ArentFox Schiff LLP
Attorneys

# Kevin R. Pinkney

PARTNER AND GOVERNMENT CONTRACTS PRACTICE LEADER

Kevin represents Government contractors in audits, investigations, and all other areas of Government contracting. He also handles software audits – he represented Mars, Inc. and Oregon in high-profile disputes with Oracle, and has defended software audits involving claims exceeding $3.2 billion.



## Industries

National Security

## Practices

Government Contracts

## Education

Harvard Law School, JD, 2002

Brigham Young University, BS, Magna Cum Laude, 1997


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Kevin calls on his 20 years of experience – advising on M&A, challenging procurement decisions, defending and responding to subpoenas, conducting internal investigations, litigating disputes, and providing regulatory advice – to help clients grow their businesses and craft solutions to resolve the toughest issues that arise at all stages of the contract and grant life cycle.

Kevin has been at the forefront of the recent resurgence of the Government's use of the Defense Production Act to advance industrial policy, where he has negotiated dozens of transactions involving *non-dilutive* capital injections ranging from $15 million to $350 million.

Kevin advises clients on the Government's rights in intellectual property that arise when Government funds are used to invent or develop technical data and software, and he assists clients in developing and pursuing strategies to protect intellectual property rights. He also spends significant time advising on cybersecurity rules that apply when processing, transmitting, or storing Government data.

In addition, Kevin advises clients in regard to the full range of public policies that are advanced by the procurement system, including: domestic preferences (Buy American Act, Trade Agreements Act, Berry Amendment, etc.); small business and small disadvantaged business preferences; and labor and employment policies (EO/AA; prevailing wages; SOFAs). He counsels commercial companies entering the Government space and holding GSA schedule contracts.

## Client Work

**Cost recovery and retaining funds subject to audit/investigation** . Representative matters: DCAA cost disallowance for change orders on aircraft carrier repair contract (persuaded AUSA all costs were allowable); CAS 401 noncompliance of nuclear detection equipment manufacturer (showed no noncompliance, recovered > $3 million); adequacy of IRAD documentation (equipment manufacturer); allowability of IRAD costs (software developer); allowability and allocability of payment of class action settlement brought by firefighters on military bases in Iraq (recovered > $35 million); internal review of cost accounting practices of one of the largest transit agencies in U.S. and preparation of written policies and procedures to ensure future compliance; differing site conditions claims (multiple clients and agencies); SCA price adjustments (multiple clients and agencies); uncompensated overtime and/or adequacy of time-keeping system (multiple clients and agencies);

and adequacy of documents supporting allowable costs (multiple clients, agencies and FAR cost principles). Kevin also advised on high-profile whistleblower suits and Congressional investigations, including: U.S. embassy in Kabul (FCA cases, Department of State investigation, and Congressional review); Afghanistan-related matters (allegations of Taliban in work force; tax law changes; demining); and contracts with NSA programs (Snowden).

**Software license audits**. Representative matters:

- Counsel to Mars, Inc. for all stages of the software license audit that culminated in the *Mars v. Oracle* lawsuit.
- Negotiated with Oracle an Unlimited License Agreement that resolved six lawsuits arising out of Oracle's work on a state Affordable Care Act website. The client wrote: "Kevin's professionalism, manner and attention to detail were key to getting this done. Late hours, early mornings, weekends, Kevin worked meticulously on behalf of [the client] to ensure critical terms were preserved and the deal stayed on track." "[H]is understanding of the complex business issues and relationships, coupled with his ability to work through the technical details, were extraordinary."
- Internal investigation of potential "indirect use" of software across multinational company with over 400 sites. Developed licensing strategy and negotiated licensing terms to permit indirect use of software at no additional cost to the client. The Chief Digital Officer described Kevin's approach to mitigating risk of claims of indirect access of the type that SAP pursued in the *SAP v. Diageo* case as "genius."
- Internal investigations of purportedly decommissioned software, and resolve audits that include such decommissioned software (multiple clients).
- Defend software license and disputes, and/or negotiate software licenses involving Oracle, SAP, Microsoft, IBM, Citrix, Symantec, Deloitte, and other software producers (multiple clients).

**Rights in intellectual property; cybersecurity**. Representative industries and subject matters: heat-resistant UAV weapons pods (SBIR funding); gun sights operating in IR/UV spectrum; flu vaccines (clinical trials at military medical treatment facilities); ScanEagle UAV (patent infringement action against U.S. and Boeing in Court of Federal claims); dust monitoring equipment (IRAD funding); MEMS optical sensors (subcontracts with system integrator); facial recognition software and technology (primary research through to sale to Govt); texting service used to protect Super Bowl (NIST rules for handling FBI criminal history information); DOD cybersecurity rules – applicability and implementation (multiple clients).

**Other areas procurement system advances public policy**. Representative matters:

- Domestic preferences: non-U.S. office supplies (FCA suit and internal investigation); laboratory equipment (policies and procedures for Fortune 100 company); pharmaceutical APIs (multiple clients); spectrometers (substantial transformation analysis); subway tunnel liners (Buy America Act analysis); specialty thermoplastics (Berry Amendment).
- Small business and small disadvantaged business preferences: affiliation rule (familial relationship; ostensible subcontractor; etc.); joint venture agreements and mentor-protégé agreements (multiple clients); small business subcontracting plans (almost all clients to whom we provide ethics and compliance advice).
- Labor and employment: equal opportunity and affirmative action requirements (compliance and investigations); price adjustments for changed wages of foreign workers at Diego Garcia; SCA wage adjustments for Federal Protective Services (multiple states and locations); deploying U.S. workers under SOFAs (Germany, Italy, Japan, etc.); deploying non-local nationals under SOFAs and UN mandates (Sudan, South Sudan, Mali, etc.); definition of "subcontractor."
- Commercial item purchasing: SAM registration (due diligence prior to becoming Govt contractor); GSA/VA federal supply schedules; price reduction clause (compliance, investigations and FCA suits); definitions of "commercial" and "COTS"; flowdowns and commercial item subcontracting.

## Previous Work

Immediately prior to joining ArentFox Schiff, Kevin was co-founder and general counsel of a biotechnology firm in the veterinary diagnostics industry. Kevin began the private practice of law as an associate at a prominent national law firm, where he practiced in the areas of Government contracts and export control. Immediately following law school, Kevin clerked for the Honorable Edith Brown Clement, U.S. Court of Appeals for the Fifth Circuit, in New Orleans, Louisiana.

## Professional Activities

Kevin is a member of the American Bar Association, Public Contract Law Section.

## Bar Admissions

District of Columbia
Virginia

## Court Admissions

US Court of Federal Claims