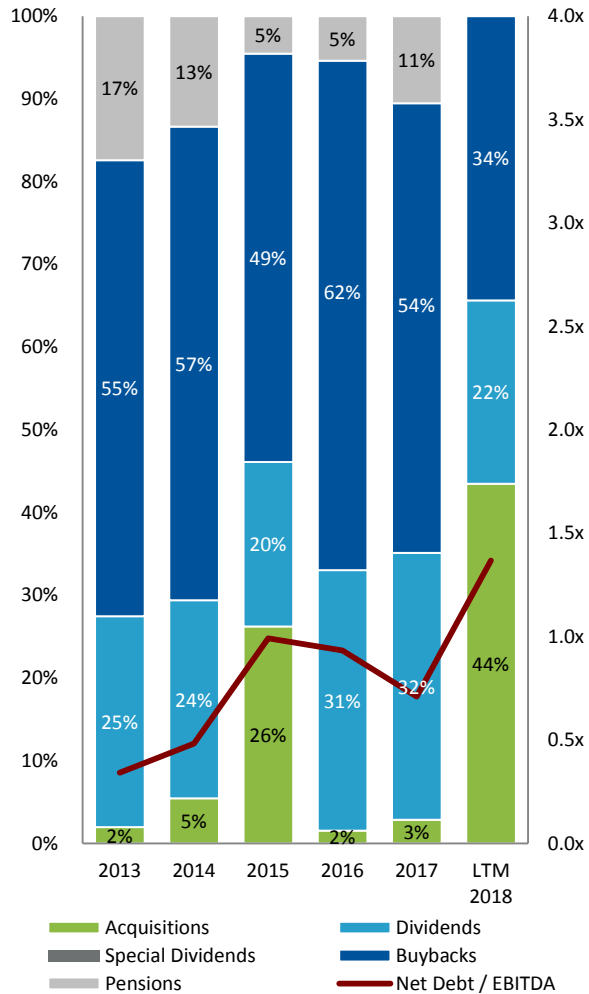
Primes: LSE:BA., BA, LMT, GD, NOC, RTN

Defense Electronics: AVAV, BLL, COB, CUB, HRS, KTOS, LLL, MAXR, MRCY, HO, QQ., ULE, VSAI

Government Services: BAH, CACI, KEYW, LDOS, MANT, PRSP, SAIC

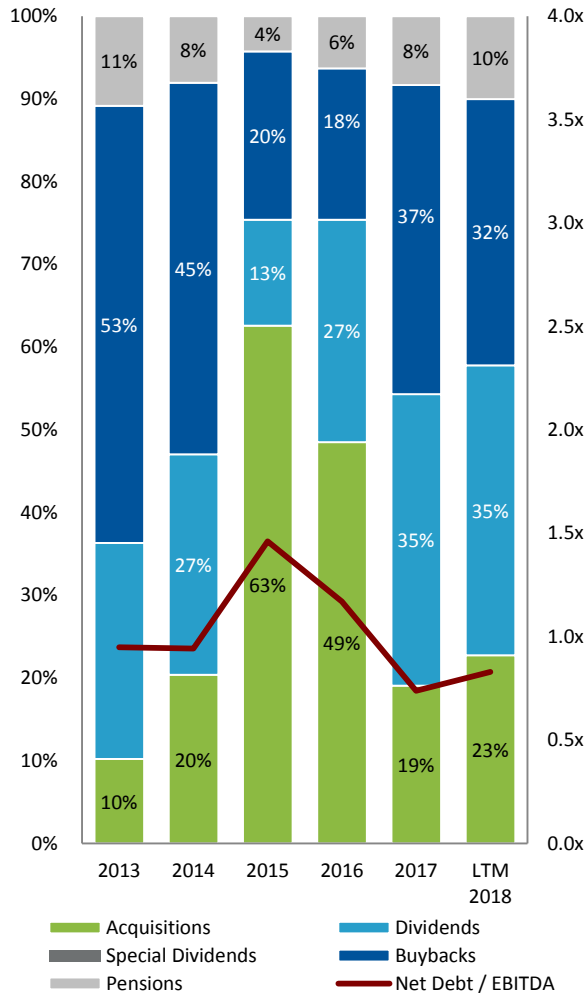
INCREASED CAPITAL ALLOCATION TO M&A

PRIMES



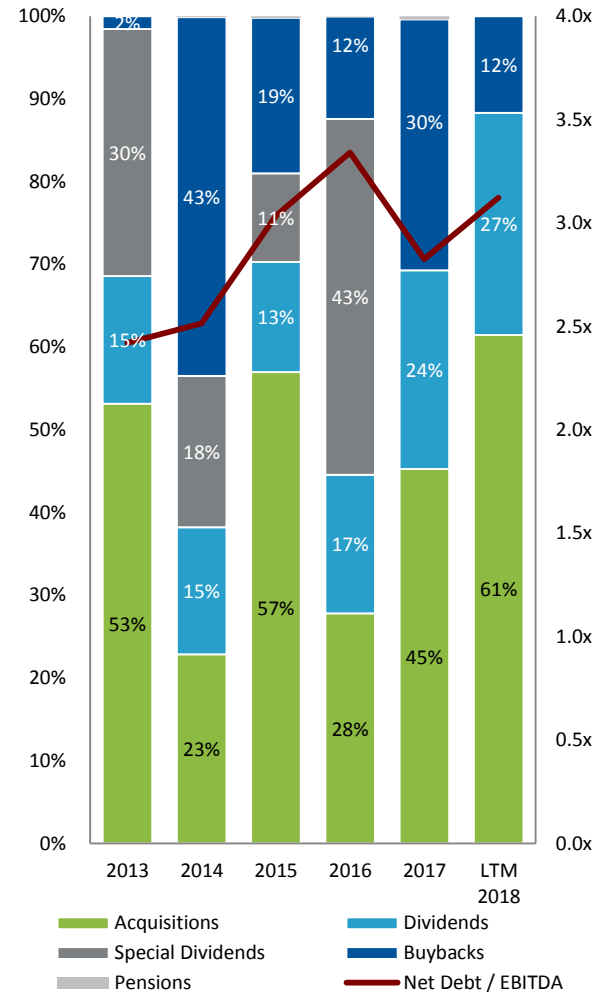
Capital Availability: \$90.5B

DEFENSE ELECTRONICS



Capital Availability: \$19.9B

GOVERNMENT SERVICES



Capital Availability: \$3.6B

Source: CapitalIQ, Latest SEC filings, Baird proprietary database, as of 10/23/2018

Primes: LSE:BA., BA, LMT, GD, NOC, RTN

Defense Electronics: AVAV, BLL, COB, CUB, HRS, KTOS, LLL, MAXR, MRCY, HO, QQ., ULE, VSTAT

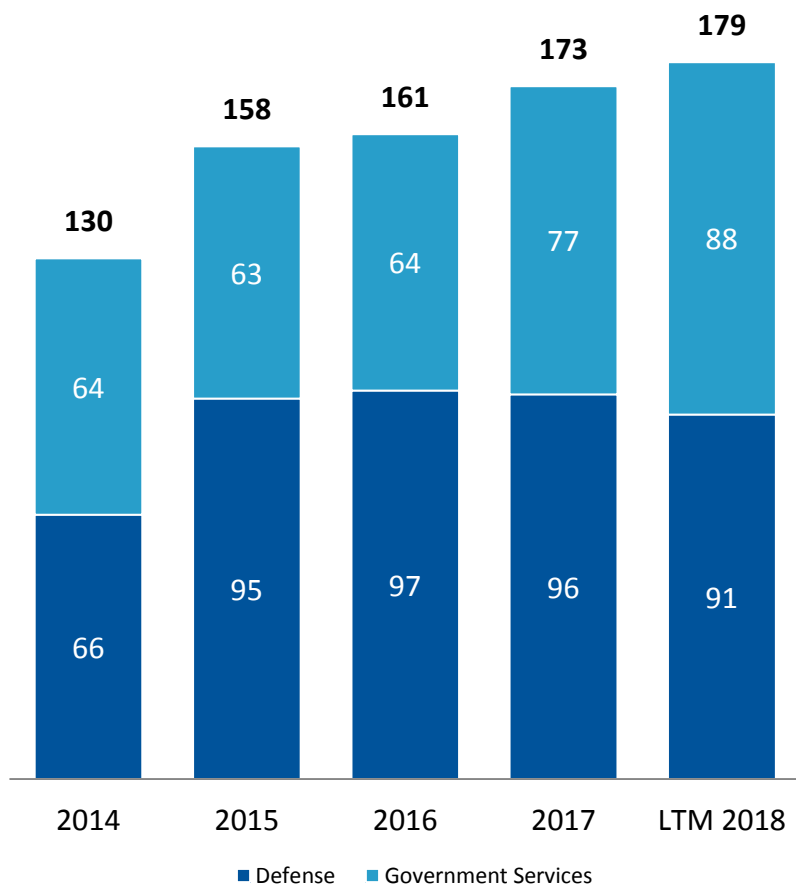
Government Services: BAH, CACI, KEYW, LDOS, MANT, PRSP, SAIC

DEFENSE & GOVERNMENT M&A MARKET OVERVIEW

Significant large and mid-tier market consolidation

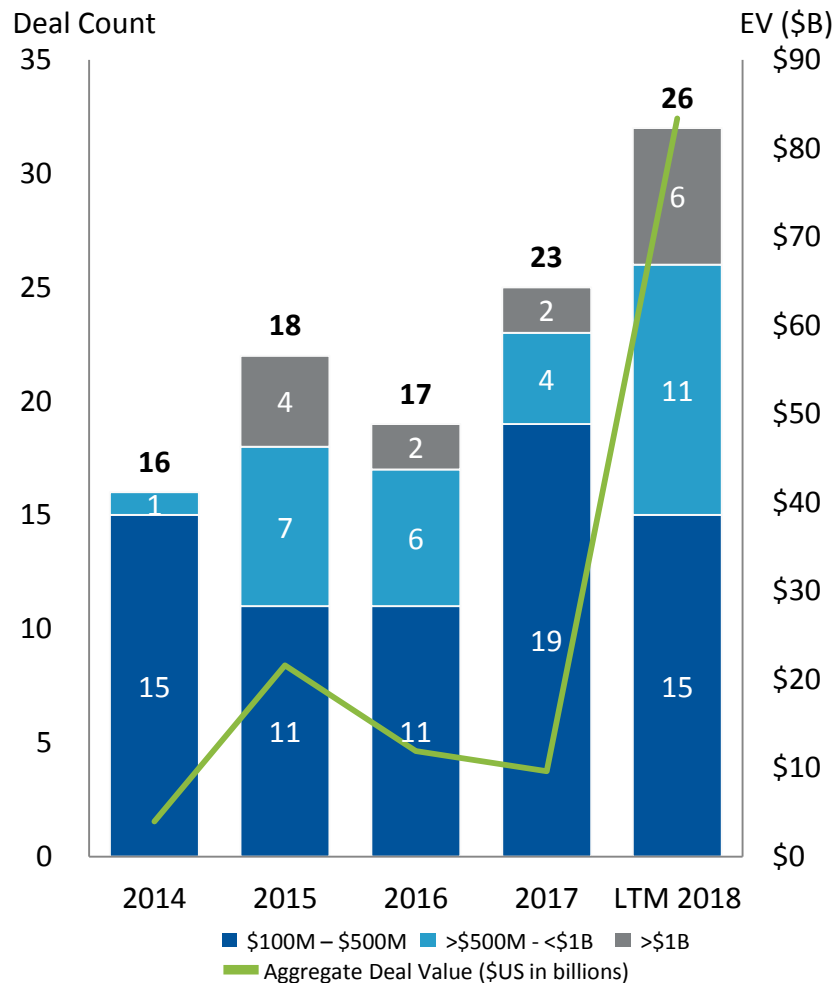
M&A ACTIVITY REACHING 5-YEAR HIGHS

Deal Count



INCREASED MID-TIER MARKET CONSOLIDATION

Deals \$100M+



Source: CapitalIQ, Latest SEC filings, Baird proprietary database, as of 10/23/2018

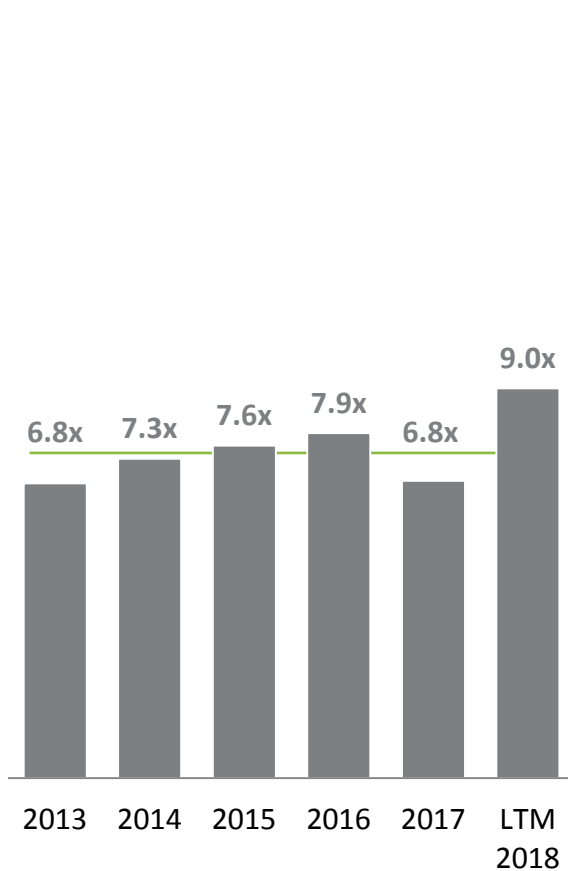
M&A VALUATIONS AT A PREMIUM

The convergence of strong market dynamics and increased M&A activity is driving M&A valuations to historic high levels, particularly in larger transactions

(Enterprise Value / LTM EBITDA)

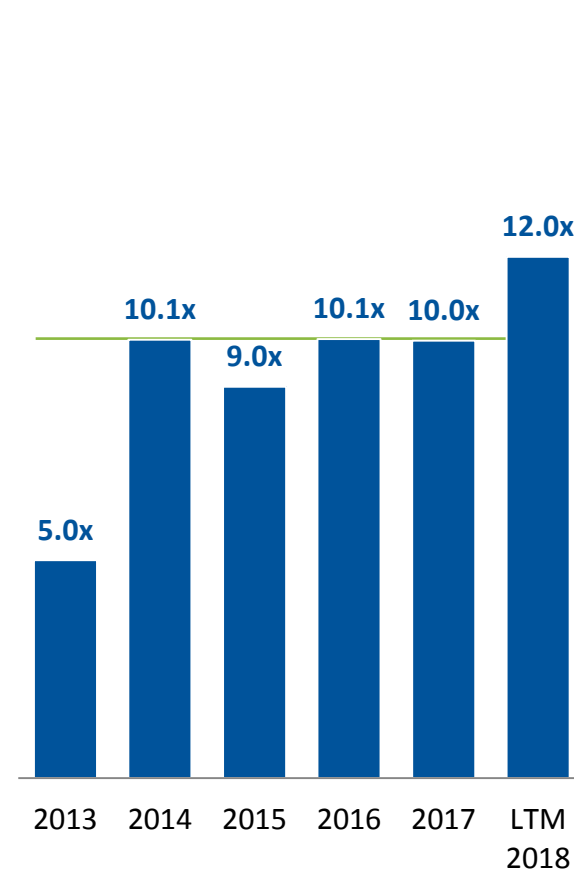
DEALS LESS THAN \$100M

Median: 7.5x



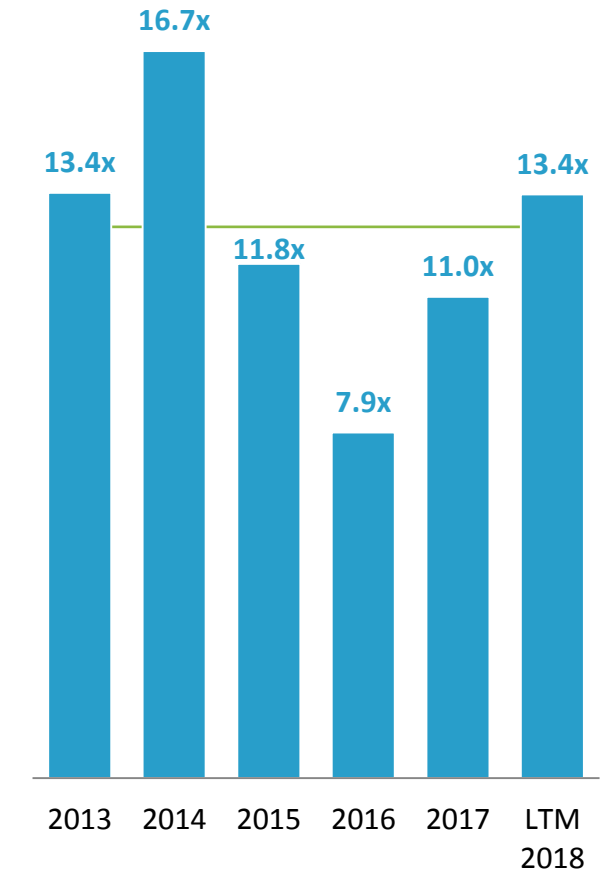
DEALS BETWEEN \$100M – \$500M

Median: 10.1x



DEALS GREATER THAN \$500M

Median: 12.6x



CURRENT M&A THEMES

Representative transactions illustrating major M&A market themes

Scale



intends to merge with



Targeted, Mid-tier



has acquired



New Entrants



has been acquired by



Private Equity Platform



has been acquired by



Private Equity Roll Up



has acquired



Divestitures



Government IT Services Business
has been acquired by



Intel



has been acquired by



C4ISR



has acquired



Creative Deal Structures



US Public Sector Business
has combined with

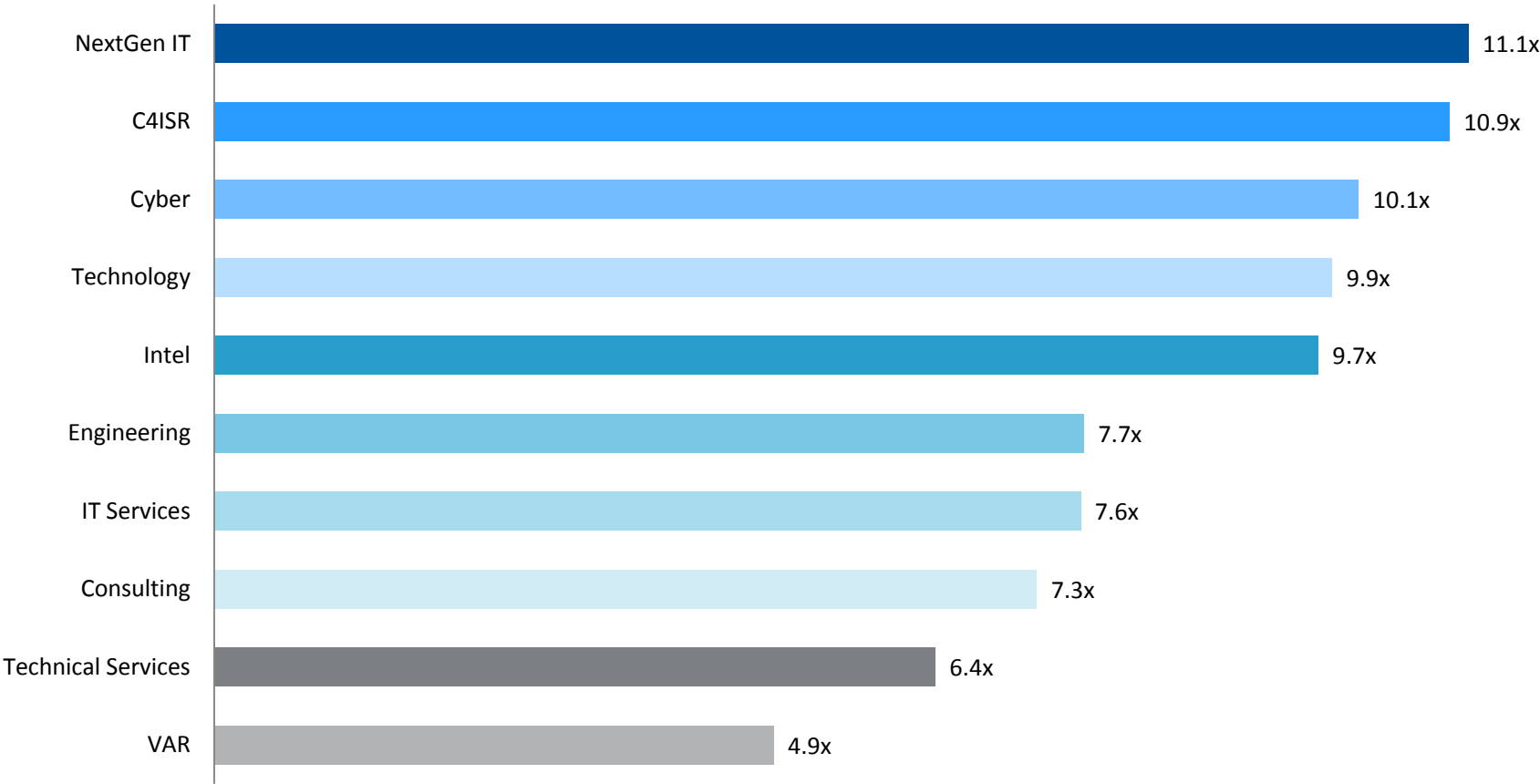


GOVERNMENT SERVICES M&A VALUATIONS BY SUB-SECTOR



2015 – 2018 YTD Transactions

PRICING BY SEGMENT



Source: Proprietary Baird database as of 10/23/2018. Transaction data reflects deals closed by December 31st of each year.

- ✓ M&A Activity Will Accelerate Into 2019
- ✓ “No Impact” From Mid-Term Elections
- ✓ Markets to Watch:
 - Space
 - C4ISR Solutions and Systems
 - Cyber
 - NextGen IT
 - Machine Learning
- ✓ All Bets Are Off In 2020

BAIRD IS A LEADING ADVISOR TO THE DEFENSE & GOVERNMENT SECTOR

BAIRD

ADVISOR ON

46

Defense & Government transactions since 2014

\$7.8 billion

Aggregate transaction value

\$178 million

Average deal size

79%

Strategic buyers

98%

Close rate

100%

Of the transactions were initiated, executed, and closed by the Baird team

SELECT TRANSACTIONS 2014 – 2018

<p>Software</p>  <p>Conduent Government Software Solutions Business Sale to</p>  <p>A Portfolio Company of</p> 	<p>Space</p>  <p>Sale to</p> 	<p>C4ISR</p>  <p>Acquisition of</p>  <p>A Portfolio Company of</p> 	<p>Software Development</p>  <p>Sale to</p> 	<p>NextGen IT</p>  <p>Sale to</p> 
<p>Intel</p>  <p>Has Been Acquired by</p>  <p>Think Next. Now.</p>	<p>IT Modernization</p>  <p>Has Been Acquired by</p> 	<p>Special Ops</p>  <p>Has Been Acquired by</p> 	<p>NextGen IT</p>  <p>Has Been Acquired by</p> 	<p>Federal BPO</p>  <p>Has Been Acquired by</p>  <p>A Portfolio Company of</p> 
<p>National Security Solutions</p>  <p>Government IT Services</p> <p>Has Been Acquired by</p> 	<p>Digital Services</p>  <p>Has Been Acquired by</p> <p>Booz Allen Hamilton</p>	<p>C4ISR</p>  <p>A Portfolio Company of</p>  <p>Has Been Acquired by</p> 	<p>Cyber Operations</p>  <p>Cyber Business</p> <p>Has Been Acquired by</p> 	<p>Mission Solutions</p>  <p>A Portfolio Company of</p>  <p>Has Been Acquired by</p> 
<p>IT Modernization</p>  <p>Merger with</p> 	<p>SIGINT</p>  <p>Has Been Acquired by</p> 	<p>Data Analytics</p>  <p>A Portfolio Company of</p>  <p>Has Been Acquired by</p> 	<p>Cyber</p>  <p>Has Been Acquired by</p> 	<p>High-End Engineering</p>  <p>A Wholly Owned Subsidiary of</p>  <p>Has Been Acquired by</p> 
<p>IT Modernization</p>  <p>A Portfolio Company of</p>  <p>Has Been Acquired by</p> 	<p>IT Modernization</p>  <p>Has Been Acquired by</p> 	<p>SIGINT</p>  <p>Has Been Acquired by</p> 	<p>Cyber Defense</p>  <p>A Portfolio Company of</p>  <p>Has Been Acquired by</p> 	<p>Advanced R&D</p>  <p>Has Been Acquired by</p> 

* Tombstones include transactions completed by bankers while at another firm.

GOVERNMENT SERVICES & DEFENSE CONFERENCE



November 29, 2018
8:00 a.m. – 5:00 p.m. ET
Cocktail reception to follow



The Ritz-Carlton, Tysons Corner
McLean, VA

ALSTON & BIRD

2018 GovCon
Briefing and CLE



Ethical Quandaries for the GovCon Lawyer

Jeff Belkin
Mike Mortorano

Alston & Bird
Alston & Bird



Introduction and Take Out Your Phones

We will be using **interactive polling software** so you may vote via text message directly from your mobile device.

Let's go ahead and get set up. Participation is simple!

Text ABEvent to 22333

When prompted, respond with A, B, C, or D.

Participation is completely anonymous.



Intersection of Legal Ethics and Government Contracting

- Common Representations with Ethics Issues
 - Corporate Transactions
 - Internal or Government Investigations
 - Bid Protests and Contract Disputes



Familiar GovCon Principles Overlapping with Legal Ethics

- Organizational and Personal Conflicts of Interest
- Attorney-Client Privilege
- Mandatory Disclosures



Ethical Rules Commonly Implicated

- Some Applicable Virginia (Model) Rules of Professional Conduct (http://www.vsb.org/pro-guidelines/index.php/main/print_view):
 - Rule 1.2 Scope of Representation
 - Rule 1.3 Diligence
 - Rule 1.6 Confidentiality of Information
 - Rule 1.7 Conflict of Interest: General Rule
 - Rule 1.8 Conflict of Interest: Prohibited Transactions
 - Rule 1.13 Organization as Client
 - Rule 1.16 Declining or Terminating Representation
 - Rule 1.18 Duties to Prospective Client
 - Rule 4.1 Truthfulness in Statements to Others



Scenario 1.0

- Five years ago, Skip, Partner at the Stodgy firm, was asked to write a memorandum to Sham Corporation that it would qualify for government contracts set aside for women-owned small businesses. Sham then relied upon the memorandum when bidding on several contracts, which it won. Several successful years later, Skip told Sham that though it was still woman-owned, it now exceeded the average annual receipts limitation for its NAICS code. Skip advised Sham that it would need to so inform the government, and that it could not continue to bid on new contracts as a WOSB under that NAICS code. Sham explained that it was still in growth mode, refused the advice, and stated it would deal with all that “legal stuff” down the line. Skip advised against this course of action, but Skip continued representing Sham on other compliance questions. Sham decided to get a new opinion letter from Slim Shady, who employed some “creative” accounting to assert that Sham was under its NAICS size limit. Skip continues to advise Sham on its contracts, knowing Sham is relying on the Slim Shady opinion for new contract bidding. Sham continued to bid on, and win, new contracts as a WOSB.
- The DOJ has now issued a civil investigative demand for records related to Sham’s size representations, including any legal memoranda Sham used in self-certifying as a WOSB.



Polling Question 1 - In this scenario, is the government immediately entitled to both memoranda it requested?

Yes

No

Maybe

Start the presentation to see live content. Still no live content? Install the app or get help at Pollev.com/app

Total Results



Crime-Fraud Exception

- *United States v. Gorski*, 807 F.3d 451, 460 (1st Cir. 2015)

The crime-fraud exception “withdraws protection where the client sought or employed legal representation in order to commit or facilitate a crime or fraud.” The party invoking the crime-fraud exception “must make a prima facie showing: (1) that the client was engaged in (or was planning) criminal or fraudulent activity when the attorney-client communications took place; *and* (2) that the communications were intended by the client to facilitate or conceal the criminal or fraudulent activity.”

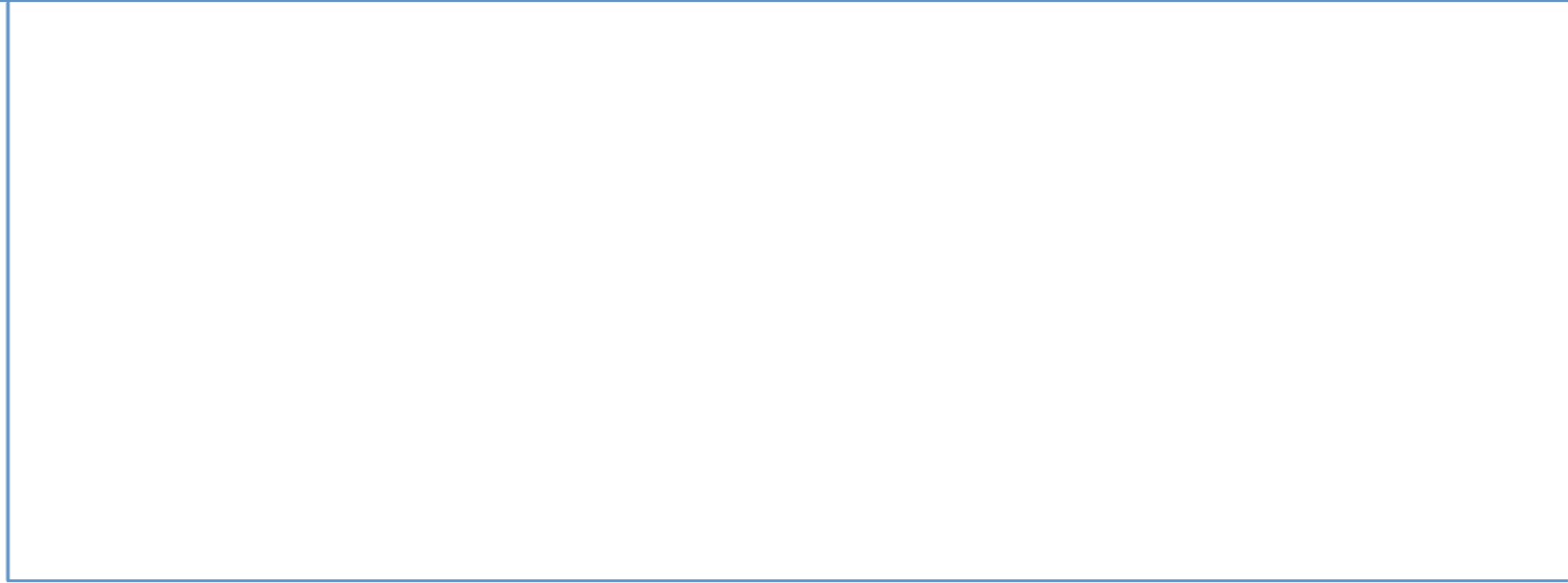


Polling Question 2 - Did Skip violate his ethical obligations by not withdrawing from the representation?

Yes

No

Maybe





Ethical Obligation

- **Virginia Rule 1.2 Scope of Representation**

(c) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.



Truthfulness

- **Virginia Rule 4.1 Truthfulness in Statements to Others**

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of fact or law; or

(b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.



Truthfulness

- **Virginia Rule 4.1 Truthfulness in Statements to Others**

[Comment 1] A lawyer is required to be truthful when dealing with others on a client's behalf, but ***generally has no affirmative duty to inform an opposing party of relevant facts.*** A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. ***Misrepresentations can also occur by failure to act or by knowingly failing to correct false statements made by the lawyer's client or someone acting on behalf of the client.***



Withdrawal

- **Virginia Rule 1.6 Confidentiality of Information**

[Comment 9] ***If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).***

[Comment 9a] After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

[Comment 9b] Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).



Withdrawal

- **Virginia Rule 1.16 Declining or Terminating Representation**

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, ***shall withdraw from the representation of a client if:***

- (1) ***the representation will result in violation of the Rules of Professional Conduct or other law;***
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), ***a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client,*** or if:

- (1) ***the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is illegal or unjust;***
- (2) ***the client has used the lawyer's services to perpetrate a crime or fraud;***
- (3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
- (4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client;
or
- (6) other good cause for withdrawal exists.



Scenario 1.1

- In response to the CID, Sham hires its first in-house attorney, Genny Counsel. Genny decides to conduct an investigation into Sham's self-certification. After interviewing a number of current and former employees, Genny realizes that Sham never really qualified as a WOSB. Instead, under pressure to increase sales, Sham's VP apparently failed to disclose to Skip that Sham's principal owner also owned another business in a similar field, Spam, which combined with Sham well exceeded the revenue size standard for Sham's NAICS code. Skip was not aware of Spam when he wrote his opinion letter.
- After Genny raises this issue with Skip, Skip advises Sham to make a mandatory disclosure to the government on all of the contracts awarded after his original memorandum. Genny passes on this recommendation to Sham's (and Spam's) CEO and Board of Directors.

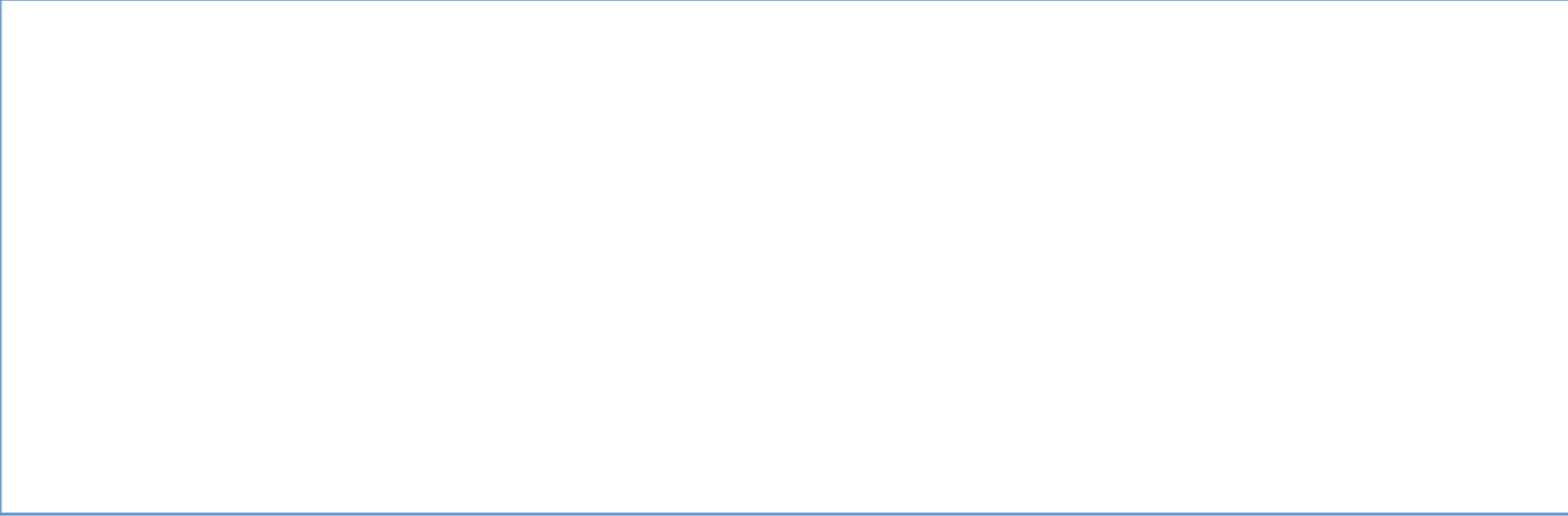


Polling Question 3 - Do these additional facts change the application of the crime-fraud exception to Skip's original memo?

Yes

No

Maybe



Start the presentation to see live content. Still no live content? Install the app or get help at PollEv.com/app

Total Results



Crime-Fraud Exception

- *United States v. Gorski*, 807 F.3d 451, 460 (1st Cir. 2015)

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Polling Question 4 - Are the requirements of a mandatory disclosure met?

Yes

No

Maybe





Mandatory Disclosure Rule

- FAR 52.203-13(b)(3)(i)

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).



Mandatory Disclosure Rule

- The FAR requires **mandatory disclosures** and penalizes a contractor for:

Knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of —

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

(B) Violation of the civil False Claims Act (31 U.S.C. 3729-3733); or

(C) Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in 32.001.

FAR 9.406-2(b)(1)(vi) (debarment); FAR 9.407-2(a)(8) (suspension).

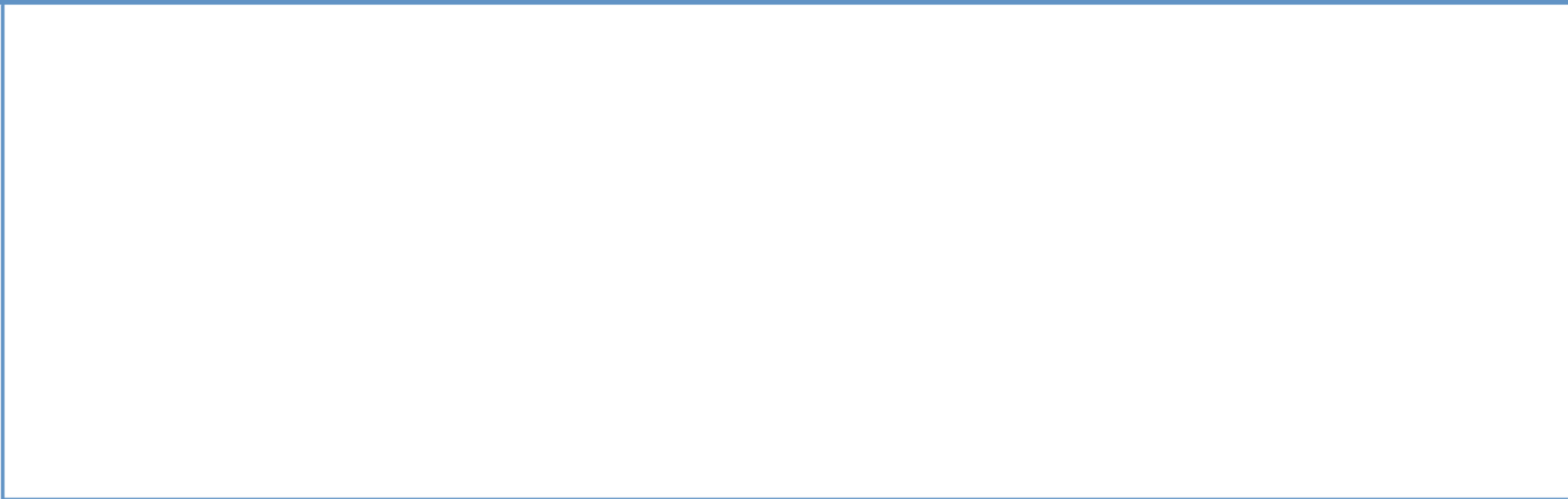


Polling Question 5 - Does Skip have a duty to withdraw if Sham/Spam refuses to follow his advice regarding making a mandatory disclosure?

Yes

No

Maybe





Withdrawal

- **Virginia Rule 1.6 Confidentiality of Information**

[Comment 9] ***If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).***

[Comment 9a] After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

[Comment 9b] Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).



Withdrawal

- **Virginia Rule 1.16 Declining or Terminating Representation**

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- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
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- (2) ***the client has used the lawyer's services to perpetrate a crime or fraud;***
- (3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
- (4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client;
or
- (6) other good cause for withdrawal exists.



Polling Question 6 - If Genny's internal reporting is ignored, and Sham continues to bid on WOSB contracts, does Genny have a duty to withdraw?

Yes

No

Maybe

Start the presentation to see live content. Still no live content? Install the app or get help at PolleEv.com/app

Total Results



Withdrawal

- Virginia Rule 1.6 Confidentiality of Information

[Comment 9] ***If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).***

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[Comment 9b] Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).



Scenario 1.2

- Fast-forward 6 months. Sham's VP has been indicted for criminal fraud against the U.S. Skip has since moved from Stodgy to Greengrass, and Greengrass seeks to protest a non-set-aside contract award to Sham on behalf of Soreloser, Greengrass's client. Soreloser is challenging the responsibility determination of Sham. Soreloser claims Sham lied to obtain previous government contracts, based on a public news report of the indictment and Sham's SAM.gov registration. Proposals were due one month after the indictment was announced. Sham's current SAM.gov registration does not disclose a "principal's" indictment related to a government contract. Stodgy, which still represents Sham on this new full-and-open contract award, moves to disqualify Greengrass based on Skip's former representation.

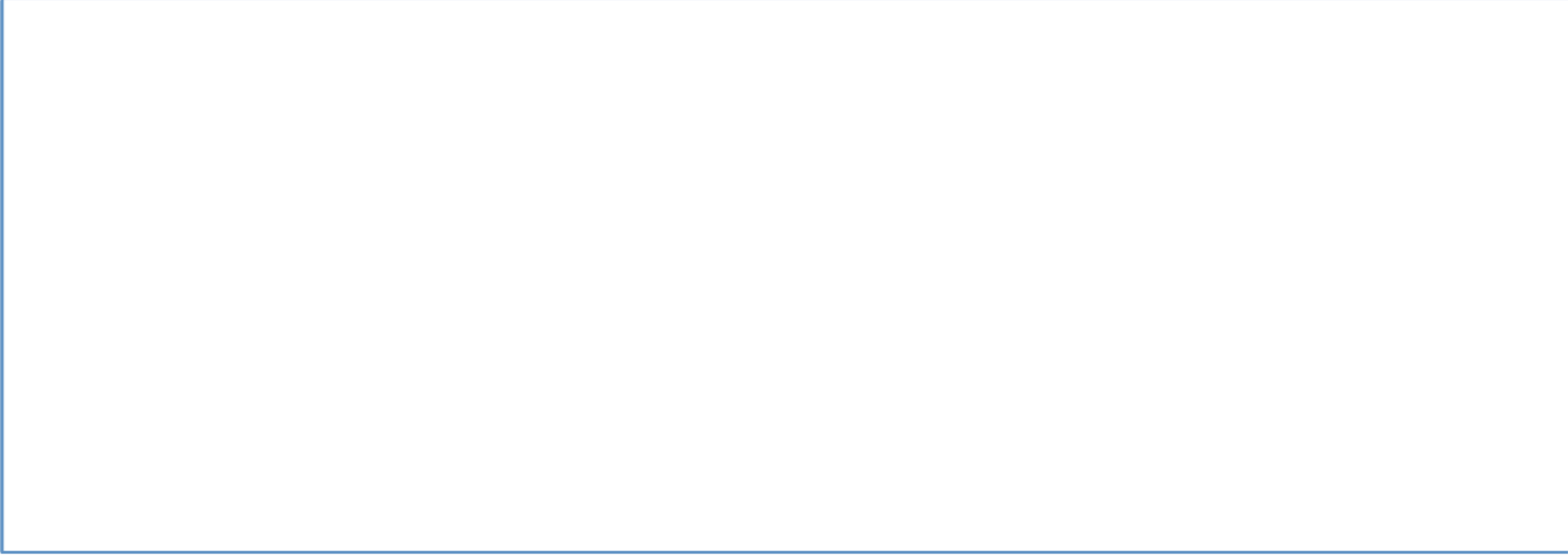


Polling Question 7 - Should Greengrass be disqualified from representing Soreloser in the bid protest?

Yes

No

Maybe





FAR Responsibility Determinations

- **FAR 9.103** (Government policy of affirmative responsibility determinations)
 - (a) Purchases shall be made from, and contracts shall be awarded to, ***responsible prospective contractors only***.
 - (b) No purchase or award shall be made unless the contracting officer makes an ***affirmative determination of responsibility***. In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility. If the prospective contractor is a small business concern, the contracting officer shall comply with subpart 19.6, Certificates of Competency and Determinations of Responsibility. (If Section 8(a) of the Small Business Act (15 U.S.C. 637) applies, see Subpart 19.8.)
 - (c) The award of a contract to a supplier based on lowest evaluated price alone can be false economy if there is subsequent default, late deliveries, or other unsatisfactory performance resulting in additional contractual or administrative costs. While it is important that Government purchases be made at the lowest price, this does not require an award to a supplier solely because that supplier submits the lowest offer. ***A prospective contractor must affirmatively demonstrate its responsibility, including, when necessary, the responsibility of its proposed subcontractors.***



Conflicts of Interest

- **Virginia Rule 1.7 Conflict of Interest: General Rule**

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) ***there is significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person*** or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if each affected client consents after consultation, and:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) ***the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal***; and
- (4) the consent from the client is memorialized in writing.



Conflicts of Interest

- **Virginia Rule 1.7 Conflict of Interest: General Rule**

[Comment 23] Paragraph (a)(1) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by paragraph(a)(2). An impermissible conflict may exist by reason of ***substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question.*** Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. ***On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met.***



Conflicts of Interest

- See *FMS Inv. Corp. v. United States*, 137 Fed. Cl. 99 (2018) (disqualifying counsel in bid protest due to violations of Model Rule 1.7)
 - Protestants were originally aligned during first round of protests, but then interests diverged later, and outside counsel disparaged and sued one client on behalf of another. The law firm failed to obtain consent to the conflict and had flaws in its conflict check system.
 - “While the Court acknowledges that it is difficult to foresee *how* the parties may realign in a bid protest, it is certainly foreseeable that they *would* realign in a bid protest, especially in one involving an IDIQ contract with multiple offerors and awardees like the one at issue here. Pillsbury’s claim that it could not have possibly foreseen an eventual realignment of parties in this litigation at the outset of this bid protest—particularly in a bid protest that appears to have an affinity for corrective action—is ignorant and careless. Awards are granted, awards are challenged, corrective action is taken, new awards are granted, new awards are challenged, plaintiffs become defendant-intervenors and vice versa, and the cycle repeats; such is the life of a bid protest in this Court.”



Other Ethical Issues in Government Contracting

- Diligence in Protest Deadlines (Rule 1.3)
- Internal Investigations (*Upjohn* Warnings; At-Issue Waiver; Rule 1.13)
- Prospective Protestors (Rule 1.18)
- Litigation Finance of Qui Tam Suits (Rules 1.2, 1.8)



Diligence

- Virginia Rule 1.3 Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

[Comment 3] Perhaps no professional shortcoming is more widely resented than procrastination. ***A client's interests often can be adversely affected by the passage of time or the change of conditions;*** in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.



Internal Investigations

- *Upjohn v. United States*, 449 U.S. 383 (1981) (established the standard practice now followed by most lawyers to advise an employee at the beginning of an interview that lawyers represent the corporation and not the employee individually, and that the corporation therefore controls the attorney-client privilege).
- Compare Virginia Rule 1.13(d)

In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client **when it is apparent** that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

- ...with Model Rule 1.13(f)

In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client **when the lawyer knows or reasonably should know** that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.



Internal Investigations

- “At-Issue” Waiver Issues

Corporations may protect their privileges without manipulation simply by being forthright with their regulators and identifying material as to which they claim privilege at the time they submit their voluntary disclosure reports. They will, of course, bear the risk that their reports will not be accepted as full disclosures. ***But if they choose to make a pretense of unconditional disclosure***, they bear another risk—that we will imply a waiver of privilege with respect to any material necessary for a fair evaluation of their disclosures.

In re Kellogg Brown & Root, Inc., 796 F.3d 137, 147 (D.C. Cir. 2015).



Prospective Protestors

- **Virginia Rule 1.18 Duties to Prospective Client**

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) ***Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation***, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or

(2) ***the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client***; and

(i) the disqualified lawyer is timely screened from any participation in the matter; the disqualified lawyer reasonably believes that the screen would be effective to sufficiently protect information that could be significantly harmful to the prospective client; and

(ii) written notice that includes a general description of the subject matter about which the lawyer was consulted and the screening procedures employed is promptly given to the prospective client.



Prospective Protestors

- Virginia Rule 1.18 Duties to Prospective Client

[Comment 4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should ***limit the initial interview to only such information as reasonably appears necessary*** for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[Comment 5] ***A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter.*** If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

Questions?



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