

Government Contracts 101: Back to Basics

Washington, D.C. | September 21, 2022

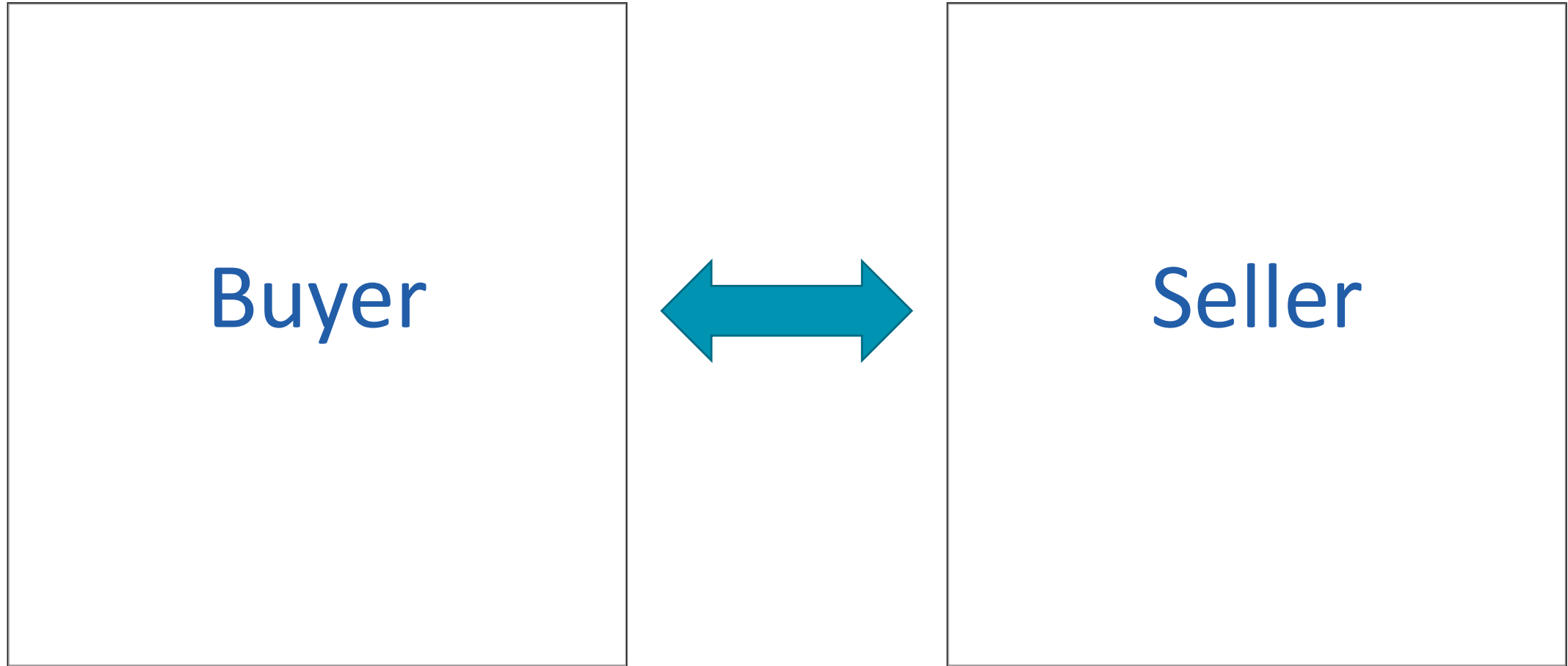


Welcome and Overview

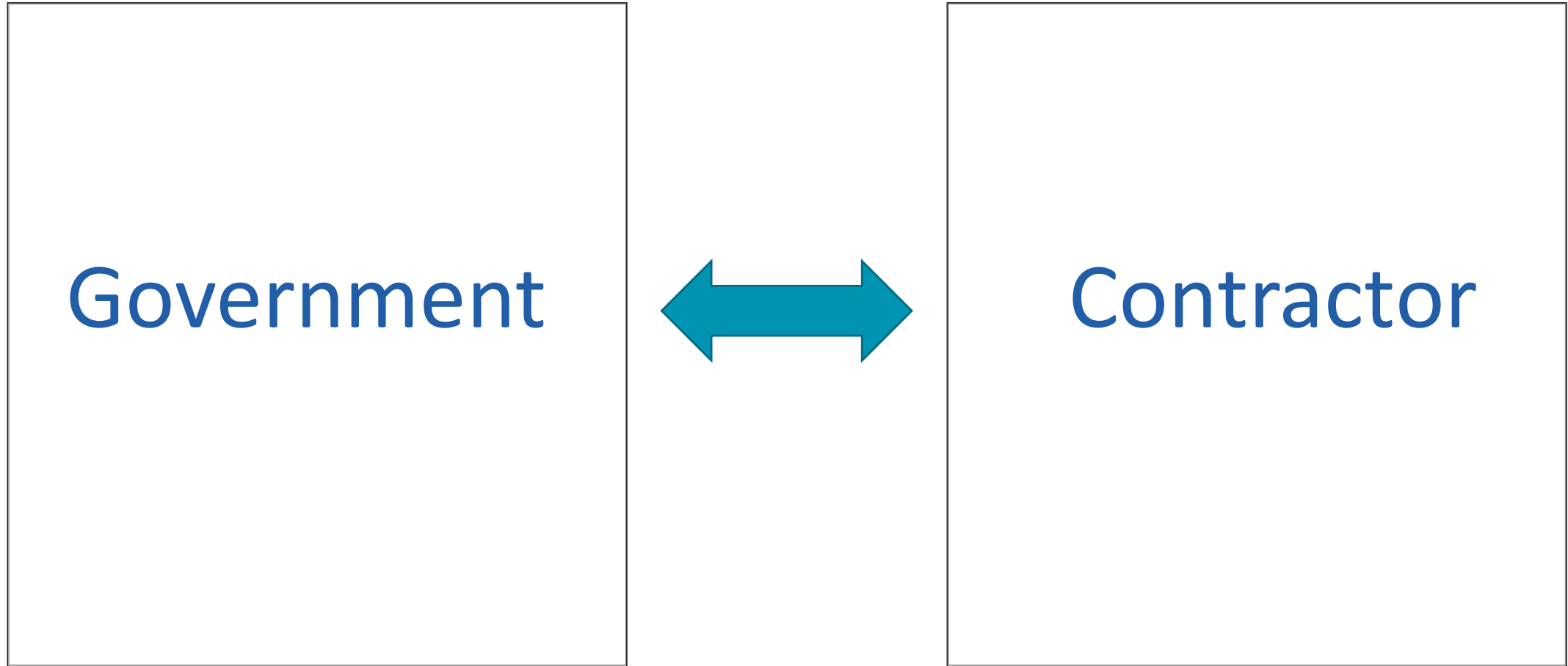
Peter Eyre



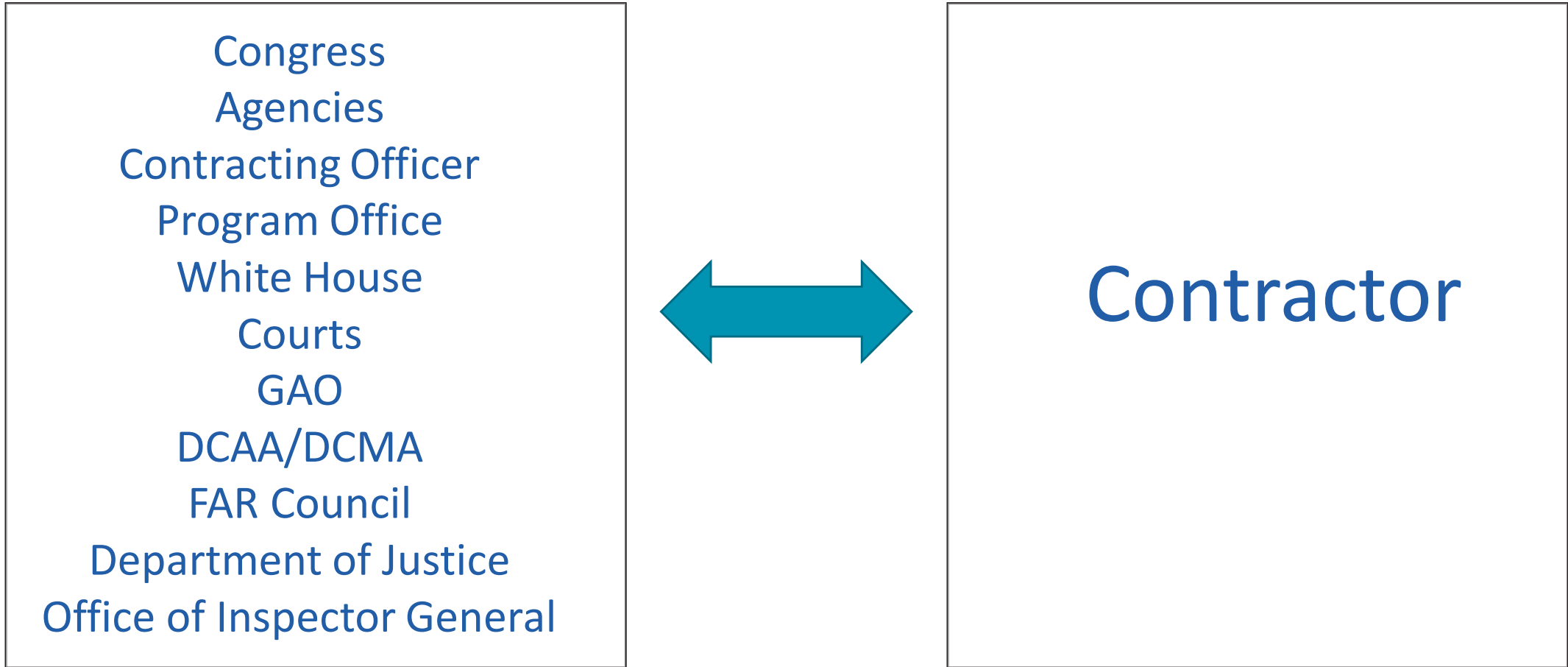
Commercial Transaction



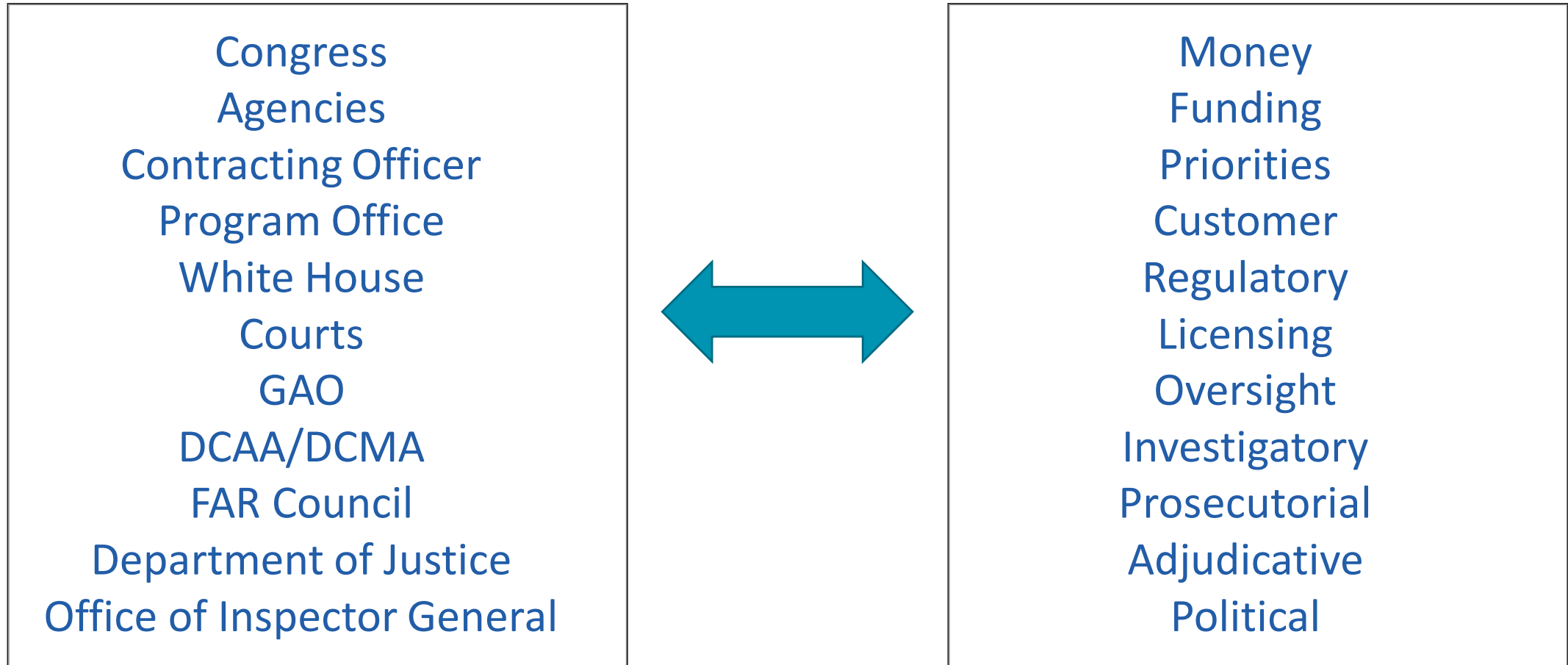
Government Contracts Transaction



Government Contracts Transaction



The Government Plays Many Roles



The Landscape

- U.S. Government purchases more than \$500 billion/year from the private sector
- Lots of opportunities as a prime or lower tier contractor



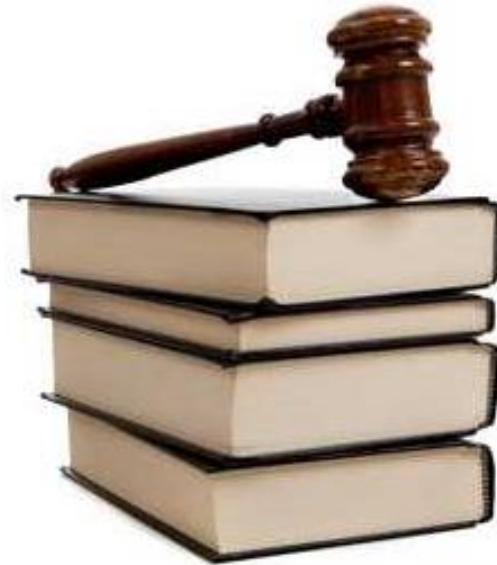
Public Sector Contracts Are Unique

- Special statutes, regulations, and contract terms, e.g.,:
 - Convenience terminations
 - Unilateral changes
 - Certain terms unenforceable
 - Implementation of social policies
- Litigation limits (sovereign immunity)
- Limitations on authorized representatives



Government Enforcement Tools

- Audits and investigations
 - IGs, DOJ, FBI, DCAA
- Federal & State Statutes
 - False Claims Acts
 - False Statements Acts
- Civil False Claims Act
- Mandatory Disclosure
- Suspension & Debarment
- Contract Termination
- Past Performance Reviews



Today's Agenda

- Foundational Statutes and the FAR
- Common Compliance Issues
- Source Selection and Bid Protests
- Global Sourcing & National Security
- Information Risk Management & Security
- Cost & Pricing
- Small Business
- Government Contracts M&A
- Claims
- Intellectual Property Rights
- Procurement Fraud & Enforcement



Questions?



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The Foundations of Government Contracting

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Per Midboe

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Foundational Concepts

“When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.”

Lynch v. United States, 292 U.S. 571, 579 (1934)



Foundational Concepts

“Men must turn square corners when they deal with the Government.” *Rock Island, A. & L. R. Co.*, 254 U.S. 141, 143 (1920)

But:

“[T]here is no reason why the square corners should constitute a one-way street.” *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 388 (1947) (J. Jackson *dissenting*)

“While it is true enough, . . ., that one who deals with the Government may need to ‘turn square corners,’ . . ., he need not turn them twice.” *United States v. Winstar Corp.*, 518 U.S. 839, 922 (1996) (J. Scalia *concurring*)



Legal Authority to Contract

- Well established that Government has plenary authority to contract.
- BUT:
 - Sovereign is generally immune from suit
 - Congress controls the purse
 - Limits on authority



Limits on Authority - Agency

- Statutory restrictions must be followed
 - *Christian Doctrine*
- Consequences of “illegal” contract:
 - *Void ab initio*
 - Voidable



Limits on Authority - Personnel

“The Government is too vast, its operation too varied and intricate, to put it to risk of losing that which it holds for the nation as a whole because of the oversight of subordinate officials.” *Montana Power Co. v. Federal Power Comm.*, 185 F.2d 491, 497 (D.C. Cir. 1950)

- Government agents must have actual authority;
- Agency concept of apparent authority does not apply to agents of the government.
- “It is well-settled, however, that government officials are presumed to act conscientiously and in good faith in the discharge of their duties.” *L.P. Consulting Group, Inc.*, 66 Fed. Cl. 238 (2005).



Practical Exercise



- **Hypo:** CO designates a Contracting Officer Representative (COR) for purposes of contract administration. During the course of contract performance, COR tells contractor that the government will absolutely need additional work, and authorizes the contractor to provide additional work. Contractor performs additional work at the COR's direction.
- **Any risks?**

Appropriations

- Anti-Deficiency Act – USG must have available appropriations in order to commit funds for procurement
- Impoundment
 - Procedures for compelling Executive to spend funds appropriated



Challenging Government Actions

- Waivers of sovereign immunity
–limited
- Sovereign Acts Doctrine – when is USG performance excused because of legislative or regulatory action.
See United States v. Winstar Corp., supra



Foundational Statutes and Regulations



Foundational Statutes (Sample)

Basic Procurement Statutes

- Armed Services Procurement Act (ASPA) of 1947, Title 10
- Federal Property and Administrative Service Act (FPASA), Title 41

Evolutionary Procurement Statutes

- Office of Federal Procurement Policy Act
- Competition in Contracting Act (CICA) of 1984
- Federal Acquisition Streamlining Act (FASA), 1994

Longstanding Regulatory Statutes

- Anti-Assignment Act
- Buy American Act of 1933 (BAA)
- Truth in Negotiations Act of 1962 (TINA)
- Defense Production Act of 1950



Foundational Statutes (Sample)

Integrity Statutes

- False Claims Act (FCA)
- Procurement Integrity Act (PIA)
- Anti-Kickback Act

Jurisdictional Statutes

- Tucker Act
- Contract Disputes Act (CDA) of 1978

Specialized (Socio-Economic) Statutes (Just a Few Examples)

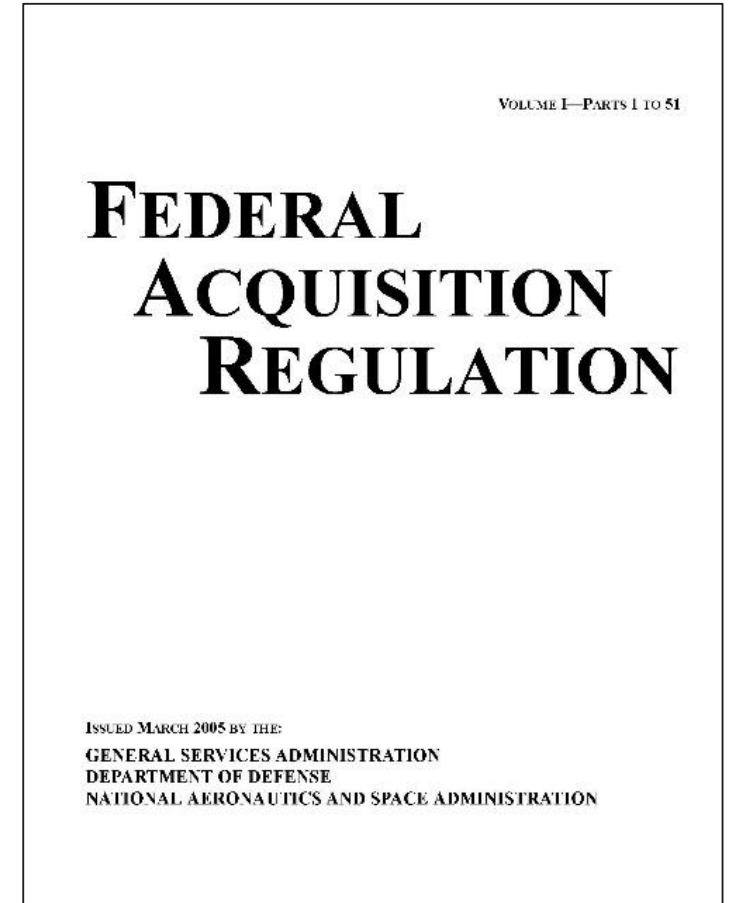
- Small Business Act (SBA)
- Service Contract Act (SCA)
- Javits-Wagner-O'Day Act (Ability One)

Annual Authorization and Appropriation Acts



Federal Acquisition Regulation (FAR)

- Formally published in Code of Federal Regulations (CFR) at Title 48, Chapter 1
- Establishes uniform policies and procedures for acquisition by all federal agencies
- Basic regulation applicable to acquisition of supplies and services
- “Contracting by regulation” – 90% or more of the clauses in government contracts are prescribed by regulation
- Nearly 2,000 pages



Organization of the FAR

- Subchapter A – General
 - Part 1 – FAR System
 - Part 2 – Definitions of words and terms
 - Part 3 – Improper Business Practices & PCI
 - Part 4 – Administrative Matters
- Subchapter B – Competition and Acquisition Planning
 - Part 5 – Publicizing Contract Actions
 - Part 6 – Competition Requirements
 - Part 7 – Acquisition Planning
 - Part 8 – Required Sources of Supplies and Services
 - Part 9 – Contractor Qualifications
 - Part 10 – Market Research
 - Part 11 – Describing Agency Needs
 - Part 12 – Acquisition of commercial items



Organization of the FAR

- Subchapter C – Contracting Methods and Contract Types
 - Part 13 – Simplified Acquisition Procedures
 - Part 14 – Sealed Bidding
 - Part 15 – Contracting by Negotiation
 - Part 16 – Types of Contracts
 - Part 17 – Special Contracting Methods
 - Part 18 – Emergency Acquisitions
- Subchapter D – Socioeconomic Programs
 - Part 19 – Small Business Programs
 - Part 22 – Application of Labor Law to Gov Acquisitions
 - Part 23 – Environment, Occupational Safety, Drug-Free
 - Part 24 – Protection of Privacy and Freedom of Information
 - Part 25 – Foreign Acquisition
 - Part 26 – Other Socioeconomic Programs



Organization of the FAR

- Subchapter E – General Contracting Requirements
 - Part 27 – Patents, Data, and Copyrights
 - Part 28 – Bonds and Insurance
 - Part 29 – Taxes
 - Part 30 – Cost Accounting Standards Administration
 - Part 31 – Cost Accounting Standards (CAS)
 - Part 32 – Contract Financing
 - Part 33 – Protests, Disputes, and Appeals
- Subchapter F – Special Categories of Contracting
 - Part 34 – Major System Acquisition
 - Part 35 – Research and Development Contracting
 - Part 36 – Construction and A&E Contracts
 - Part 37 – Service Contracting
 - Part 38 – Federal Supply Schedule Contracting
 - Part 39 – Acquisition of Information Technology
 - Part 41 – Acquisition of Utility Services



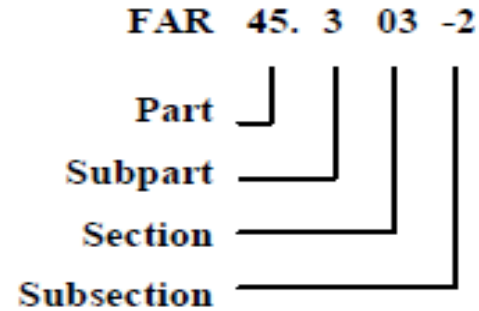
Organization of the FAR

- Subchapter G – Contract Management
 - Part 42 – Contract Administration and Audit Services
 - Part 43 – Contract Modifications
 - Part 44 – Subcontracting Policies and Procedures
 - Part 45 – Government Property
 - Part 46 – Quality Assurance
 - Part 47 – Transportation
 - Part 48 – Value Engineering
 - Part 49 – Termination of Contracts
 - Part 50 – Extraordinary Contractual Actions
 - Part 51 – Use of Government Resources by Contractors
- Subchapter H – Clauses and Forms
 - Part 52 – Solicitation Provisions and Contract Clauses
 - Part 53 – Forms

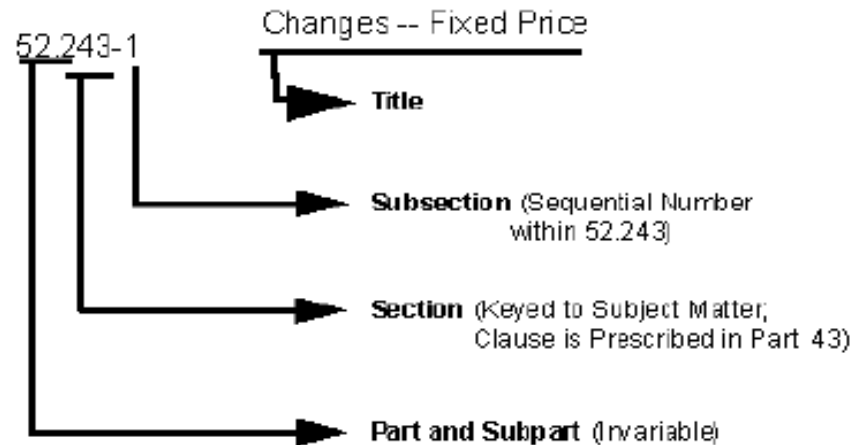


Organization of the FAR

- Citing the FAR:



- Standard provisions and clauses numbered 52. 2 xx -xx



Agency Supplements

<u>Ch.</u>	<u>Agency/Department</u>
2	Defense
3	Health & Human Servs.
4	Agriculture
5	General Servs Admin
6	State
7	Agency for Int'l Dev
8	Veterans Affairs
9	Energy
10	Treasury
12	Transportation
13	Commerce
14	Interior
15	Environ Protection Agency
16	OPM – Fed EE Health Benes
17	Office of Personnel Mgmt
18	Nat'l Aero & Space Admin
19	Broadcasting Bd of Governors

<u>Ch.</u>	<u>Agency/Department</u>
20	Nuclear Reg Commission
21	OPM – Fed Emp Gp Life Ins
23	Social Security Admin
24	Housing & Urban Dev
25	Nat'l Science Foundation
28	Justice
29	Labor
30	Homeland Security
34	Education
44	Fed Emergency Mgmt Agency
51	Army (“AFARS”)
52	Navy (“NMCARS”)
53	Air Force (“AFFARS”)
54	Defense Logistics (“DLAD”)



DoD FAR Supplement (DFARS)

- 48 CFR Chapter 2 – over 1500 pages
 - Hundreds more standard clauses
 - Standard clauses numbered 252.xxx-xx
- Additional policies implemented
 - *E.g.*, Specialty metals
- Annual DoD authorization acts
 - Means regular changes



Parts of a Contract



Standard Contract Format – SF33

SOLICITATION, OFFER AND AWARD		1. THIS CONTRACT IS A RATED ORDER UNDER DSAS (15 CFR 700)		RATING	PAGE	OF	PAGES
2. CONTRACT NUMBER	3. SOLICITATION NUMBER	4. TYPE OF SOLICITATION <input type="checkbox"/> SEALED BID (FB) <input type="checkbox"/> NEGOTIATED (RFP)		5. DATE ISSUED	6. REQUISITION/PURCHASE NUMBER		
7. ISSUED BY		CODE	8. ADDRESS OFFER TO (if other than item 7)				

NOTE: In sealed bid solicitations "offer" and "offeror" mean "bid" and "bidder".

SOLICITATION

9. Sealed offers in original and copies for furnishings the supplies or services in the Schedule will be received at the place specified in item 8, or if hand carried, in the depository located in _____ state _____ local time _____

CAUTION - LATE Submissions, Modifications, and Withdrawals: See Section L, Provision No. 52.214-7 or 52.215-1. All offers are subject to all terms and conditions contained in this solicitation.

10. FOR INFORMATION CALL:	A. NAME	B. TELEPHONE (NO COLLECT CALLS)		C. E-MAIL ADDRESS
	AREA CODE	NUMBER	EXTENSION	

11. TABLE OF CONTENTS							
(0)	SEC.	DESCRIPTION	PAGE(S)	(0)	SEC.	DESCRIPTION	PAGE(S)
	PART I - THE SCHEDULE				PART II - CONTRACT CLAUSES		
	A	SOLICITATION/CONTRACT FORM			I	CONTRACT CLAUSES	
	B	SUPPLIES OR SERVICES AND PRICES/COSTS			J	LIST OF DOCUMENTS, EXHIBITS AND OTHER ATTACH.	
	C	DESCRIPTION/SPEC'S WORK STATEMENT			K	LIST OF ATTACHMENTS	
	D	PACKAGING AND MARKING			L	REPRESENTATIONS AND INSTRUCTIONS	
	E	INSPECTION AND ACCEPTANCE			M	REPRESENTATIONS, CERTIFICATIONS AND OTHER STATEMENTS OF OFFERORS	
	F	DELIVERIES OR PERFORMANCE			N	INSTRUCTIONS, CONDITIONS, AND NOTICES TO OFFERORS	
	G	CONTRACT ADMINISTRATION DATA			O	EVALUATION FACTORS FOR AWARD	
	H	SPECIAL CONTRACT REQUIREMENTS					

OFFER (Must be fully completed by offeror)

NOTE: Item 12 does not apply if the solicitation includes the provisions at 52.214-16, Minimum Bid Acceptance Period.

12. In compliance with the above, the undersigned agrees, if this offer is accepted within _____ calendar days (if calendar days unless a different period is inserted by the offeror) from the date for receipt of offers specified above, to furnish any or all items upon which prices are offered at the set opposite each item, delivered at the designated point(s), within the time specified in the schedule.

13. DISCOUNT FOR PROMPT PAYMENT (See Section I, Clause No. 52.232-6)	10 CALENDAR DAYS (%)	20 CALENDAR DAYS (%)	30 CALENDAR DAYS (%)	CALENDAR DAY(S)
14. ACKNOWLEDGMENT OF AMENDMENTS (The offeror acknowledges receipt of amendments to the SOLICITATION for offers and related documents numbered and dated)	AMENDMENT NO.	DATE	AMENDMENT NO.	DATE

15A. NAME AND ADDRESS OF OFFEROR	CODE	FACILITY	16. NAME AND TITLE OF PERSON AUTHORIZED TO SIGN OFFER (Type or print)
15B. TELEPHONE NUMBER AREA CODE NUMBER EXTENSION	15C. CHECK IF REMITTANCE ADDRESS IS DIFFERENT FROM ABOVE - ENTER SUCH ADDRESS IN SCHEDULE.		17. SIGNATURE
			18. OFFER DATE

AWARD (To be completed by Government)

19. ACCEPTED AS TO ITEMS NUMBERED	20. AMOUNT	21. ACCOUNTING AND APPROPRIATION	
22. AUTHORITY FOR USING OTHER THAN FULL OPEN COMPETITION: <input type="checkbox"/> 10 U.S.C. 2304 (c) <input type="checkbox"/> 41 U.S.C. 3304(a) ()	23. SUBMIT INVOICES TO ADDRESS SHOWN IN (if copies unless otherwise specified)	(ITEM)	
24. ADMINISTERED BY (if other than item 7)	25. PAYMENT WILL BE MADE BY	CODE	
26. NAME OF CONTRACTING OFFICER (Type or print)	27. UNITED STATES OF AMERICA	28. AWARD DATE	

(Signature of Contracting Officer)

IMPORTANT - Award will be made on this Form, or on Standard Form 26, or by other authorized official written notice.

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Previous edition is unusable

STANDARD FORM 33 (REV. 6/2014)
Prescribed by GSA - FAR (48 CFR) 53.214 (c)

B – Contract Line Item Numbers (CLINs)

C – Statement of Work (SOW)

H – Special Clauses

I – Standard Clauses

K – Representations & Certifications

L – Instructions

M – Evaluation Factors

Attachments



Section B – CLINs

Section B - Supplies or Services and Prices					
ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0001	Basic Effort CPFF Scope of Work SW-IM-06-03, dated 01 Apr 03, titled "Display Services," incorporated herein and attached as set forth in Part III, Section J, hereof. PURCHASE REQUEST NUMBER: DS1031	29,978	DPPH		
				ESTIMATED COST	
				FIXED FEE	
				TOTAL EST COST + FEE	
	FOB: Destination				
ITEM NO	SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
0002	Data Items CPFF Contract Data Requirements List (CDRL), DD Form 1423, consisting of Line Items Nos. *001 through *004, incorporated herein and attached as set forth in				



Section C – SOW

W912CM-04-R-0028

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Section C - Descriptions and Specifications

DESCRIPTION/STATEMENT OF WORK

STATEMENT OF WORK C2 Support to MNF-I

1. Introduction. This statement of work focuses on providing the Assistant Chief of Staff (ACofS), C2, Multi-National Forces - Iraq (MNF-I) with intelligence operations support.

Identification.

Organization: Multi-National Forces – Iraq (MNF-I)

Location: Baghdad, Iraq (MNF-I AOR)

1.2 Scope of Work.

1.2.1 Background. The contractor shall provide personnel, management, and any other items and services not Government furnished, necessary to provide the ACofS, C2, MNF-I with intelligence operations support consisting of Interrogation Operations Support, Locally Employed Persons (LEP) Screening, Open Source Intelligence (OSINT), Special Security Office (SSO), Human Intelligence (HUMINT) Support Teams (HST), and Intelligence Support management and support; functioning as resident experts for the implementation of appropriate regulations and standard operating procedures within C2, MNF-I. Contractor shall perform from the offices of the MNF-I and designated interrogation facilities at various locations in Iraq. The Contractor shall provide the requested services, as directed by military authority, throughout the MNF-I area of responsibility (AOR) to assist in all aspects of intelligence support activities, in order to provide timely and actionable intelligence to the commander. The Contractor is responsible for providing administrative supervision for all contractor personnel. Administrative supervision includes performing tasks that free the individual to perform his or her duties (e.g., pay issues).



Section I – Standard Clauses

Section I - Contract Clauses

CLAUSES INCORPORATED BY REFERENCE

52.202-1	Definitions	DEC 2001
52.203-3	Gratuities	APR 1984
52.203-5	Covenant Against Contingent Fees	APR 1984
52.203-6	Restrictions On Subcontractor Sales To The Government	JUL 1995
52.203-7	Anti-Kickback Procedures	JUL 1995
52.203-8	Cancellation, Rescission, and Recovery of Funds for Illegal or Improper Activity	JAN 1997
52.203-10	Price Or Fee Adjustment For Illegal Or Improper Activity	JAN 1997
52.203-12	Limitation On Payments To Influence Certain Federal Transactions	JUN 1997
52.204-4	Printed or Copied Double-Sided on Recycled Paper	AUG 2000
52.209-6	Protecting the Government's Interest When Subcontracting With Contractors Debarred, Suspended, or Proposed for Debarment	JUL 1995
52.211-15	Defense Priority And Allocation Requirements	SEP 1990
52.215-2	Audit and Records--Negotiation	JUN 1999
52.215-8	Order of Precedence--Uniform Contract Format	OCT 1997
52.215-10	Price Reduction for Defective Cost or Pricing Data	OCT 1997
52.215-12	Subcontractor Cost or Pricing Data	OCT 1997
52.215-13	Subcontractor Cost or Pricing Data--Modifications	OCT 1997
52.215-14	Integrity of Unit Prices	OCT 1997
52.215-15	Pension Adjustments and Asset Reversions	DEC 1998
52.215-16	Facilities Capital Cost of Money	OCT 1997
52.215-17	Waiver of Facilities Capital Cost of Money	OCT 1997
52.215-18	Reversion or Adjustment of Plans for Postretirement Benefits (PRB) Other than Pensions	OCT 1997
52.215-20 Alt IV	Requirements for Cost or Pricing Data or Information Other	OCT 1997



Section L – Instructions

Section L - Instructions, Conditions and Notices to Bidders

SUBMISSION OF OFFERS

INSTRUCTIONS, CONDITIONS, AND NOTICES TO OFFERORS

1. General Instructions for the Preparation of Proposals.

This section provides instructions on how to prepare and submit a proposal in response to this solicitation. Offerors that do not meet the minimum mandatory requirements, as defined in Section C, Statement of Work, should not respond.

Notice to Foreign Contractors. Due to the security requirements specified in the Statement of Work (SOW), offers received from Foreign Contractors will not be considered.

Offers shall be sent to the attention of Ms. Liz Graves at the mailing address specified in Block 7 of the Standard Form 33 or the address listed at the end of this paragraph. The address for mail originating in Europe and being delivered via courier service is Wiesbaden Contracting Center, ATTN: Ms. Liz Graves, Division B, Team 1, Konrad-Adenauer Ring 39, 65187 Wiesbaden, Germany.

In addition to sending an offer via courier or mail, offerors shall send e-mail notification to 04R0028@rcc.wbn.usace.army.mil that an offer was sent and the day it was sent. Subject of e-mail shall be "Submission of Offer RFP W912CM-04-R-0028." Faxed offers are not authorized and will be rejected.

Questions Pertaining to the Solicitation. Offerors may submit questions pertaining to information in the solicitation. Questions shall be submitted via e-mail to 04R0028@rcc.wbn.usace.army.mil. The subject of the e-mail shall be "Questions – W912CM-04-R-0028." Questions shall annotate a reference to the specific solicitation element to which they pertain. All questions shall be submitted to ensure that they are received no later than 10 calendar days before the date for receipt of proposals. All questions and answers, and any resulting amendments, will be sent



Section M – Evaluation Factors

Section M - Evaluation Factors for Award

EVALUATION FACTORS AND BASIS

EVALUATION FACTORS FOR AWARD

This procurement is being conducted using formal source selection procedures. The Government intends to award one (but reserves the right to award more than one) contract for Intelligence Support Services including interrogators in support of Operation Iraqi Freedom and the Global War on Terrorism to the responsible offeror(s) whose proposal(s) conforming to the solicitation represent(s) the best overall value(s) to the Government as explained below. The Government will evaluate each proposal strictly in accordance with its content and will not assume that performance will include areas not specified in the offeror's proposal.

The offeror's proposal must demonstrate a clear understanding of the nature and scope of the work required. Failure to provide a realistic, reasonable, and complete proposal may reflect a lack of understanding of the requirements of the contract and may result in a determination that the offer is unacceptable.

The Government will not assess capability on a pass/fail basis, but will use its assessments of capability as a basis for comparing proposals to determine best value.

Evaluation Factors and Their Relative Importance. The evaluation factors are: Technical Proposal, Experience, Past Performance, Business Arrangement, and Cost/Price. Technical Proposal is approximately equal to the combined importance of Experience and Past Performance. Experience and Past Performance are approximately equal in importance. Cost/Price is approximately equal to the combined importance of Experience and Past Performance. Business Arrangement is less important than the other non-cost evaluation factors. The Government considers the non-cost factors, when combined, to be significantly more important than cost/price.

Evaluation Factors. The Government will evaluate proposals on the basis of the following factors and subfactors:

1. Technical Proposal (Factor). The Government will evaluate the completeness of the offer based on documentation provided. The evaluation will assess the technical advantages and proposal risks of each offer as they relate to the requirements contained in this solicitation. The subfactors are listed in descending order of



Which Clauses Apply?

FAR and FAR Supplement Clauses are Terms of the Contract

- Prime contracts – Government includes the relevant clauses in full text and/or by reference. You must go to the regulations to read the clauses.
- Signing proposal/accepting order will accept these clauses.

Public Policy Controls

- Omitted clauses required by statute or regulation may be incorporated by operation of law. *Christian doctrine.*
- Included clauses violative of statute or regulation may be read out of the contract.
- Incorrect clauses may be replaced with the correct ones.

<u>Regulatory Cite</u>	<u>Title</u>	<u>Date</u>
52.202-1	DEFINITIONS	NOV/2013
52.203-3	GRATUITIES	APR/1984
52.203-5	COVENANT AGAINST CONTINGENT FEES	MAY/2014
52.203-6	RESTRICTIONS ON SUBCONTRACTOR SALES TO THE GOVERNMENT	SEP/2006
52.203-7	ANTI-KICKBACK PROCEDURES	MAY/2014
52.203-8	CANCELLATION, RESCISSION, AND RECOVERY OF FUNDS FOR ILLEGAL OR IMPROPER ACTIVITY	MAY/2014
52.203-10	PRICE OR FEE ADJUSTMENT FOR ILLEGAL OR IMPROPER ACTIVITY	MAY/2014
52.203-12	LIMITATION ON PAYMENTS TO INFLUENCE CERTAIN FEDERAL TRANSACTIONS	OCT/2010
52.204-4	PRINTED OR COPIED DOUBLE-SIDED ON POSTCONSUMER FIBER CONTENT PAPER	MAY/2011
52.204-10	REPORTING EXECUTIVE COMPENSATION AND FIRST-TIER SUBCONTRACT AWARDS	OCT/2015
52.204-13	SYSTEM FOR AWARD MANAGEMENT MAINTENANCE	JUL/2013
52.209-6	PROTECTING THE GOVERNMENT'S INTEREST WHEN SUBCONTRACTING WITH CONTRACTORS DEBARRED, SUSPENDED, OR PROPOSED FOR DEBARMENT	OCT/2015
52.209-9	UPDATES OF PUBLICLY AVAILABLE INFORMATION REGARDING RESPONSIBILITY MATTERS	JUL/2013



Practical Exercise



- **Hypo #1:** Contractor to provide instructors for writing and communication courses at a government training facility. Government terminates contractor's participation in the program, but contract did not include any TFC clause. Contractor seeks lost profits. What's the likely result?
- **Hypo #2:** What if the reason behind the termination was that Government wanted to replace the contractor with the previous director of the training facility, who had retired a few years ago?

Flowing Down Contract Clauses



Challenges & Best Practices

Privity of Contract

- The Government only contracts with the prime, but wants to ensure that the whole supply chain supports the Government reaching its goals. This leads to flow-downs.

Potential Challenges

- Prime is responsible for its sub(s); subcontractors also have responsibility to flow down clauses to lower-tier sub(s)
- Identification of which vendors qualify as lower-tier subcontractors (and ensuring that a process is in place to make such identification)
- Knowing which clauses apply to subcontractors
- Dichotomy between contractor vs. subcontractor interests

Best Practices

- Do not fall into trap of flowing down EVERYTHING
- Conduct a multi-step analysis to determine what flows down



Multi-Step Analysis – What is a Subcontract?

- **Numerous definitions of subcontract/subcontractor**
- **May include vendors, distributors, brokers and suppliers**
- **FAR 44.101 defines subcontract as:**
 - Any contract as defined in subpart 2.1 entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.
- **FAR 44.101 defines subcontractor as:**
 - Any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.



Multi-Step Analysis – The Flow-down Process

- **What clauses must be flowed down?**
 - Text of the clause will indicate (“The Contractor shall include....”)
- **When must those clauses be flowed down?**
 - Be aware of “triggering” events, e.g., dollar thresholds and certain activities (sometimes, the prime contractor’s best judgment will need to be applied)
- **How must those clauses be flowed down?**
 - Verbatim, in substance, silence



Examples

- **FAR 52.203-13, Contractor Code of Business Ethics and Conduct**
 - (d) *Subcontracts*. (1) The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts that have a value in excess of \$5.5 million and a performance period of more than 120 days.
- **FAR 52.222-41, Service Contract Labor Standards**
 - (l) *Subcontracts*. The Contractor agrees to insert this clause in all subcontracts subject to the Service Contract Labor Standards statute.



Multi-Step Analysis – Other Considerations

- **Is the subcontract for a commercial item?**
 - FAR Part 12 requires only minimal flow-downs in commercial item subcontracts (*see* FAR 52.212-5(e) and 52.244-6)
- **Any optional clauses that the prime should consider flowing down?**
 - Termination for Convenience, Changes, Disputes



Tougher Question . . .

- What to do with a clause that is not required to be flowed down . . . But subcontractor should know about the requirement
 - 889 Part B – Prohibited Chinese Technology
 - Not a required flow-down to subcontractors
 - Only prime government contractors will have to ensure compliance with the prohibited “use” of covered telecommunications equipment BUT prime contractors may need to inquire with their subcontractors.



Questions?



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Common Compliance Issues

Laura Baker

Yuan Zhou

Tyler Brown

Rina Gashaw



Introduction

- Panelists: Yuan Zhou, Laura Baker, Rina Gashaw, Tyler Brown
- Roadmap:
 - Contract Management (reps & certs, OCIs, AKA)
 - Operations (gifts & gratuities, business systems rules, NISPOM)
 - Legal Considerations (small business considerations, export controls)
 - Procurement (domestic preferences, supply chain)
 - Human Resources (pay and benefits, hiring, record keeping and reporting)
 - Why Compliance Matters – Investigations & Disclosures



Why Compliance Matters—High Stakes and High Visibility

- U.S. Government purchases more than \$600 billion per year from the private sector
- Unique tools to investigate and enforce
 - Audit and investigations
 - False Claims Act (civil and criminal)
 - Mandatory disclosure
 - Suspension & debarment
 - Contract termination
 - Past-performance reviews
 - Non-responsibility determinations



Contract Management



Representations and Certifications – Overview

- Required for local, state, federal, and commercial work
- Necessary periodic updates
- A key element of risk in contracting



The Official U.S. Government System for:

Contract Opportunities

(was fbo.gov)

Contract Data

(Reports ONLY from fpds.gov)

Wage Determinations

(was wdol.gov)

Federal Hierarchy

Departments and Subtiers

Assistance Listings

(was cfda.gov)

Entity Information

Entity Registrations, Disaster Response Registry, Entity UEI and Exclusions

Entity Reporting

SCR and Bio-Preferred Reporting

Representations and Certifications – Common Types

- **FAR 52.209-5** – Certification Regarding Responsibility Matters
- **FAR 52.203-19** – Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements
- **FAR 52.203-11** – Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions
- **FAR 52.219-1** – Small Business Program Representations
- **FAR 52.222-25** – Affirmative Action Compliance
- **FAR 52.230-1** – Cost Accounting Standards Notices and Certification
- **FAR 52.203-2** – Certificate of Independence Price Determination



GSA Schedule Contract Obligations

- Wide scope of opportunity with additional strings attached
- Additional compliance obligations:
 - Pricing
 - Discounting
 - Labor Categories
 - Disclosures
 - Other



“Off-Limits” Information – Overview

What are the main sources of rules related to “off-limits” government or competitor information?

- **Procurement Integrity Act** (41 U.S.C. §§ 2101-2107)
 - Prohibitions on disclosing and obtaining procurement sensitive information, particularly source selection information and contactor bid or proposal information
 - FAR implementation at FAR 3.104
- Federal and state trade secrets laws



“Off-Limits” Information – Scope

What are the main types of “off-limits” information?

- Financial data
 - Including: indirect and direct labor rates and similar information, profit margins, and other sensitive economically valuable data not released to the public
- “Trade secrets” or “proprietary information”
 - For example: technical solutions, innovations, software, supplier base, customer lists
- “Inside” information
 - Regarding competitors, the procurement, etc.



“Off-Limits” Information – Scope

Other important considerations

- Source of the information is typically irrelevant
- Written *and* oral information are subject to regulations
- Spotting red flags:
 - Conversations that “never happened”
 - Proprietary or source selection sensitive legends
 - Hiring government personnel or competitor personnel for their “inside” knowledge
- Suspension and debarment risk



“Off-Limits” Information – Organizational Conflicts of Interest (OCI)

OCI as defined by FAR 2.101:

- *Organizational conflict of interest* means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person’s objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.
- Three categories of OCI:
 - Biased ground rules
 - Impaired objectivity
 - Unequal access to information



“Off-Limits” Information – Personal Conflicts of Interest (PCI)

PCI as defined by FAR 52.203-16

- *Personal conflict of interest* means a situation in which a covered employee has a financial interest, personal activity, or relationship that could impair the employee’s ability to act impartially and in the best interest of the Government when performing under the contract. (A de minimis interest that would not "impair the employee’s ability to act impartially and in the best interest of the Government" is not covered under this definition.)
- Enforced through a variety of separate restrictions applicable to U.S. government employees and to government contractors seeking to hire former U.S. government employees.



Anti-Kickback Act

41 U.S.C. §§ 8701-8707

- Improper intent can be inferred from the circumstances
- No bright line dollar value
- Improper benefit to employees *or* the company
- Anything of value given to improperly obtain or reward favorable treatment
 - Gifts and entertainment offered by vendors
 - Gifts and entertainment offered to prime contractors
 - Rebates and discounts
 - Volume-based reductions
 - Commission splitting



Operations



Gifts and Gratuities

- Basic rules
 - With few exceptions, cannot offer or give anything of value to a government employee
 - Government employees cannot accept gifts from prohibited sources (e.g., contractors) or gifts given because of the employee's official position
- What rules apply?
 - Criminal bribery and gratuities in 18 U.S.C. § 201
 - FAR Gratuities clause (52.203-3)
 - Office of Government Ethics regulation (5 C.F.R. § 2635)
 - Federal Executive Order for certain presidential appointees
 - State/local laws & regulations



Gifts and Gratuities

“Anything of value” includes food, alcohol, discounts, airplane tickets, lodging, samples, tradeshow entrance fees, transportation, training, tickets to theater and sporting events, flowers.



Gifts and Gratuities

- Pitfalls
 - “Everyone does it”
 - “We’re friends”
 - “Sometimes she pays; sometimes I pay”
 - “No one will know”
- Key takeaways:
 - Avoid appearances of impropriety
 - No “employee discounted” products
 - State & local governments have their own unique prohibitions too
 - Confer with Legal before providing any gifts, gratuities, or entertainment



Contractor Business Systems

DFARS 252.242-7005

- *Acceptable contractor business systems* means contractor business systems that comply with the terms and conditions of the applicable business system clauses
 - Six business system clauses
 - Applies to covered contracts subject to the Cost Accounting Standards
- Subject to temporary payment withholding for systems determined to be inadequate due to “significant deficiencies”
 - *Significant deficiency* means a shortcoming in the system that materially affects the ability of officials of the Department of Defense to rely upon information produced by the system that is needed for management purposes



Accounting System

DFARS 252.242-7006

- *Accounting system* means the Contractor's system or systems for accounting methods, procedures, and controls established to gather, record, classify, analyze, summarize, interpret, and present accurate and timely financial data for reporting in compliance with applicable laws, regulations, and management decisions, and may include subsystems for specific areas such as indirect and other direct costs, compensation, billing, labor, and general information technology
- System must satisfy 18 criteria, which includes:
 - timekeeping;
 - labor distribution (direct/indirect);
 - segregation of allowable/unallowable costs;
 - allocation of direct/indirect costs; and
 - billing
- Note that contractor must have an adequate accounting system before it can receive a cost-reimbursement contract (FAR 16.301)



Earned Value Management System (EVMS)

DFARS 252.234-7002

- *Earned value management system* means “an earned value management system that complies with the earned value management system guidelines in the ANSI/EIA-748”
- Applies to contractors on DoD prime contracts or subcontracts for which certified cost or pricing data was required
 - If valued at \$20M, but less than \$100M, must comply with ANSI/EIAS-748 guidelines, but no formal validation required
 - If valued at \$100M or more, formal validation by Contracting Officer is required
- System will be disapproved if significant deficiency in ANSI/EIAS-748 high-risk guidelines
- Disapproval based on noncompliance with other ANSI/EIAS-748 guidelines is at Contracting Officer’s discretion



Estimating System

DFARS 252.215-7002

- *Estimating system* means the Contractor's policies, procedures, and practices for budgeting and planning controls, and generating estimates of costs and other data included in proposals submitted to customers in the expectation of receiving contract awards
- Minimum requirements include that the system:
 - is maintained, reliable, and consistently applied;
 - produces verifiable, supportable, documented, timely cost estimates;
 - is consistent and integrated with related management systems; and
 - is subject to applicable financial control systems
- Must be disclosed to ACO if large business and in prior FY, either:
 - \$50M+ DoD contracts with CCOPD, or
 - \$10M+ DoD contracts with CCOPD & CO notified in writing that disclosure would be required



Material Management and Accounting System

DFARS 252.242-7004

- *Material management and accounting system* means the Contractor's system or systems for planning, controlling, and accounting for the acquisition, use, issuing, and disposition of material
- System must:
 - reasonably forecast material requirements;
 - ensure that costs of purchased and fabricated material charged or allocated to a contract are based on valid time-phased requirements; and
 - maintain a consistent equitable and unbiased logic for costing of material transactions
- Must satisfy 9 specified criteria



Property Management System

DFARS 252.245-7003

- *Property management system* means the Contractor's system or systems for managing and controlling Government property
- System must comply with FAR 52.245-1(f) requirements for property management plans, systems, and procedures for handling acquisition and receipt of government property

Purchasing System

DFARS 252.244-7001

- *Purchasing system* means the Contractor's system or systems for purchasing and subcontracting, including make-or-buy decisions, the selection of vendors, analysis of quoted prices, negotiation of prices with vendors, placing and administering of orders, and expediting delivery of materials
- Must satisfy 24 specific criteria, including:
 - having an adequate system description including policies, procedures, and purchasing practices that comply with the FAR and DFARS;
 - establishing and maintaining adequate documentation to provide a complete and accurate history of purchase transactions to support vendors selected and prices paid; and
 - performing timely and adequate cost or price analysis and technical evaluation for each subcontractor and supplier proposal or quote to ensure fair and reasonable subcontract prices



Classified Contracting

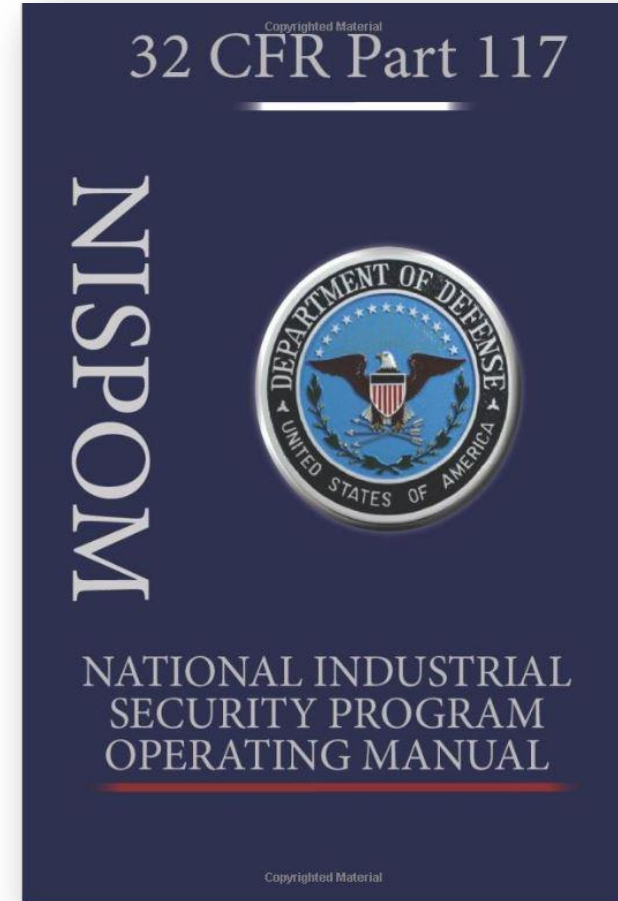
- National Industrial Security Program (NISP) established by EO 12829 (1993) to ensure that U.S. industry safeguards classified information while performing on government contracts, responding to solicitations, or working on R&D efforts
- Classification levels:
 - Confidential
 - Secret
 - Top Secret
- Various other councils, offices, and agencies contribute to the classification system (e.g., National Security Council, Cognizant Security Agencies, Government Contracting Activity)



Classified Contracting

NISPOM

- Prescribes requirements, restrictions, and safeguards to prevent unauthorized disclosure of classified information
- Covers disclosure of classified information released by Executive Branch to contractors
- Applies to:
 - All Executive Branch departments and agencies
 - All cleared contractor facilities within U.S. and its territories



Management + Legal



Small Business Considerations

- If the company is a small business:
 - Certain reporting and other compliance requirements exist
 - *E.g.*, limits on the amount of money executives may remove from the business
- If the company is a large business:
 - May be required to submit small business contracting plans and exercise good faith to meet their proposed subcontracting goals



Export Control Considerations

- Company must comply with restrictions on the export of products and information
- “Export” – broadly defined
 - Can include, among other things, traveling outside the U.S. with controlled information stored on a laptop—even if the laptop is never turned on!



Procurement/Supply Chain



Key Considerations

- Ethics & Compliance During Procurement Process (e.g., PIA, off-limits information)
- Sourcing Considerations (e.g., domestic preferences)
- Supply Chain Considerations
- Subcontractors, Suppliers, and Flowdowns



Domestic Preferences

- Buy American Act
 - Applies to all federal procurement above the micro-purchase threshold, unless waived by TAA
 - Applies to supplies acquired for use in the United States
 - Two-part test: to qualify as “domestic end product”:
 - (1) “end product” must be manufactured in the U.S.; and
 - (2) the cost of components manufactured in the U.S. must exceed 50% of the cost of all components
 - Operates as evaluation preference, not prohibition
- Trade Agreements Act
 - Implements the World Trade Organization Agreement on Government Procurement (WTO GPA) and other free trade agreements
 - Waives the BAA and opens up procurement to “end products” from “designated countries”
 - Prohibits procurement of “end products” and services from non-designated countries (e.g., China, Malaysia, and India)
 - Rules of Origin
 - Where article consists of materials from different countries (or mfg operations in different countries), country in which article was “substantially transformed into a new and different article”
 - ✓ Yes: manufacturing processes complex, parts lose their identify and become integral part of new article
 - ✓ No: assembly or manufacturing minimal or simple
 - U.S. Customs and Border Protection (CBP) has authority to make binding country of origin determinations for purposes of the TAA



Supply Chain – Compliance Landscape

- Regulatory overlay: special rules that are constantly evolving and changing
 - Both Congress and Biden Administration heavily focused on supply chain resiliency and security
 - Requirements added and updated through annual appropriations statutes
 - Restrictions to implement social, economic, and political objectives that affect the ability to leverage commercial supply chain
- Oversight of vendors and suppliers (flowdowns, risk assessments, etc.)
- NDIA's Vital Signs: The Health and Readiness of the Defense Industrial Base (February 2022) highlights that the supply chain has been negatively impacted by external events, particularly the COVID-19 pandemic
- Supply chain security (e.g., Deliver Uncompromised (August 2018))



Supply Chain Restrictions – Examples

- **FAR 52.204-23:** prohibition on contracting for hardware, software, and services developed or provided by Kaspersky Labs
- **FAR 52.204-24 and -25:** prohibition on procurement of equipment systems or services that use “covered telecommunications equipment” from certain Chinese companies (Huawei, ZTE)
- **FAR 52.246-26:** requires screening for and reporting counterfeit or suspect counterfeit parts and any critical or major nonconformances
- **DFARS 252.204-7018:** prohibition on procurement of telecommunications equipment, systems, or services from certain Chinese and Russian companies for critical technology for nuclear or homeland defense missions
- **DFARS 252.225-7051:** prohibition on procurement of satellite services from China, North Korea, Russia, or state sponsor of terrorism or related entities
- **DFARS 252.225-7008 and -7052:** restrictions on procurement of identified metals and magnets
- **DFARS 252.246-7007:** avoidance and detection of counterfeit parts for electronic parts and components
- **DFARS 252.246-7008:** requires electronic parts from original manufacturers and authorized distributors



Contractor Obligations & Best Practices

- Review RFP/contract to determine what rules and restrictions apply
 - Beware of confusing solicitation/contract language
 - Seek contracting officer clarification where needed
- Incorporate procurement-related obligations into overall compliance program
 - Coordination among legal, contracts management, IT, procurement, global trade, and others
 - Resources to continually assess and address evolving threats and requirements
 - Vet suppliers, service providers, and products and include strong contractual requirements
- Maintain records on compliance
- Flow down requirements and obtain certifications from suppliers
- Audits throughout contract performance as necessary (*e.g.*, to identify and address supply chain changes)



Human Resources



“Off-Limits” Information – Employment Discussions

- **Basic rule**
 - Without agency approval, current government employees cannot discuss employment with firms over which they—or their subordinates—have any oversight or regulatory responsibility
- Sources of applicable statutes and regulations
 - 18 U.S.C. § 208 and 41 U.S.C. §§ 2101-2107
 - Office of Government Ethics regulations at 5 C.F.R. § 2635
 - FAR implementation at FAR 3.104-3



“Off-Limits” Information – Revolving Door

- General restrictions on hiring
 - Some former government employees cannot be hired by a contractor until after a one-year “cooling off” period has elapsed
- Representation before a former agency employer
 - Some former government employees cannot contact their former agency on any matter for one to two years or longer
- Other specific circumstances
 - Some former government employees can never communicate with the government on contracts or other matters they worked on in government



Pay and Benefits – Service Contract Act

- Applies to contracts
 - In excess of \$2,500
 - With Federal Government or District of Columbia
 - Performed in the United States
 - Principally for “service” through the use of “service employees”
- Requirements
 - Pay prevailing minimum wage and fringe benefits in accordance with an incorporated wage determination or collective bargaining agreement



Pay and Benefits – Service Contract Act

- Defining “principally for service”
- Identifying “service employees”
- Compliance challenges
 - Mapping issues
 - Calculating wages and fringe benefits
 - Flow-down requirements
 - Recordkeeping
 - Penalties



Pay and Benefits – Davis Bacon Act

- Applies to contracts
 - In excess of \$2,000
 - With Federal Government or District of Columbia
 - For construction, alteration, repair
- Coverage
 - Laborers and mechanics
 - “Site of work”
- Key requirements
 - Pay wages and fringe benefits in accordance with wage determinations
 - Weekly submission of certified payroll



Timekeeping & Executive Compensation and Disclosure

Timekeeping

- **FAR 31.201-2** – Determining Allowability
 - **(d)** A contractor is responsible for accounting for costs appropriately and for maintaining records, including supporting documentation, adequate to demonstrate that costs claimed have been incurred, are allocable to the contract, and comply with applicable cost principles in this subpart and agency supplements. The contracting officer may disallow all or part of a claimed cost that is inadequately supported.
- Additional guidance found in DCAA Contract Audit Manual
 - **7641.90** – Information for Contractors under Labor Charging System

Executive Compensation and Disclosure

- **FAR 4.14** – Reporting Executive Compensation and First-Tier Subcontract Awards
 - Requires contractors to report subcontract award data and the total compensation of the five most highly compensated executives of the contractor and subcontractor.



Why does all of this matter?



Investigate When Problems Arise

- Civil liability (among other consequences) can arise from deliberate ignorance of issues relating to government contracting.
- Government contractors are expected to investigate timely and thoroughly when issues arise.

Mandatory Disclosure Rule (FAR 52.203-13) and Other Disclosure Requirements

- Requires contractors to timely disclose credible evidence of violations of certain criminal laws (fraud, conflict of interest, bribery, or gratuity violations found in Title 18), violations of the False Claims Act, and significant overpayments.
- Different disclosure requirements have different standards and channels for required disclosure.
- Failure to disclose can lead to consequences, including government enforcement action, or exclusion from government contracting by suspension/debarment.

Suspension & Debarment—FAR 9.4

- Purpose is to protect the public interest, focused on concept of “present responsibility”
- Suspension vs. Debarment
 - Effect: No new contracts, orders, option exercises, or contract extensions
- Collateral consequences



With the groundwork laid . . . Goals of an Investigation

- Understand the facts
- Understand the cause
- Maintain privilege
- Assess exposure to criminal, regulatory, civil liability
- Implement corrective actions (remediation/mitigation)
- Minimize disruption to the business
- Determine disclosure obligations



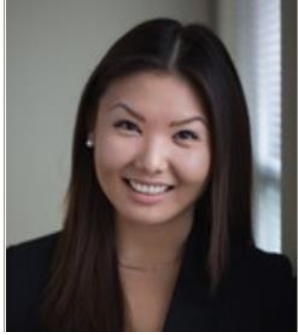
DOJ Guidance re Compliance Programs

- DOJ Guidance provides a detailed list of compliance-focused sample topics and questions that the Fraud section believes are relevant to its analysis, such as:
 - “Is the compliance program adequately resourced and empowered to function effectively?”
 - Does the company have processes for updating policies and procedures, in addition to implementing new policies and procedures?
 - *E.g.*, Does the company “periodically tests the effectiveness of the hotline, for example by tracking a report from start to finish?”
 - Does the company “engage in risk management third parties?”
 - “How does the company invest in further training and development of the compliance and other control personnel?”



Select Sources and Materials

- Corporate Crisis Handbook: A Desktop Investigations Guide for In-House Counsel: <https://www.crowell.com/files/Crowell-Moring-Corporate-Crisis-Handbook.pdf>
- DOJ Guidance on Evaluation of Corporate Compliance Programs: <https://www.justice.gov/criminal-fraud/page/file/937501/download>



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Source Selection and Bid Protests: Pre- and Post-Award Considerations

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The Procurement Cycle

- Acquisition planning/source selection
 - Pre-award bid protest litigation
- Proposal submission and evaluation
 - Exchanges and competitive range
- Contract award and debriefing
 - Post-award bid protest litigation
- Rinse, repeat



CICA's Competition Mandate

- The Competition in Contracting Act of 1984
 - Passed to foster competition and reduce costs
- Mandates full and open competition
 - I.e., all responsible sources are permitted to submit proposals
- Sets minimum time frames after publication before procurement can be processed
 - Typically procurements must be advertised for at least 15 days before issuance of solicitation
 - Minimum response times (30-45 days) set for receipt of proposals or bids from date of solicitation issuance



Full & Open vs. Limited Competition

- Typical full & open competitions:
 - FAR Part 14 Sealed Bids
 - FAR Part 15 Competitive Proposals
- Limited Competitions & Set-Aside Examples:
 - FAR Subpart 8.4 GSA Schedules
 - FAR Subpart 16.5 task and delivery orders
 - Small Business Section 8(a) set-asides



Sole Source Awards

- Seven exceptions to full and open competition:
 1. Only one responsible source (FAR 6.302-1)
 2. Unusual and compelling urgency (FAR 6.302-2)
 3. Industrial Mobilization, Engineering Development, or Research Capability (FAR 6.302-3)
 4. International Agreement (FAR 6.302-4)
 5. Authorized or Required by Statute (FAR 6.302-5)
 6. National Security (FAR 6.302-6)
 7. Public Interest (FAR 6.302-7)
- Requires Documentation (J&A), Publication, and Higher-Level Approval



Acquisition Planning

- The FAR encourages exchanges with industry to identify and resolve concerns regarding:
 - acquisition strategy—e.g., proposed contract type, terms and conditions, and acquisition planning schedules
 - feasibility of requirements, including performance requirements, statements of work, and data requirements
 - suitability of proposal instructions and evaluation criteria, including the approach for assessing past performance information
 - availability of reference documents
- Mechanisms: RFIs, industry conferences, draft RFPs, pre-solicitation notices, site visits



The Solicitation

- Solicitation must include:
 - Government's requirements
 - Proposal instructions/information required
 - Evaluation factors and significant subfactors
- The Government must ensure level playing field and that no offeror receives an unfair competitive advantage
- Look out for patent or latent defects



The Q&A Process

- Tool for advocating change to solicitation or pointing out shortcomings
 - Understand how to ask questions to improve your competitive standing
 - Can be as and often more effective than pre-award protest (and significantly cheaper)
- Q&As published to all offerors
- Even if deadline for questions has passed, still consider submitting question!



Pre-Award Protests – Common Issues

- Solicitation issues, *e.g.*:
 - Unduly restrictive requirements that do not reflect agency needs
 - Terms ambiguous
 - Relevant clauses missing or incorrect
 - Improper justification for threshold pre-qualification
 - Improper justification for single award
- Competitive range challenges (akin to post-award protests)



Pre-Award Protests - Considerations

- Timing – Solicitation challenges must be filed prior to date and time for proposal submission
- May need to submit proposal to preserve standing (but award stayed pending protest resolution)
- Practice Tip: For solicitation challenges, use the Q&A process first!
- Timing – other challenges must be filed within 10 days of knowledge of alleged impropriety



Proposal Submission

- It is an offeror's responsibility to submit a proposal that establishes capability and technical merit of proposed approach
 - Important to provide all required information
 - Demonstrate compliance with material solicitation requirements
- Key RFP Sections: C, L, M (and H for “special” clauses)
- Ensure timely submission (“late is late”) – even if protesting terms of Solicitation



Proposal Evaluation

- Agencies must evaluate proposals in accordance with stated criteria and may not introduce new criteria midstream without allowing offerors to revise proposals
- Agencies may not deviate from stated evaluation criteria
- Note: While agencies may not create new criteria on the fly, certain unannounced considerations will be deemed to be “encompassed” by stated evaluation criteria (e.g., proposal risk)
- Focus on weighting of factors
- Understand differences between best-value and LPTA



Exchanges

- Clarifications
 - Limited exchanges between an agency and an offeror for purpose of eliminating minor uncertainties or irregularities in a proposal; do not allow proposal revisions
 - Government has discretion to issue clarification questions – offerors should not rely on Government doing so
- Establishment of competitive range and discussions
 - Discussions provide offerors opportunity to revise or modify proposal in some material respect
 - If discussions, must be meaningful, equal, and not misleading
 - Must address Significant Weaknesses, Deficiencies, and adverse past performance
- Train your employees to recognize permissible communications



Contract Award/Debriefing

- Debriefings typically must be requested within 3 days of award decision
- Debriefings help offerors better understand basis for agency selection decision, to improve their future proposals
- Always timely request debriefing (and accept first date offered)
- Format and level of detail provided varies greatly
 - E.g., FAR Part 15 v. Subpart 8.4
 - Agencies cannot provide point-by-point comparisons
- Debriefings are post-award events outside scope of protest jurisdiction
- Understand differences in pre- and post-award debriefings
- Enhanced DoD post-award debriefing procedures



Post-Award Protests – Common Issues

- Deviation from solicitation's stated evaluation criteria
- Relaxation of solicitation technical requirements and/or addition of unstated minimum technical requirements
- Arbitrary/Unreasonable proposal evaluation (technical, price, past performance, etc.)
- Unequal treatment
- Improper best value tradeoff analysis
- Lack of meaningful discussions or misleading discussions
- Organizational Conflicts of Interest
- Cost/price realism
- Key personnel bait & switch or late substitutions by awardee
- Improper determination of contractor responsibility



Post-Award Protests – The Basics

- May allege error in the evaluation of the protester or the awardee (and sometimes intervening offerors, too)
- If filed within 10 days of award or 5 days after requested and required debriefing, agency must immediately suspend contract performance
 - Note: GAO protest filed within 10 days of requested and required debriefing is timely, but must be filed within 5 days for CICA stay
- Major challenge of protest process: you must generally move quickly and file protest with limited information



Considerations Before Filing a Protest

- Merits of protest allegations
- Standing/prejudice
- Customer reaction
- Incumbent status
- Cost of protesting
- Likelihood of “win” beyond a sustained protest
- Tough, high-level decisions to be made in short time window



Bid Protest Forums

- Agency-Level Protest
 - Limited statistics re success, but can be effective to express frustration and/or disappointment without “suing the customer”
- GAO
 - Recommended forum in most circumstances
 - Decision-makers have specialized expertise in procurement law
 - Quick process: 100 days from start to finish
 - Mandatory stay of performance when protests are timely filed
 - Potential recovery of protest costs, including attorneys fees, for certain successful protests
- Court of Federal Claims
 - No automatic stay and unlikely award of protest costs
 - Decisions are binding but can be appealed
 - Can cost more and take longer than GAO protests
- SBA; FAA ODRA
 - Special forums for unique protests



GAO Protest Statistics

Fiscal Year	2021	2020	2019	2018	2017	2016	2015	2014
Cases Filed	1,897	2,149	2,198	2,607	2,596	2,789	2,639	2,561
Cases Closed	2017	2,137	2,200	2,642	2,672	2,734	2,647	2,458
Merits Decision	581	545	587	622	581	616	587	556
Sustains	85	84	77	92	99	139	68	72
Sustain Rate	15%	15%	13%	15%	17%	23%	12%	13%
Effectiveness Rate	48%	51%	44%	44%	47%	46%	45%	43%
ADR (cases used)	76	124	40	86	81	69	103	96
ADR Success Rate	84%	82%	90%	77%	90%	84%	70%	83%
Hearings	13	9	21	5	17	27	31	42



COFC Protest Statistics

Calendar Year	2021	2020	2019	2018	2017	2016	2015	2014
Protests Filed	137	117	142	179	129	124	126	110
Pre-award	34	41	46	52	41	31	35	35
Post-award	103	76	96	127	88	93	91	75
Published Decisions	74	53	62	67	70	64	63	58
Unpublished Decisions	4	4	6	8	4	1	24	7



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Global Sourcing and National Security: Special Considerations for Government Contractors

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Global Sourcing and National Security: Special Considerations for Government Contractors

- Export Control Regimes and Economic Trade Sanctions
- Domestic Preferences and Country of Origin Requirements
- Supply Chain Sourcing and Restrictions
- Basics of Facility and Personnel Clearances



Export Control Regimes and Economic Trade Sanctions



Background: U.S. Export Control System

- **What Does it Regulate?**

- *The export, reexport, or transfer of certain goods, technology, software, or services*
 - To certain foreign countries (and beyond), entities and end-users; or
 - For certain end uses

- **International Traffic in Arms Regulations (ITAR)**

- *U.S. Department of State Directorate of Defense Trade Controls (DDTC)*
 - Covers defense articles and related technical data and defense services that appear on the U.S. Munitions List (USML)
 - Often covers conversion of standard items for military customers

- **Export Administration Regulations (EAR)**

- *U.S. Department of Commerce Bureau of Industry and Security (BIS)*
 - Covers just about everything else - commodities, software and technology
 - Many appear on the Commerce Control List (CCL)
 - EAR99 designation for everything else “**subject to the EAR**”

- **Office of Foreign Assets Control (OFAC) Regulations**



Export Control: Big Picture Analysis

(1) Evaluate whether a transaction is subject to U.S. controls

- *Is there a U.S. nexus: U.S. items, persons, services, or territory involved?*

(2) If yes, determine which agency(ies) has jurisdiction

- *Regulated by the U.S. State Department's International Traffic in Arms Regulations (ITAR), the U.S. Commerce Department's Export Administration Regulations (EAR), or none of the above?*

(3) Identify the item's export control classification

- *United States Munitions List (USML) Category or Export Control Classification Number?*

(4) Does classification require a license for end use/user?

- *controls on the country to which it is being shipped (End destination), the customer (end-user), or the intended use (end-use) (Note – OFAC)*

(5) Get the paperwork right.



International Traffic in Arms Regulations

- **What Does it Regulate?**

- Defense articles
- Technical data
- Defense services

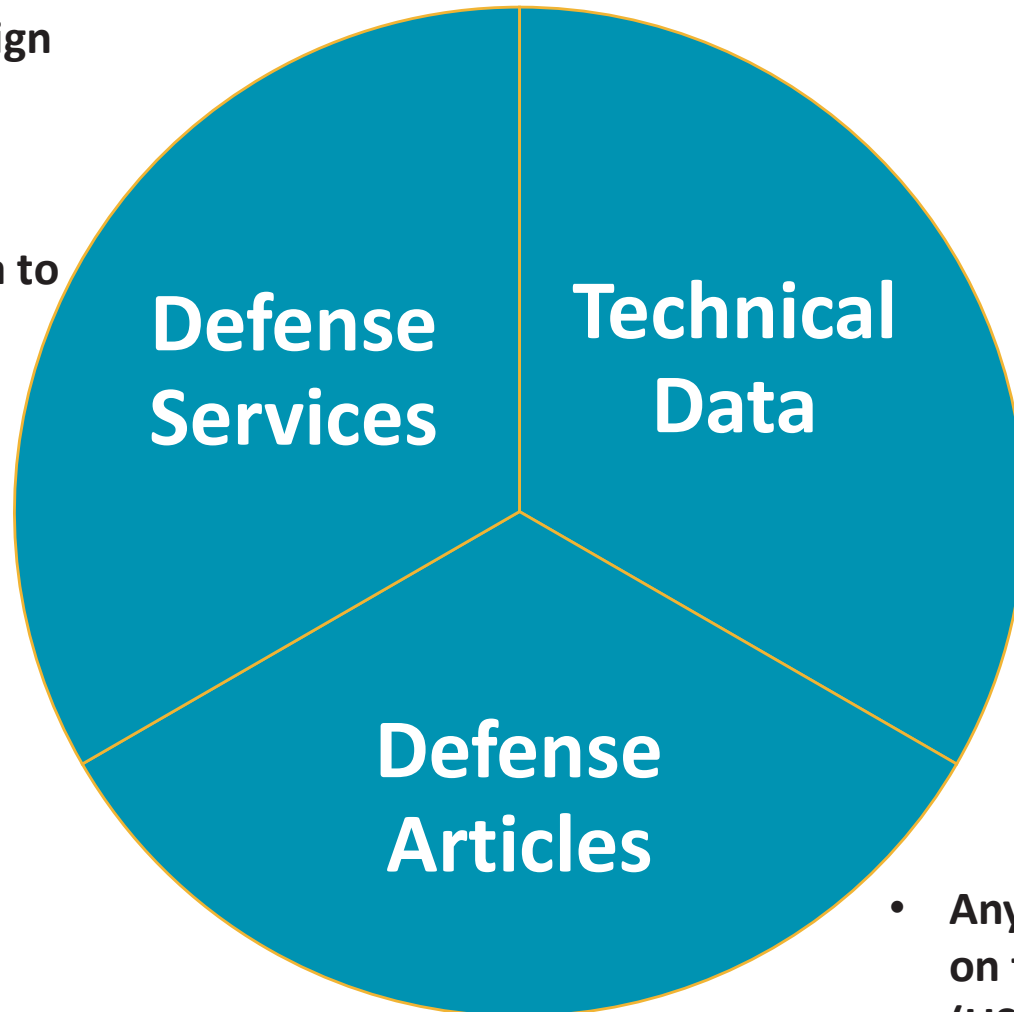
- **Registration is Required**

- U.S. entities must register with DDTC and renew the registration annually
- It is required when the entity manufactures, exports, or temporarily imports defense articles or furnishes defense services
- Any material change in registration requires submitting an update to DDTC in 5 days



Items & Activities Covered under the ITAR

- Furnishing assistance to foreign persons related to defense articles (*e.g.*, use, training, repair)
- Furnishing any technical data to foreign person
- Military training of foreign forces



- Information required for the operation of defense articles
- Classified information relating to defense articles or services or 600-series items on the Commerce Control List
- Information covered by an invention secrecy order
- Software related to defense articles

- Any items or technical data listed on the U.S. Munitions List (USML)

U.S. Munitions List

- **What is it?**

- It contains the list of defense articles and technical data controlled under the ITAR

- **What Restrictions Apply?**

- All items on the USML require an export license or license exemption to export

- There are 21 categories

- Examples include: Firearms, launch vehicles, spacecraft, nuclear weapons, gas turbine engines, and submersible vessels

- **Public Domain Exception**

- Anything that is in the “public domain” is not subject to the ITAR

- This includes information which is published and generally accessible or available to the public (*e.g.*, patents, fundamental research, bookstores)

- Public release requires approval of cognizant USG agency.



Deemed Exports

- **What is a Deemed Export?**

- A release of controlled technology to a foreign person that constitutes an export to their home country at the moment of release/access

- **When does it Apply?**

- When a foreign person (even if physically in the United States) is exposed to controlled technology through the scope of their employment or visits
- If so, such releases would constitute exports to that foreign person's country

- **Who is a Foreign National?**

- Someone who is not (1) a U.S. citizen or permanent resident; (2) a U.S. incorporated entity; or (3) a protected individual under certain immigration laws

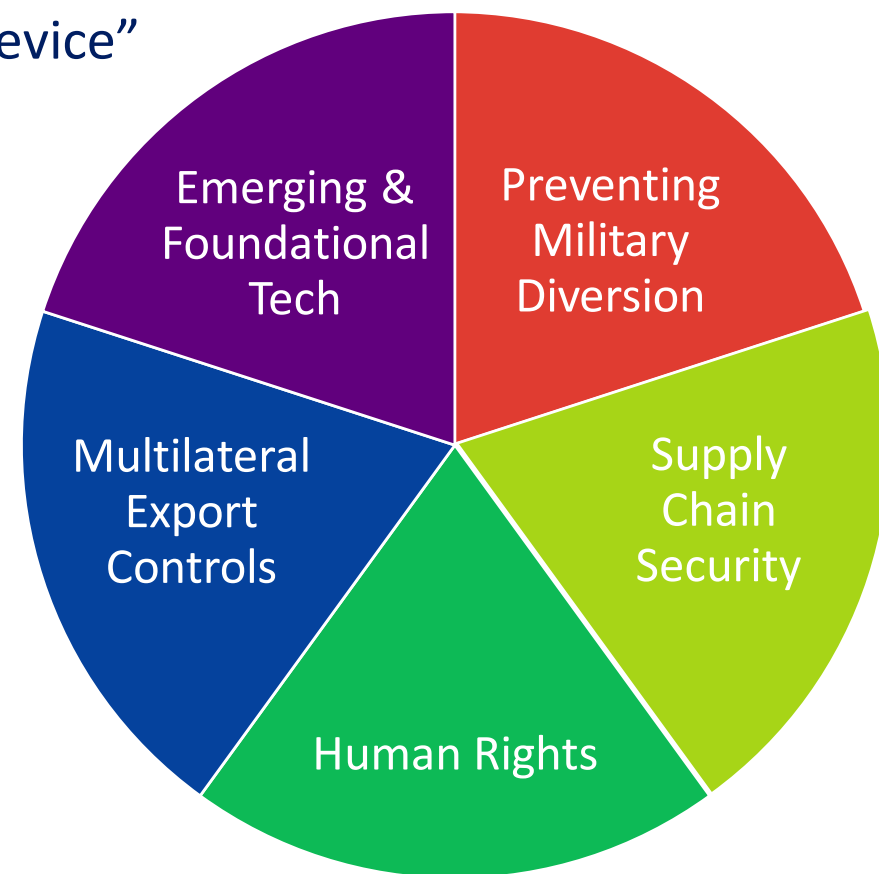
- **Considerations?**

- Businesses should be aware of any foreign nationals in their employ or that visit their facilities, regardless of location



BIS – New Roles and Challenges

- **Trends from Trump to Biden continue**
 - From a “backwater” to the “death star” or the “doomsday device”
- **BIS now wears many hats**
 - Leading the fight on military diversion
 - Restricted party list designations and the creation of new lists
 - Focus on semiconductors and BIS’s “long arm”
 - Supply chain leadership
 - Semiconductors
 - Large capacity batteries
 - Critical minerals and materials
 - Pharmaceuticals
 - Crossover role into Human Rights
 - Entity list designations
 - Human rights considerations expanded beyond “crime controlled” items
 - Multilateral export controls
 - Sanctions and export controls and Russia have reemphasized this role
 - Controls on emerging and foundational technology
 - 14 specific emerging technology categories so far identified



U.S. Export Administration Regulations

- **Jurisdiction applies if the item is “subject to the EAR”**
 - Items can be commodities, software, & technology
- **When it Applies**
 - U.S. origin items
 - Items with a certain de minimis amount of U.S. origin content
 - Items physically in the United States
 - Items controlled under the “Foreign Direct Product Rule”
- **What it does not include**
 - Publicly available information (*e.g.*, if a patent is public)
 - Information that is not technology



Commerce Control List (CCL)

- **What is it?**
 - Identifies items subject to enhanced end user or use restrictions under the EAR
- **Items Covered?**
 - The CCL has 10 categories of item groupings
- **What Restrictions Apply?**
 - It lists the “Export Control Classification Number” or “ECCN,” identifies the applicable restrictions
- **When the Item is Not Listed?**
 - If the item is not listed in the USML or the CCL, then it is considered “EAR99” and subject to limited controls related to restricted parties or sanctioned countries

Commerce Control List Categories	
0	Nuclear Materials, Facilities And Equipment (and Miscellaneous Items)
1	Materials, Chemicals, Microorganisms and Toxins
2	Materials Processing
3	Electronics
4	Computers
5	Part 1 -- Telecommunications and Part 2 -- Information Security
6	Sensors and Lasers
7	Navigation and Avionics
8	Marine
9	Aerospace and Propulsion



U.S. Sanctions Regime

Primary Sanctions

Geographic Restrictions

- Prohibition on exporting goods or services to or from a particular location or persons incorporated/resident there
- Current Embargoed Jurisdictions: Crimea, Cuba, Iran, North Korea, Syria, and so-called Donetsk and Luhansk People's Republics

"List-Based" Blocking Sanctions

- Prohibits virtually all transactions with designated persons (individuals, entities, vessels, aircraft, etc.)
- Examples: U.S. "SDN" List; EU "Consolidated List"; UK "HMT" List

Sectoral Sanctions

- Prohibits certain categories of transactions with designated persons in specific sectors
- U.S. Current Sectoral Sanctions: Russia and Venezuela (sort of)

Possible Penalties for Noncompliance

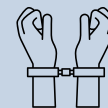


Generally speaking, maximum is greater of ~\$305,000 (adjusted for inflation) OR twice the transaction value.

Recent settlements have reached multiple billions.



Strict Liability: No demonstration of intent or knowledge is required.



Potential criminal penalties for willful violations. \$1 million and up to 20 year imprisonment.

Can result in loss of export privileges or prohibition on using US correspondent accounts.

Secondary Sanctions

Activity-Based Sanctions

- Targets non-U.S. persons and third-party transactions without a U.S. nexus that involve specified trade activities
- Attached to primary sanctions to protect national security interests on global basis
- Ex: Iran, North Korea, Russia, Syria, Cyber & Global Terrorism sanctions programs



Denial of access to U.S. market.

For example: visas, currency/foreign exchange prohibition, government contracts, export license privileges, investments, etc.

Developing Compliance Infrastructure



Domestic Preferences & Country of Origin Requirements



Major Domestic Preference/COO Regimes

- Buy America Act (“BAA”)
- Trade Agreements Act (“TAA”)
- Agency-Specific Requirements
- State & Local Procurements



BAA – Applicability

- Applies to all federal procurement above the micro-purchase threshold (currently \$10,000), unless waived by the Trade Agreements Act (TAA)
- Applies to supplies acquired for use in the United States
 - Does not apply to services
 - Does apply to supply portion of a contract for services that involves furnishing of supplies
- For DoD, Balance of Payments Program applies to contracts for acquisition of supplies for use outside of the United States, and construction to be performed outside of the United States, including FMS sales. *See* DFARS 225.7500.



BAA – Applicability

- For construction contracts, applies to “construction materials,” defined as an article, material, or supply brought to the construction site for incorporation into building/work. *See FAR 25.003.*
- For supply contracts, applies to “end product,” defined as “those articles, materials, and supplies to be acquired for public use.” *See FAR 25.003.*
 - Contracting officer has substantial discretion to define “end product”
 - Definition of “end product” at FAR 2.101 (“supplies delivered under a line item of Government contract”) expressly does not apply for purposes of BAA and TAA; *i.e.*, CLIN structure is *not* dispositive, though it can be informative
 - Challenge areas:
 - System end products
 - Spare and replacement parts
 - Warranty, repair and maintenance work



BAA – Rule of Origin

- 2 part test: to qualify as “domestic end product”:
 - (1) “end product” must be manufactured in the U.S.; and
 - (2) the cost of components manufactured in the U.S. must exceed 55% of the cost of all components
 - Phased increase to 75% by 2029
 - Special rules for iron and steel products



BAA – “Manufacture”

- No statutory or regulatory definition of what constitutes “manufacturing”
- GAO has articulated a standard, applied on a case-by-case basis:
 - “Completion of the article in the form required for use by the Government”
 - Testing and packaging is not enough
 - Assembly may or may not be enough
 - Reassembly of disassembled components not enough
 - Single component or material? GAO will examine manufacturing process to determine whether it consists of two distinct phases (manufacture of domestic component from foreign-sourced material, and then manufacture of end product), focusing on whether material undergoes substantial changes in physical character
 - Manufacture is not “substantial transformation”



BAA – “Cost of Components”

- Components = those items directly incorporated into the end product
- Calculating component cost:
 - Acquired by contractor: acquisition cost, including transportation costs to place of incorporation into end product
 - Manufactured by contractor: all costs associated with manufacture of component, plus allocable overhead, but excluding profit (and no costs associated with manufacture of end product)
- Component test waived for COTS items (COTS “end product”)



BAA – Rule of Origin

- Special rule for end products that are “wholly or predominantly of iron or steel or a combination of both”
 - “Predominantly of iron or steel or a combination of both” = cost of iron and steel content >50% of the total cost of all components
- Content rule: Cost of foreign iron and steel must constitute <5% of the cost of all components used in the end product
- “Foreign iron and steel” = iron or steel products not “produced” in the U.S.; produced in the U.S. means that all manufacturing processes of the iron or steel must take place in the US, from initial melting stage through application of coatings
- The component test not waived for COTS items in this category (except for COTS fasteners)



BAA – Exceptions

- Commercial item information technology (as defined at FAR 2.101)
- Public interest (determination made by head of agency)
- Non-availability
 - Class determinations at FAR 25.104
 - Individual determinations (made by head of contracting activity)
- Unreasonable cost
 - Civilian agencies: contracting officer applies 20% or 30% price evaluation factor
 - DoD: contracting officer applies 50% price evaluation factor
 - Increased price preferences for “critical” supplies



BAA – Considerations Unique to DoD

- “Qualifying Countries”

- DoD has standing waiver for end products from “qualifying countries” (must be identified in BAA certification)
- Components from “qualifying countries” counted as domestic in applying the 55% component test

See DFARS 225.872-1

Australia	Japan
Belgium	Latvia
Canada	Luxembourg
Czech Republic	Netherlands
Denmark	Norway
Egypt	Poland
Estonia	Portugal
Germany	Slovenia
Finland	Spain
France	Sweden
Greece	Switzerland
Israel	Turkey
Italy	UK



BAA – Considerations Unique to DoD

- DFARS includes additional clarification on available exceptions
- Public interest exception “may be appropriate” (subject to determinations at level above contracting officer (acquisitions below SAT), by head of contracting activity (SAT to \$1.5M), or by agency head (>\$1.5M)
 - To ensure access to advanced state-of-the-art commercial technology (DFARS 225.103(a)(ii)(A)(2))
 - To maintain the same source of supply for spare and replacement parts (DFARS 225.103(a)(ii)(A)(3))
- DoD has already determined that spare or replacement parts that must be acquired from the original foreign manufacturer or supplier are not reasonably available from domestic sources (*i.e.*, no separate determination required to waive the BAA). *See* DFARS 225.103(b)(iii)A).
- BOPP: has exception for spare parts for foreign manufactured equipment and systems, if acquisition restricted to OEM or its supplier (DFARS 225.7501(a)(2)(iii))



TAA – Applicability

- Implements the World Trade Organization Agreement on Government Procurement (WTO GPA) and other free trade agreements
- When applicable, TAA waives the BAA and opens up procurement to “end products” from “designated countries”
- Prohibits procurement of “end products” and services from non-designated countries (e.g., China, Malaysia, and India)
- Applies to listed agencies (including DoD), for specified product categories, and above specified dollar thresholds (adjusted every two years)



TAA – Current Thresholds

Agreement	Supply Contract	Construction Contract
WTO GPA	\$182,000	\$7,008,000
Australia FTA, CAFTA-DR FTA, Chile FTA, Singapore FTA Colombia FTA Morocco FTA Panama FTA Peru FTA	\$83,099	\$7,008,000
NAFTA	\$83,099/ \$25,000	\$10,802,884
Bahrain FTA Oman FTA	\$182,000	\$10,802,884
Israel Trade Act	\$50,000	



TAA – Applicability

- For DoD procurements, TAA does not cover procurement of certain products (designated by Federal Supply Code classification), including:
 - Clothing, textiles, hand tools, measuring tools (covered by Berry Amendment)
 - Specialty metals
 - Weapons
 - Fire control equipment
 - Ammunitions and explosives
 - Guided missiles
 - Aircraft components and accessories
 - Space vehicles



TAA – Rules of Origin

- “End products”
 - Where article consists of materials from different countries (or mfg operations in different countries), country in which article was “substantially transformed into a new and different article”
 - ✓ Yes: manufacturing processes complex, parts lose their identify and become integral part of new article
 - ✓ No: assembly or manufacturing minimal or simple
 - U.S. Customs and Border Protection (CBP) has authority to make binding country of origin determinations for purposes of the TAA
- Services: country in which the firm providing the services is established (*see FAR 25.402(a)(2)*)



TAA – Rules of Origin

- Factors considered in “substantial transformation” test (on case-by-case basis) include:
 - Origin of key/essential components
 - Critical programming (software development and download)
 - Costs incurred in manufacturing processes
 - Value-added by manufacturing processes
 - Physical fabrication
 - Requirements for precision and specialized tools
 - Relative training/experience of those performing manufacturing steps



TAA – Rules of Origin

- “Designated country end product” defined in FAR provisions as article “substantially transformed” in designated country
- “US made end product” defined in FAR provisions as an article that is manufactured in the US or substantially transformed in the US.
- Under *Acetris* Federal Circuit decision, contracting officer has to independently assess whether an article has been “manufactured” in the US (cannot rely on CBP determination re “substantial transformation”)



TAA – Exceptions

- Acquisitions not using full and open competition (*i.e.*, sole source)
- Acquisitions of arms, ammunition, or war materials, purchases indispensable for national security or for national defense purposes
 - For DoD, approval by Defense Pricing and Contracting (DPC) required unless purchase from foreign sources restricted by statute or another exception applies
- Services purchased in support of military service overseas
- R&D



Other restrictions

- DoD Domestic Restrictions
 - Specialty Metals
 - Certain Magnets & Tungsten
 - Berry Amendment
 - Foreign Military Financing
- State statutory preferences
- DOT Requirements for Federally-Funded Infrastructure Projects
 - FTA Buy America
 - FRA Buy America
 - FAA Buy America
 - FHWA Buy America
 - Amtrak Buy American



Supply Chain Sourcing and Restrictions



Supply Chain Security

- From the DoD to the entire U.S. Government
- *Deliver Uncompromised* – DoD initiative introduced in approximately June 2018
 - Makes supply chain security the “fourth pillar” of acquisition, along with price, schedule, and performance
 - Seeing more regulations and emphasis on supply chain security (including foreign sourcing/foreign ownership)
- Prohibition on Products from Certain Sources
- Counterfeit and Nonconforming Parts Rules
- Cybersecurity Rules

Deliver Uncompromised

“For mission owners, the primary goal of DoD must be to deliver warfighting capabilities to Operating Forces without their critical information and/or technology being wittingly or unwittingly lost, stolen, denied, degraded or inappropriately given away or sold.”

*William Stephens,
Director of Counterintelligence, DSS*



Sourcing Restrictions

- **FAR 52.204-23:** prohibition on contracting for hardware, software, and services developed or provided by Kaspersky Labs
- **FAR 52.204-24 and -25:** prohibition on procurement of equipment systems or services that use or procurement from contractors who use “covered telecommunications equipment” from certain Chinese companies (Huawei, ZTE)
- **DFARS 252.204-7018:** prohibition on procurement of telecommunications equipment, systems, or services from certain Chinese and Russian companies for critical technology for nuclear or homeland defense missions
- **DFARS 252.225-7051:** prohibition on procurement of satellite services from China, North Korea, Russia, or state sponsor of terrorism or related entities
- **DFARS 252.225-7008, -7009, and -7052:** restrictions on procurement of identified metals and magnets
- **DFARS 252.246-7008:** requires electronic parts from original manufacturers and authorized distributors

kaspersky

ZTE



Section 889

“Part A”



Section 889(a)(1)(A): prohibits contractors from furnishing Government customers with any equipment, system, or services that uses covered telecommunications equipment or services as a substantial or essential component of any system or as a critical technology of any system

“Part B”



Section 889(a)(1)(B): prohibits agencies from entering into a contract with an entity that uses covered telecommunications equipment or services as a substantial or essential component of any system or as a critical technology of any system (no nexus to government contracting required)

Section 889 Part (a)(1)(B) (Anti-Huawei Rule)

Applicability

- All offeror* contractors with FAR-covered contracts (similar prohibition likely included in non-FAR covered contracting vehicles).

Representations (-24 clause/SAM)

- Representation the entity does/does not use covered equipment or services to be made after “reasonable inquiry.” No substantial or essential component qualification in the representation. A “does use” representation requires submission of descriptive information.

Exceptions*

- Equipment that cannot route or redirect user data traffic and cannot permit visibility into user data or packets.

Reporting

- When use is identified, contractor has 1 day from the date of identification to report to the contracting officer and DoD website, if applicable.

Flowdown

- Not a mandatory flowdown.



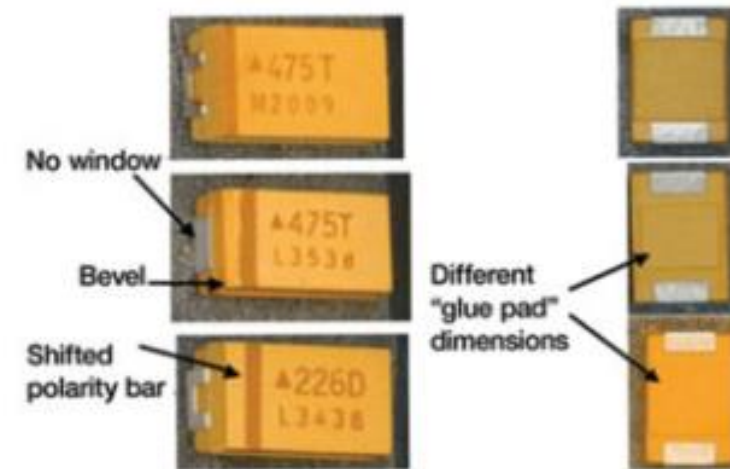
Section 889 Part B Grant Prohibition

- 2019 NDAA Section 889 included grant/loan restrictions
- 2 C.F.R. 200.216
 - Part (b) prohibition published August 13
 - Prohibits grant and loan recipients and subrecipients from using federal funds to enter into, or renew, contracts for equipment, services, or systems that use covered telecommunications equipment or services as a substantial or essential component of any system or critical technology as part of any system
 - Makes certain telecommunications and video surveillance services and equipment allowable (except prohibited services and equipment)



Counterfeit and Nonconforming Parts

- Screening and Reporting
- **FAR 52.246-26:** requires screening for and reporting counterfeit or suspect counterfeit parts and any critical or major nonconformances
- **DFARS 252.246-7007:** avoidance and detection of counterfeit parts for electronic parts and components



FAR Counterfeit Parts and Nonconformance Reporting

- Applies to all government agencies.
- Where inserted, new clause 52.246-26 will require contractors and subcontractors to screen for and report: (1) counterfeit or suspect counterfeit parts; and (2) “critical” and “major” nonconformances.
 - **Common item**: an item that has multiple applications versus a single or peculiar application.
 - **Major nonconformance**: A nonconformance, other than critical, that is likely to result in failure of the supplies or services, or to materially reduce the usability of the supplies or services for their intended purpose
 - **Critical nonconformance**: A nonconformance that is likely to result in hazardous or unsafe conditions for individuals using, maintaining, or depending upon the supplies or services; or is likely to prevent performance of a vital agency mission
 - **DoD contractors already subject to DFARS 252.246-7007/7008**: an expansion and integration of existing detection and avoidance obligations.
 - **Civilian agency contractors**: new processes to meet new obligations.
 - **Contractors providing services**: covered where also “furnishing” items subject to 52.246-26.
 - **Commercial Item and COTS contractors**: Excluded for now



New and Upcoming Prohibitions

- New Rule on Reporting Employees in China issued August 25, 2022 (DFARS 252.225-7057 and -7058)
- Prohibition on Certain Procurements from the Xinjiang Uyghur Autonomous Region (2022 NDAA Section 848)
 - Prohibits DoD from procuring any products mined, produced, or manufactured wholly or in part by forced labor from Xinjiang Uyghur Autonomous Region of China (XUAR) or from an entity that has used labor from within or transferred from XUAR as part of a “poverty alleviation” or “pairing assistance” program
 - Requires the offeror to make a good faith effort to determine that forced labor from XUAR was not or will not be used in the performance of the contract.
- Modifications to Printed Circuit Board Acquisition Restrictions (2022 NDAA Section 851)
 - Amends prohibition on DoD acquiring certain printed circuit boards from China, Russia, Iran, or North Korea, to:
 - Push the effective date of these restrictions from January 1, 2023 to January 1, 2027
 - Redefine “covered printed circuit board”
 - Permit DoD to exempt commercial product/services contracts through rulemaking
 - DoD released Commercial Microelectronics Framework at the beginning of this year



Basics of Facility and Personnel Clearances



Classified Contracting Overview

- Classified contracting can take three significant forms:

Performance

- Requires access to classified information for performance

Contract Documents

- Some of the contract documents (e.g., PWS/SOW; Specs) are classified

Entire Contract/Customer

- Existence of the contract/customer is classified

Facility Clearances (FCLs)

- FCL: an administrative determination, from a security viewpoint, that an entity is eligible for access to classified information of a certain level
 - FCLs do not transfer – require DCSA approval (or Cognizant Security Agency)
- Obtaining an FCL. Requirements include, *inter alia*:
 - Sponsorship
 - Certain key management personnel must possess personnel clearances
 - Facility Security Officer (FSO) & Insider Threat Program Senior Official (ITPSO)
 - No (or mitigated) foreign ownership, control, or influence (FOCI)
- FCL Requirements. *Inter alia*:
 - Security and Insider Threat annual training
 - Insider Threat program
 - Standard Practice Procedures
 - Annual self inspections; separate intermittent DCSA reviews



Personnel Clearances (PCLs)

- PCL: administrative determination that an individual is eligible, from a security point of view, for access to classified information of the same or lower category as the level of the personnel clearance being granted
- Granted upon consideration of 13 adjudicative guidelines
 - E.g., allegiance to the U.S.; foreign preference; criminal conduct
- Ongoing reporting requirements for individuals with PCLs and facilities with FCLs



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Agenda

- Introduction to Cybersecurity
- Cybersecurity Requirements for Unclassified Information
- Cloud Security Requirements Generally
- Security Requirements for Classified Contracts
- Privacy Requirements for Government Contractors
- Questions & Answers



Introduction to Cybersecurity



Introduction to Cybersecurity

- Key cybersecurity concepts
 - Goals: Confidentiality v. Integrity v. Availability
 - Methods: Administrative v. Technical v. Physical
 - Multi-stakeholder approach
 - This is not just an IT issue!
 - Managing up and down the supply chain
 - Security is all about the lowest common denominator.



Introduction to Cybersecurity

- Key cybersecurity standards
 - NIST = National Institute of Standards & Technology // SP = Special Publication
 - NIST SP 800-53 Rev. 5
 - Security and privacy standard for federal agency systems
 - Applicable when acting as an extension of your customer
 - NIST SP 800-171 Rev. 2
 - Security standard for contractor systems with federal information
 - Applicable when using your own systems to handle customer information



Introduction to Cybersecurity

- Includes 110 controls across 14 categories (or “families”)
- Implemented via administrative, technical, and/or physical means

TABLE 1: SECURITY REQUIREMENT FAMILIES

FAMILY	FAMILY
Access Control	Media Protection
Awareness and Training	Personnel Security
Audit and Accountability	Physical Protection
Configuration Management	Risk Assessment
Identification and Authentication	Security Assessment
Incident Response	System and Communications Protection
Maintenance	System and Information Integrity

Introduction to Cybersecurity

- Key types of information (generally defined):
 - Federal Contract Information (FCI)
 - Any information handled specifically under a government contract
 - Except public or simple transactional information
 - Controlled Unclassified Information (CUI)
 - Any federal information that requires protection under law, regulation, or Government-wide policy
 - Must have a Government nexus
 - Covered Defense Information (CDI)
 - Any CUI handled by DoD contractors
 - Must be identified as such by customer



Cybersecurity Requirements for Unclassified Information



FAR Safeguarding Clause

FAR 52.204-21 (JUN 2016), *Basic Safeguarding of Covered Contractor Information Systems*

- Mandatory in (almost) all contracts with mandatory flowdown
- Requires protection of FCI residing on contractor information systems via 17 controls pulled from NIST SP 800-171
 - Controls reflect “basic” cyber hygiene
 - Controls must be full implemented before handling FCI

DFARS Safeguarding Clause

DFARS 252.204-7012 (DEC 2019), *Safeguarding Covered Defense Information and Cyber Incident Reporting*

- Incorporated into all DoD contracts to protect CDI
 - Also required to ensure delivery of “operationally critical support”
- Located in Section I, Contract Clauses and/or referenced in Section C, Statement of Work/Performance Work Statement
- Automatic self-certification when bidding on contracts with the Clause
- Three primary requirements:
 1. Protect CDI residing on contractor’s networks;
 2. Rapidly report cyber incidents affecting CDI; and
 3. Flowdown these obligations to subcontractors handling CDI



DFARS Safeguarding Clause

Adequate Security

- If a contractor processes, stores, or transmits CDI on its information system it must implement “adequate security” on those systems to protect CDI
- DoD defines the system’s scope based on logical segregation (or lack thereof)
- Contractor achieves adequate security by:
 - Implementing at least NIST SP 800-171, and/or
 - Using external cloud services that meet requirements equivalent to the FedRAMP Moderate baseline
- Security documented in “system security plans” and “plans of action & milestones”
- Contractor must implement any additional security measures deemed appropriate based on its unique risk profile



DFARS Safeguarding Clause

Rapid Reporting

- Contractors must report “cyber incidents” that “affect” CDI or the system on which it resides
- Designed to enable intelligence gathering
- Cyber incidents broadly defined to include unauthorized disclosure, modification, destruction, loss, or copying
- DoD does not define what it means to “affect” CDI or the overall system
- Contractor must report through a DIBNet portal within 72 hours of discovery
- Contractor must preserve and protect images of all systems and relevant monitoring/packet capture data for at least 90 days



DFARS Safeguarding Clause

Flowdowns

- Contractor must flow down the clause without alteration to subcontractors whose performance requires CDI (or the provision of operationally critical support)
- Contractors must also require subcontractors to:
 - Notify contractor when submitting requests to DoD CIO to vary from NIST SP 800-171
 - Provide contractor with incident report number issued by DoD after submitting a cyber incident report



NIST SP 800-171 DoD Assessments

DFARS 252.204-7019 (NOV 2020), *Notice of NIST SP 800-171 DoD Assessment Requirements*

DFARS 252.204-7020 (NOV 2020), *NIST SP 800-171 DoD Assessment Requirements*

- Standardized mechanism to assess how thoroughly a contractor has implemented NIST SP 800-171, per DFARS 252.204-7012
- Assessments come in three forms:
 - Basic Assessment: Contractor self-assessment, required for new contracting actions after November 30, 2020
 - Medium/High Assessments: Government assessments, performed at customer's discretion after award
- Assessment scores are uploaded to the DoD's Supplier Performance Risk System (SPRS) and generally remain current for up to 3 years
- Contractors must flow down the clause in all subcontracts, excluding COTS
 - Contractors are prohibited from awarding a subcontract requiring implementation of NIST SP 800-171 unless subcontractor has completed, at a minimum, a Basic Assessment within the preceding three years



Cybersecurity Maturity Model Certification

DFARS 252.204-7021 (NOV 2020), *Cybersecurity Maturity Model Certification Requirements*

- The Cybersecurity Maturity Model Certification (CMMC) Framework is a DoD program designed to measure a contractor's cybersecurity maturity.
- The implementing DFARS Clause 252.204-7021 requires contractors to possess a current CMMC certification at the contract's requisite CMMC level prior to contract award and to maintain that certification for the duration of the contract.
- The Clause also requires that contractors ensure that subcontractors have a current CMMC certification at an appropriate level prior to awarding a subcontract.

Cybersecurity Maturity Model Certification

DFARS 252.204-7021 (NOV 2020), *Cybersecurity Maturity Model Certification Requirements*

- DoD introduced CMMC 1.0 in November 2020.
- In March 2021, the DoD began an internal review of CMMC 1.0's implementation.
- DoD announced CMMC Version 2.0 in November 2021, implementing key changes resulting from the internal review.
- CMMC 2.0 compliance will not be required until the DoD completes a new round of rulemaking, including anticipated revisions to DFARS 252.204-7021.
- DoD anticipates that requirement for contractors to be CMMC 2.0 certified will begin appearing in contracts as early as Summer 2023.

Cybersecurity Maturity Model Certification

- **DFARS 252.204-7021 (NOV 2020), *Cybersecurity Maturity Model Certification Requirements***

CMMC Model 2.0		
	Model	Assessment
LEVEL 3 Expert	110+ practices based on NIST SP 800-172	Triennial government-led assessments
LEVEL 2 Advanced	110 practices aligned with NIST SP 800-171	Triennial third-party assessments for critical national security information; Annual self-assess- ment for select programs
LEVEL 1 Foundational	17 practices	Annual self-assessment

Source: DoD's Advanced Notice of Proposed Rulemaking Announcing CMMC 2.0, dated 17 November 2021, and DoD's CMMC Version 2.0 Briefing, dated 3 December 2021.

Cybersecurity Maturity Model Certification

DFARS 252.204-7021 (NOV 2020), *Cybersecurity Maturity Model Certification Requirements*

CMMC 2.0 Key Changes

- ✗ CMMC-specific practices
- ✗ Maturity processes
- ✗ C3PAO assessments for all certifications
- ✓ Plans of action and milestones (POAMs) (with limits)
- ✓ Senior company official attestations
- ✓ Program waivers

Other Cyber Clauses and Provisions

- Like DoD, many agencies have their own supplemental cyber clauses
 - Homeland Security - “HSAR”
 - State Department - “DSAR”
- Cloud services typically come with separate requirements
 - FedRAMP; DoD Cloud Computing Security Requirements Guide
- The customer can set a higher floor
 - Navy, Air Force, and DLA do this



Cloud Security Requirements



Cybersecurity & the Cloud

What is FedRAMP?

1

FedRAMP is a federal government program meant to provide a standardized approach to data security and continuous monitoring.

2

FedRAMP security controls are based on NIST Special Publication 800-53

3

FedRAMP authorization to proceed (ATOs) are awarded by either the Joint Authorization Board of the General Services Administration (JAB of the GSA) or by an individual agency based on agency criteria.

Cybersecurity & the Cloud

What FedRAMP is not?

1

FedRAMP addresses technical security controls. A FedRAMP authorization extends only to the application.

2

FedRAMP is not an overall compliance framework. In order to become a Federal Contractor or subcontractor, an entity must still institute additional compliance across additional functions.

3

FedRAMP authorization is not a “one and done” type deal. Continuous monitoring and continuous compliance with sponsor “findings” is needed. The sponsor can also cancel and/or modify an ATO.

Cybersecurity & the Cloud

FedRAMP Authorization

- If a contractor provides cloud computing services to the federal government, it must undergo the FedRAMP authorization process:
- Package Development: Begins with a meeting between the agency, the Cloud Service Provider (“CSP”), the FedRAMP Program Management Office, and a third-party assessor (“3PAO”). As part of this process, the CSP must develop a System Security Plan (“SSP”).
- Assessment: The CSP and 3PAO will agree on a Security Assessment Plan (“SAP”) to be used by the 3PAO to complete its assessment.
 - The CSP will create a Plan of Action & Milestones (“POA&M”), as necessary based on the assessment
- Authorization: Following the security assessment, the agency will review the completed assessment package. If accepted, the agency will issue an Authority to Operate (“ATO”) letter and the CSP will be listed in the FedRAMP Marketplace.
 - New agencies may review an existing security package and issue new ATOs on this basis, without the need to complete another assessment



Cybersecurity & the Cloud

DFARS 252.204-7012 Safeguarding Clause CSP Requirements

- Applicable to contractors using external Cloud Service Providers (CSPs) to handle CDI:
 - CSPs must meet security requirements equivalent to Federal Risk and Authorization Management Program (FedRAMP) Moderate baseline
 - Contractors must also require CSPs to:
 1. Comply with cyber incident reporting requirements
 2. Send malicious software to DoD Cyber Crime Center (DC3)
 3. Preserve and protect images of affected systems for 90 days
 4. Provide DoD access to information necessary for forensic analysis and damage assessment



Cybersecurity & the Cloud

DFARS 252.239-7010 Cloud Computing Services Requirements

- Applicable to contractors using cloud computing to provide IT services in the performance of its contract
- The Clause requires the CSP to:
 - Comply with the DoD Cloud Computing Security Requirements Guide (SRG)
 - Maintain Government data within the U.S. or outlying areas unless Contracting Officer approval, and
 - Comply with other requirements for cyber incident reporting and damage assessments.



Security Requirements for Classified Contracts



Requirements for Classified Contracts

Classified Contract (FAR 2.101)

means any contract in which the contractor or its employees must have access to classified information during contract performance. A contract may be a classified contract even though the contract document itself is unclassified.

- Will include
 - DD254
 - Will outline the contract requirements (expected classification level, locations of access, additional requirements, etc.)
 - Will include FAR 52.204-2 Security Requirements
 - Requires compliance with NISPOM
- Must flow requirements down to subcontractors



Standards for Classified Contracts

- Cybersecurity standards for classified contracts
 - NISPOM - National Industrial Security Program Operating Manual (NISPOM) (DoD 5220.22-M)
 - Chapter 1, § 1-202 Insider Threat Program
 - Chapter 1, § 4 Reports to DoD About Cyber Incidents on Cleared Defense Contractors' IS Approved to Process Classified Information
 - Chapter 3, §3-103 Insider Threat Training
 - Chapter 8, IS Security
 - Security Technical Implementation Guides (STIGs)
 - Specialized guidance (e.g. SCI, SAPs)

NISPOM General Cybersecurity Requirement

- Establish Insider Threat Program
- Mandatory incident reporting
 - Description of method used in incident
 - Sample of malicious software, if discovered and isolated
 - Summary of potentially compromised information
 - Provide access for forensic analysis
- Provide employees with security training
 - Training on methodologies used by adversaries to recruit and collect classified information
 - Responsibility to comply with IS requirements
 - Reporting responsibilities
 - Initial and annual
- Comply with IS Security Requirements



NISPOM Information System Security Elements

1. Risk mitigation policies and procedures for IS life cycle
2. Plans for information security on IS, networks, facilities, or groups of ISs
3. Provide training to IS users on their activities and responsibilities
4. T&E of IS policies, practices, and security control implementation annually
5. Process for remedial actions to address deficiencies in information security
6. Procedures for detecting, reporting, and responding to security incidents
7. Plans and procedures for IS continuity of operations
8. Self-inspection program



NISPOM Information System Security Personnel

- IS Security Manager (ISSM)
- IS Users
 - Comply with the security program requirements
 - Be accountable for their actions on an IS
 - Not share authentication mechanisms (including passwords)
 - Be subject to monitoring of their activity on any classified network



NISPOM IS Authorization and Controls

- IS authorization after security control assessment
- Minimum security controls:
 - Management Controls
 - Operational Controls
 - Technical Controls
 - Special Categories



NISPOM Management Controls

- Allocate sufficient resources
- Employ software usage and installation restrictions
- Implement security plans for ISs that describe security controls and rules for accessing
- During assessments and self-inspections, assess security controls, correct deficiencies and vulnerabilities, and monitor controls for continued effectiveness
- Implement organizational information security program to protect classified information and ISs with classified information
- Prepare risk assessment and monitor IS changes that could impact the risk assessment



NISPOM Operational Controls

- Personnel responsible for the system must meet the security criteria for the position
- Access is disabled or removed for resigned, terminated, transferred, etc. personnel
- Continuous monitoring for failure to comply with security policies
- Physical and environmental protection
- Continuity of operations planning
- Baseline configurations and IS inventories (hardware, software, etc.)
- Maintain and patch ISs
- Provide malware protection and correct vulnerabilities
- Sanitize or destroy media before disposal or reuse of removable media
- Follow trusted downloading procedures
- Implement mandated auditing processes and procedures to detect IS security incidents
- Report and respond to IS security incidents
- Ensure adequate awareness and training for security-related duties and responsibilities



NISPOM Technical Controls

- Identification and authorization for access to IS
- Limited IS access
- Audit users actions and trace actions to particular users
- Protect organization communications through system architectural design, software, malware protection, etc.



Potential Consequences

- Reporting requirements
- Loss of IS authorization
- Impact on FCL
- Impact on current and future contracts

Read your SOW/PWS/Contract

Know your agency

Know your obligations

Establish a security culture

Privacy Requirements for Government Contractors



Privacy & the Federal Government

Key Privacy Definition – Personally Identifiable Information (PII)

- “[I]nformation that can be used to distinguish or trace an individual's identity, either alone or when combined with other information that is linked or linkable to a specific individual. “
- “[T]he term PII is necessarily broad.”
- “[I]nformation that is not PII can become PII whenever additional information becomes available – in any medium or from any source – that would make it possible to identify an individual.
 - OMB Circular No. A-130, *Managing Information as a Strategic Resource* (July 28, 2016)



Privacy & the Federal Government (cont.)

Key Privacy Statute – The Privacy Act of 1974 (5 U.S.C. § 552a)

- Applies to agency systems of records about individuals
 - “Record” = any item, collection, or grouping of information about an individual that is maintained by an agency
 - “System of Records” = group of agency-controlled records from which information is retrieved (not merely retrievable) by a personal identifier
- Limits agency use and disclosure of records: “routine use” or written consent
- Protects individuals (with certain exceptions): System of Records Notice (SORN) in Federal Register, account for disclosures, Fair Information Practice Principles, right to access and correct information
- Imposes civil and criminal consequences for violations



Privacy & the Federal Contractor

- The Privacy Act does not apply to all federal contracts that involve personal information
- Agency, NOT contractor, determines whether the Privacy Act applies
 - “Agencies shall ensure that the language of each contract that involves the creation, collection, use, processing, storage, maintenance, dissemination, disclosure, or disposal of information that identifies and is about individuals, is sufficient and that the applicable requirements in the Privacy Act and OMB policies are enforceable on the contractor and its employees.”

OMB Circular A-108, Federal Agency Responsibilities for Review, Reporting, and Publication under the Privacy Act (Dec. 23, 2016)

- The Privacy Act applies IF the contractor operates or accesses a Privacy Act system of record on behalf of an agency or works with information from a Privacy Act system of record AND the agency includes Privacy Act clauses in the contract



Privacy & the Federal Contractor (cont.)

- If the agency determines that i) the Privacy Act applies or ii) the contractor will be working with agency PII, the agency must incorporate FAR 52.224-3, Privacy Training, into the contract.
- Before working on the contract, team members must receive privacy training that covers, at minimum,
 - The Privacy Act, including penalties for violations
 - The appropriate handling and safeguarding of PII
 - The authorized and official use of a system of records or any other PII
 - The prohibitions against using unauthorized equipment for PII
 - The prohibition against the unauthorized use of a system of records or unauthorized disclosure, access, handling, or use of PII
 - The incident response procedures for a suspected or confirmed breach



Privacy & NIST – SP 800-53 Rev. 5 (Sept. 2020)

- Special Publication 800-53, revision 5, renamed to “Security and Privacy Controls for Information Systems and Organizations,” integrates security and privacy controls, and adds two new control families: “PII Processing and Transparency” and “Supply Chain Risk Management”

TABLE 1: SECURITY AND PRIVACY CONTROL FAMILIES

ID	FAMILY	ID	FAMILY
<u>AC</u>	Access Control	<u>PE</u>	Physical and Environmental Protection
<u>AT</u>	Awareness and Training	<u>PL</u>	Planning
<u>AU</u>	Audit and Accountability	<u>PM</u>	Program Management
<u>CA</u>	Assessment, Authorization, and Monitoring	<u>PS</u>	Personnel Security
<u>CM</u>	Configuration Management	<u>PT</u>	PII Processing and Transparency
<u>CP</u>	Contingency Planning	<u>RA</u>	Risk Assessment
<u>IA</u>	Identification and Authentication	<u>SA</u>	System and Services Acquisition
<u>IR</u>	Incident Response	<u>SC</u>	System and Communications Protection
<u>MA</u>	Maintenance	<u>SI</u>	System and Information Integrity
<u>MP</u>	Media Protection	<u>SR</u>	Supply Chain Risk Management

Privacy & NIST – Privacy Framework 1.0

- Voluntary and intended to be tailored to the needs of the specific organization
- Compatible with the NIST Cybersecurity Framework Functions (Identify, Protect, Detect, Respond, Recover)
- Privacy Framework addresses combined effect of two risks associated with personal information
 - Security risk – risks to confidentiality, integrity, and availability (managed with cybersecurity controls)
 - Privacy risk – the risk inherent in working with personal information, including unintended consequences (managed with privacy controls)
 - Those risks overlap during data breach involving PII (managed through incident response program)
- Privacy risk assessment – Consider potential problems that individuals could experience from system, product, or service operations involving PII, whether in digital or non-digital form, throughout life cycle
- Five Core Functions
 - Four functions are primarily associated with identifying and managing data flows and related privacy risks during data processing: Identify-P, Govern-P, Control-P, and Communicate-P
 - One is primarily associated with managing privacy risks associated with privacy breaches: Protect-P.



Other Privacy Considerations for Contractors

- Contractors have to comply with otherwise applicable privacy and data security laws, including with regard to their employment-related activities
- International laws, including the EU General Data Protection Regulation (GDPR)
- U.S. State law
 - Data breach notification
 - California Consumer Privacy Act (CCPA)
 - CCPA Amendment of 2020 (California Privacy Rights Act)
 - Colorado Privacy Act (CPA)
 - Virginia Consumer Data Protection Act (VCDPA)
- Sectoral or data category-specific laws (*e.g.* biometric identifiers) such as IL BIPA
- Comprehensive federal privacy law – nothing yet, but perhaps in 2023 to counter the patchwork of state laws



Questions?

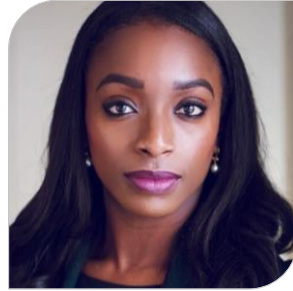


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Cost & Pricing: Our Two Cents

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Agenda

1. Contract Pricing & Truthful Cost or Pricing Data / TINA
2. Cost Allowability
3. Administration of Indirect Rates
4. Cost Accounting Standards



Contract Pricing & Truthful Cost or Pricing Data / TINA



Contract Pricing

FAR 15.4

- Objective: for the Government to negotiate a fair and reasonable price with the contractor
- The Government may use various cost/price analysis techniques and procedures to ensure a fair and reasonable price, including, but not limited to:
 - Comparison of proposed prices received in response to the solicitation (e.g., competition)
 - Comparison with competitive published price lists, market research of similar items, etc.
 - Comparison of the proposed prices to historical prices paid
 - Comparison of proposed prices with independent Government cost estimates
 - Use of parametric estimating methods/application
- The Government may also evaluate cost and pricing data, to the extent the contractor is required to submit such data
 - Certified (TINA)
 - Other than certified



Truthful Cost or Pricing Data / TINA

TINA Overview

- TINA requires “truth” in negotiation, i.e., the disclosure of all “cost or pricing data” so that both parties have access to the same information (level playing field)
- TINA requires certification that the contractor disclosed current, accurate, and complete cost or pricing data as of date of final price agreement
- TINA is a **disclosure** requirement: it does not require contractor to use the data, or to analyze available data, or to propose a lower price
- If data are “defective,” Gov’t contractually entitled to downward price adjustment (subject to defenses)
- Applies to individual pricing actions over the applicable threshold (\$2M) for non-commercial products/services when adequate competition not obtained
- Flows down to all tiers, unless exception applies



When Does TINA Apply?

TINA Coverage

- Applies to offerors/prospective contractors, prime contractors, all tiers of subcontractors, and contract modifications valued at **\$2M** or more, ***unless an exception applies***
 - Adequate price competition (i.e., two or more responsible offerors are independently competing for award)
 - Prices are set by law or regulation
 - Commercial products or commercial services are being acquired or modified
 - A waiver has been granted by the head of the contracting activity (this is rare)
 - Data that relates to an indirect offset under Foreign Military Sales contracts (this exception is implemented via DFARS 252.215-7014)
 - The exercise of an option at the price established at contract award
 - Proposals used solely for overrun funding or interim billing price adjustments



Cost or Pricing Data

Cost or Pricing Data

- “Cost or pricing data” defined in FAR 2.101
- **Facts** not judgments (facts are verifiable)
- As of date of price agreement
- Reasonably prudent buyer and seller would ***reasonably expect to affect price negotiations significantly***
- More than historical accounting data; not always easy call
- Must be “reasonably available” to the contractor:
 - Even if negotiators are unaware of data’s existence—best practice to conduct a “data sweep” of management and relevant functions
 - Urgency generally not an excuse
 - Organizational lag generally not an excuse



Enforcement of TINA

Risk of Non-Disclosure

- Government can reduce the contract price by the amount that the defective data increased the contract price, and they can recover interest for any amounts paid
 - Defective pricing clause will be applied under the *Christian* Doctrine, even if clause is not included in contract
 - Rebuttal presumption that defective data increased price
- Government can recover price adjustment from the prime for a subcontractor's defective cost or pricing data
- Penalty amounts equal to the increase (i.e., overpayment) may also be assessed for knowingly submitting defective cost or pricing data
- Can also result in civil and criminal liability
 - Frequently “defective pricing” is an underlying allegation of civil FCA claim
- Even if no liability, can create reputational risks



Defective Pricing Claims

Elements of a Government Claim for Defective Pricing

Government has burden to prove 5 elements (*Alloy Surfaces Co.*, ASBCA No. 59625, 20-1 BCA ¶ 37,574):

1. The information at issue is ***cost or pricing data***
2. The data was ***reasonably available*** to the contractor
3. The data was either not disclosed or not meaningfully disclosed
4. The Government relied on the defective data to its detriment
5. Causation (presumption that defective data causes increased contract price, but rebuttable)



Cost Allowability



Cost Allowability

FAR Part 31 Overview

- A set of complex rules applicable to direct & indirect costs in:
 - Cost-reimbursement contracts
 - Time & materials contracts (the reimbursable material portion)
 - Pricing/negotiating indirect cost rates
 - Pricing changes and other contract modifications
 - Price redeterminations under price-redetermination contracts
 - Fixed-price contracts when cost analysis is performed (e.g., when certified cost or pricing data are required)
- Does not apply to contracts/subcontracts for commercial products/services



Cost Allowability

FAR Part 31 Overview

- Provides guidance for allocating costs directly and/or indirectly to cost objectives
- Requires credits, rebates, allowances or other income relating to any allowable cost received by or accruing to the contractor to be credited to the Government via a cash refund or cost adjustment
- Requires unallowable costs (and directly associated costs) to be identified and excluded from any billing, claim, or proposal applicable to a Government contract/subcontract
- Oversight and enforcement through pre- and post-award audits
- Penalties for charging expressly unallowable costs (double damages) or agreed-to-be unallowable costs (treble damages)



Cost Allowability

Elements of Cost Allowability

- Reasonableness
 - What is reasonable depends upon a variety of considerations and circumstances, including - (1) Whether it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor's business or the contract performance; (2) Generally accepted sound business practices, arm's length bargaining, and Federal and State laws and regulations; (3) The contractor's responsibilities to the Government, other customers, the owners of the business, employees, and the public at large; and (4) Any significant deviations from the contractor's established practices
- CAS or GAAP compliant (as applicable)
- Allocable (assignable/chargeable to one or more cost objectives on the basis of relative benefits received or equitable relationship)
- Terms of the contract
- FAR Part 31 Cost Principles
- Adequately supported by documentation / other evidence



Administration of Indirect Rates



Establishment of Indirect Cost Rates

Overview

- When applicable, indirect cost rates must be established annually (contractor's fiscal year) for interim and final billing purposes (FAR 42.7)
- Provisional Billing rates
 - May be established by making appropriate adjustments to prior year's rates
 - Once established, may be prospectively or retroactively revised to prevent substantial overpayment or underpayment
- Final rates
 - Determined by the cognizant Federal agency official (e.g., the ACO) by mutual agreement, or unilateral determination
 - Failure to agree on final rates → dispute under the CDA



Indirect Cost Rate Proposals

The Typical Process

- Final rates are established after submission of an **adequate** certified final indirect rate proposal
- The proposal must be submitted to the CO and auditor (e.g., DCAA) within 6 months following the expiration of the company's fiscal year
 - The CO may grant a “reasonable” extension
 - Proposal must be supported by accounting records and underlying documentation
- Once determined to be “adequate,” DCAA will audit the proposal
 - Audit may include transaction testing on indirect and direct costs, to determine cost allowability, reasonableness, and allocability
- Audit report serves as basis for CO's negotiations/determination of any cost disallowances and final indirect cost rates



Cost Accounting Standards



What are the Cost Accounting Standards?

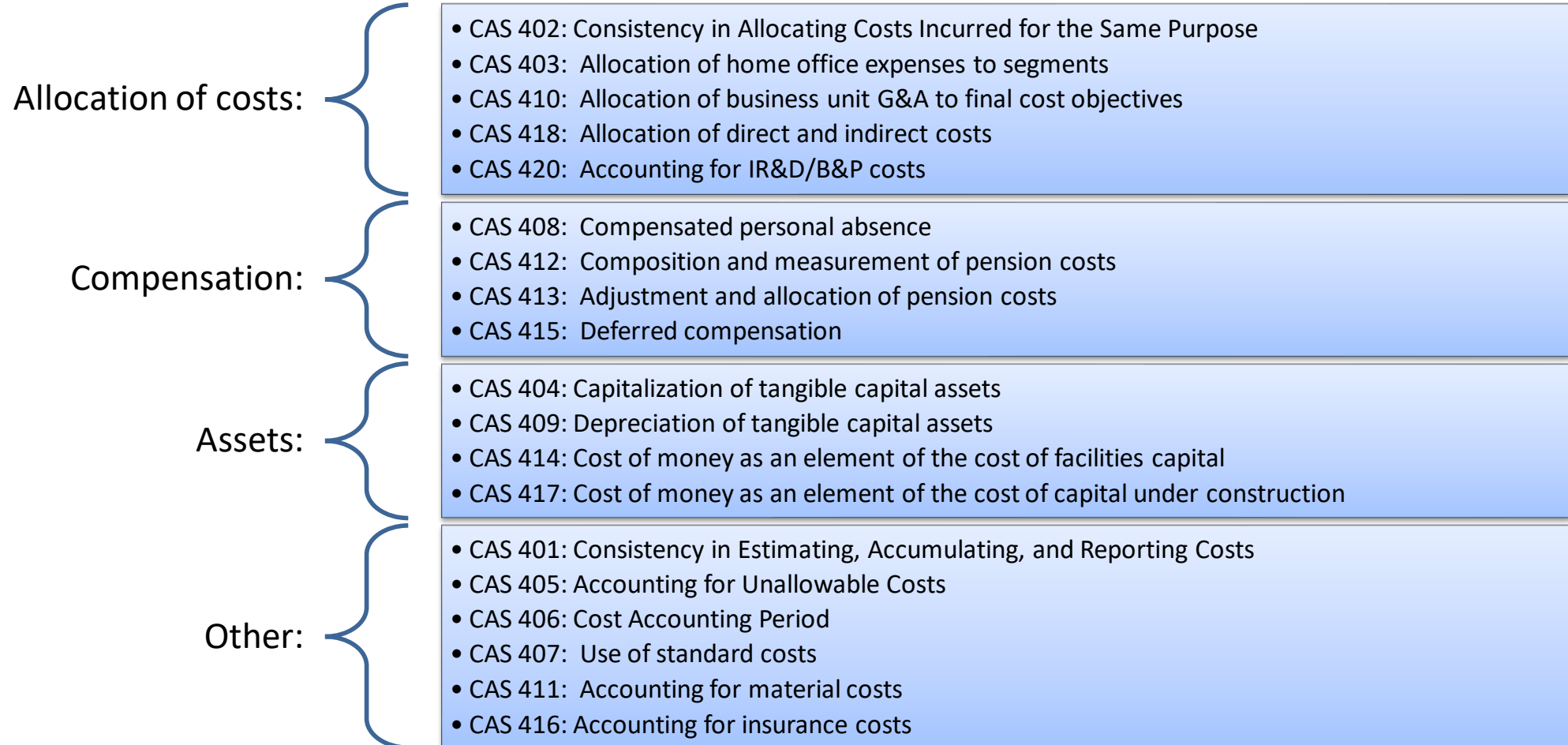
Overview

- Nineteen standards, some or all may apply to certain contracts depending on contract type, dollar thresholds, and applicability of exemptions (full or modified coverage)
- Govern how costs:
 - Are measured (how much),
 - Are assigned (to which cost accounting period), and
 - Are allocated to final cost objectives (how you distinguish direct from indirect costs, and the basis used for allocating indirect costs)
- Sometimes require submission of current Disclosure Statement that describes (compliant) cost accounting practices
- Requires the contractor to consistently follow their disclosed (or established) cost accounting practices



What are the Cost Accounting Standards?

The 19 Standards, 48 C.F.R. 9904



When Do the CAS Apply?

Determining CAS Coverage

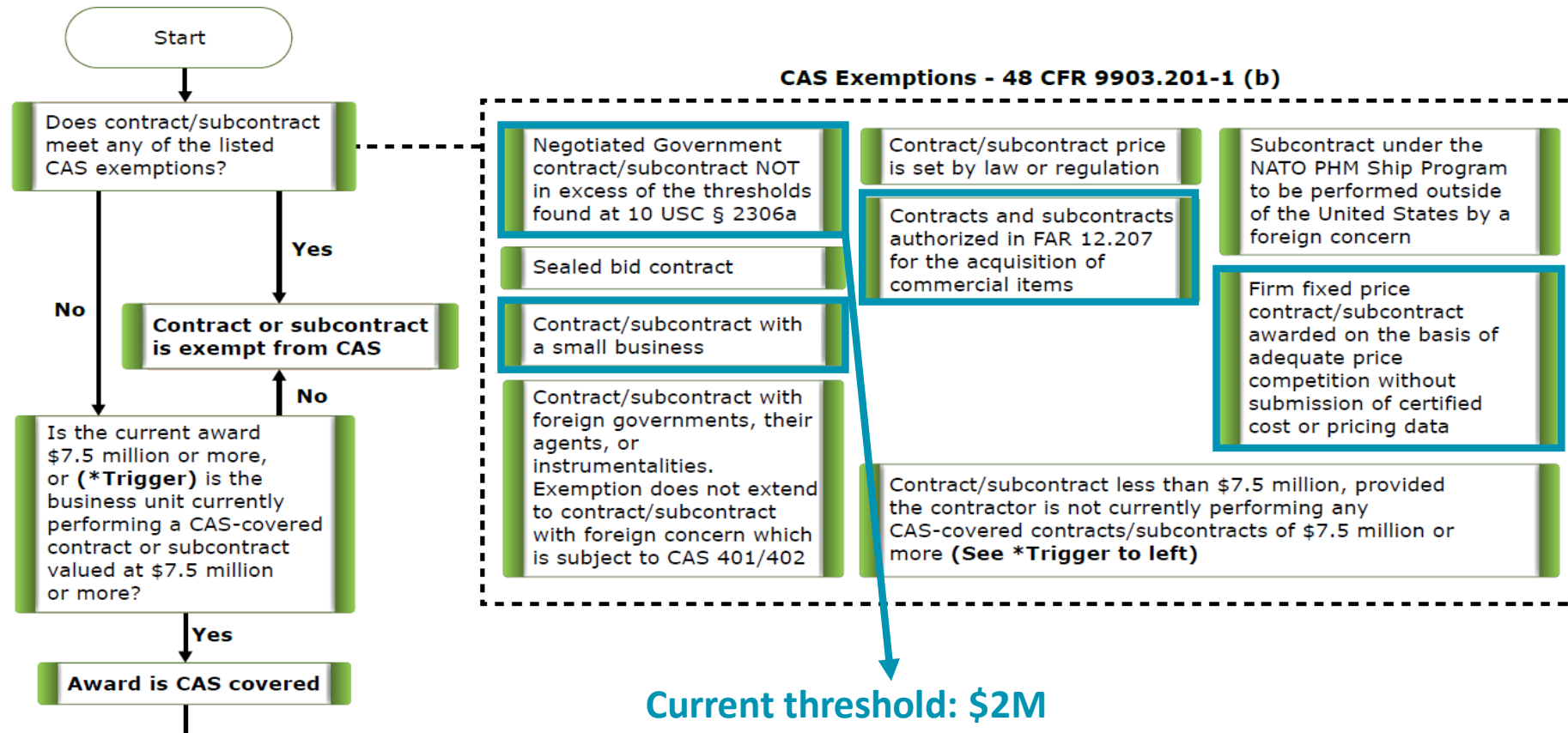
- Applies to **contracts, not contractors** (implemented by FAR Part 30 & FAR Ch. 99)
- Flowdown from CAS-covered prime contracts, but exemption may apply at subcontract level
 - FAR 52.230-2, Cost Accounting Standards
 - FAR 52.230-3, Disclosure and Consistency of Cost Accounting Practices
 - FAR 52.230-6, Administration of Cost Accounting Standards
- No clear rules for indefinite delivery/quantity contracts, “hybrid” contracts (e.g., multiple CLINs of different contracts types)
 - Clarify/assert applicable exemption(s) during proposal phase
- CAS coverage determined at time of contract award, and maintains that status throughout life of contract (regardless of any modifications that may put it over an applicable threshold)



When Do the CAS Apply?

Determining CAS Coverage: key exemptions are highlighted in blue

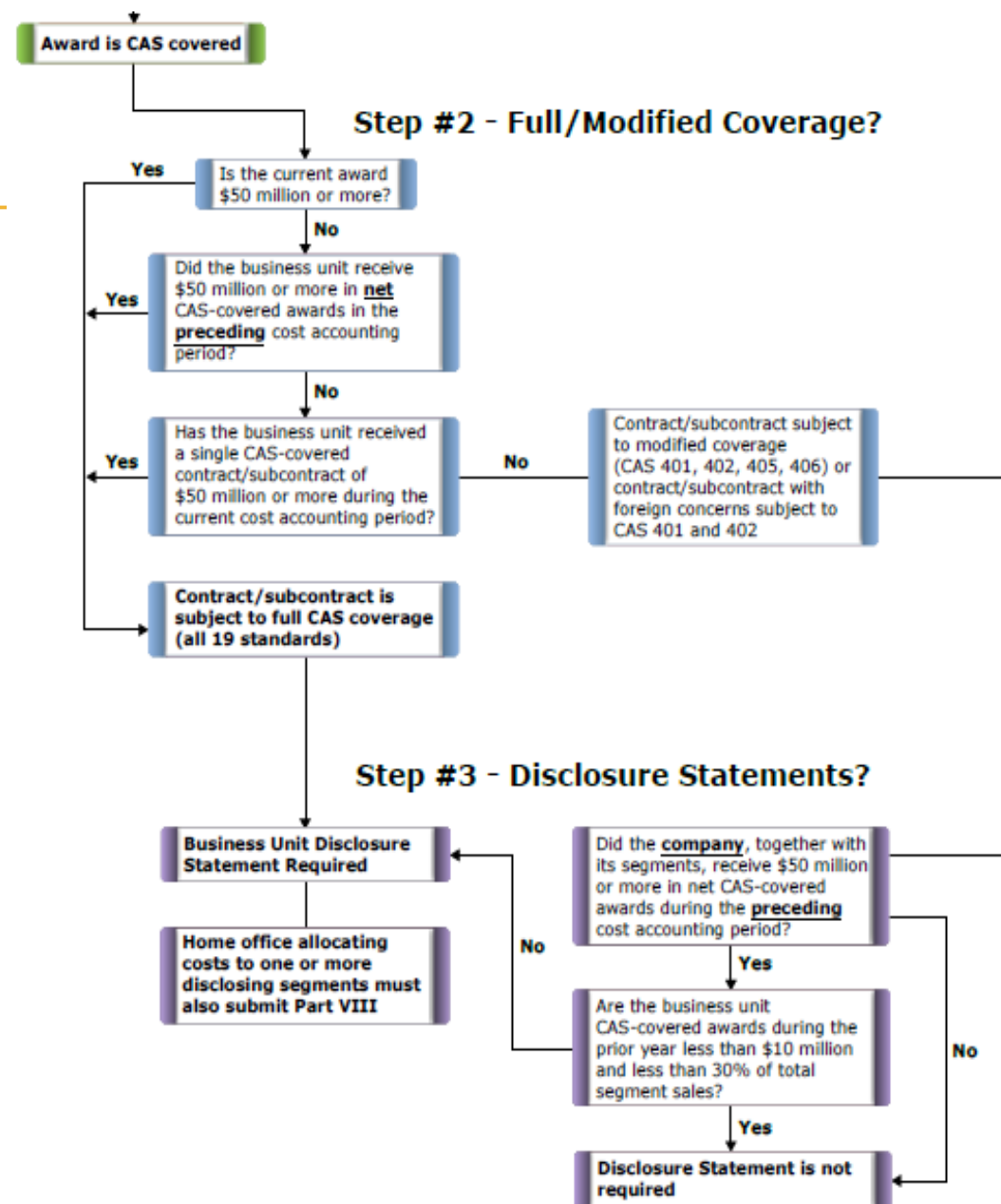
Step #1 - Does CAS Apply?



When Do the CAS Apply?

Determining Full or Modified CAS Coverage

- Full CAS coverage applies if:
 - Contract value is \$50M or more, or
 - Contract value exceeds \$7.5M and business unit received \$50M or more in net CAS-covered awards in preceding cost accounting period
- Disclosure statements are sometimes required under modified CAS coverage
 - Contract is subject to Modified CAS and company (together with its segments) received \$50M or more in net CAS-covered awards in preceding cost accounting period (unless the segment CAS-covered awards in the prior period are less than \$10M and less than 30% of total segment sales)



Changes in Cost Accounting Practices

Changing from One Compliant Practice to Another

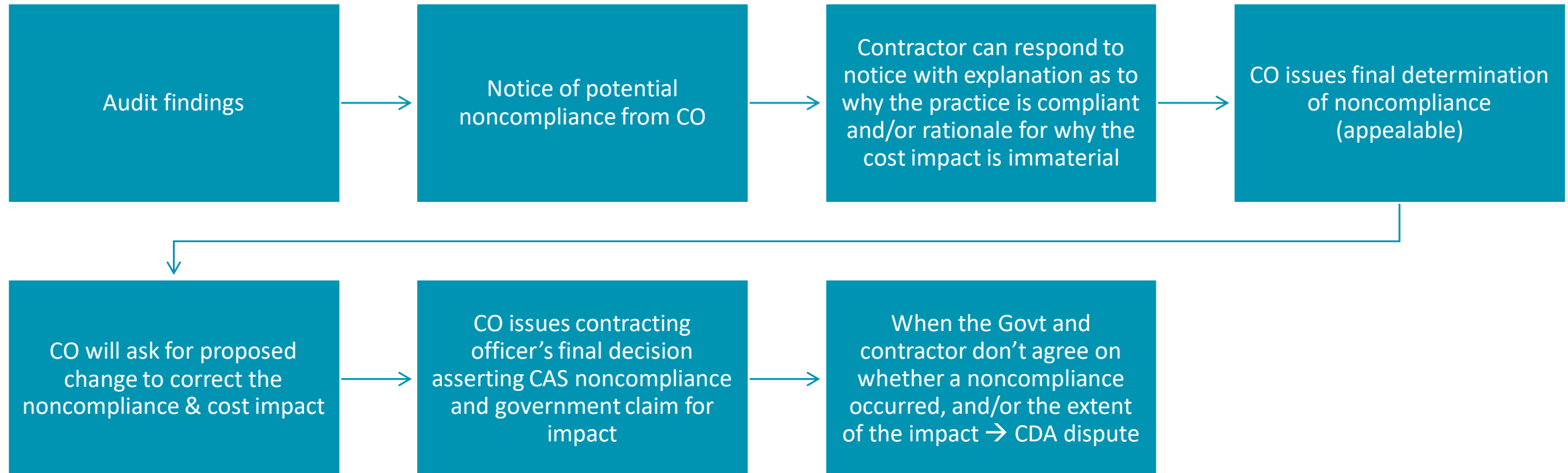
- Threshold question: is it a **change to a cost accounting practice**, or an organizational or administrative change?
- When the contractor makes a business decision to change from one compliant practice to another compliant practice, that is generally considered a “unilateral change”
- Contractor changes to practices may require contract price adjustments, but only to the extent they favor the Government
- Steps in the process to change cost accounting practice:



Noncompliance Determinations

What Now?

- Failure to comply with applicable CAS or failure to follow disclosed practices consistently may entitle the Government to contract price adjustments, plus compound interest
- The typical process:



Questions?



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Government Contracts 101

Small Businesses in Federal Government Contracting

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Agenda

- Overview of small business contracting
- Key concepts for small businesses engaging in federal government contracting
- Key concepts for other than small businesses interacting with small businesses
- Enforcement mechanisms and risk
- Small business participation and past performance evaluation and reporting



Overview of Small Business Contracting



Overview

- 1953 – Congress passed the Small Business Act, which authorized the Small Business Administration
 - Declared it the policy of Congress to promote the interests of small businesses to “preserve free competitive enterprise”
 - One way to do so was to insure that small businesses received a “fair proportion” of federal contracts and subcontracts
- Over the years, Congress has approved legislation to support small business in various ways



Overview

- Congress sets federal small business procurement goals
 - The Federal government must direct a percentage of spending dollars to small business and certain categories of small businesses
- 1988 = first procurement goal in prime contracting for small business
- Since then:
 - Goals have been increased,
 - Goals have extended to include some subcontracting, and
 - Applied to certain sectors of small businesses such as socially and economically disadvantaged small business, service-disabled veteran-owned small businesses, woman-owned small businesses, and Historically Underutilized Business Zones
 - **Note for FY22 – SDB goals increased from 5% to 11% (15% goal by FY25)**



Overview

Category	<u>Governmentwide Goal</u>
Small Business	23%
Small Disadvantaged Business	5%
<u>SDVOSB</u>	3%
WOSB	5% *
HUBZone	3% *



Overview

- Requirements and authorities:
 - Reserve contracts greater than the MPT but less than the SAT for small businesses if reasonable expectation that two SBs can satisfy requirements
 - Set aside contracts exceeding SAT if reasonable expectation that agency will receive bids from two responsible SBs at market price (Rule of Two)
 - Authority to make sole source awards
 - Authority to set aside contracts for or provide preference to specific types of SBs (e.g., 8(a), HUBZone, WOSBs, SDVOSBs)
 - Ability to have mentor-protégé relationship and joint venture with other-than-small businesses



Key Concepts for Small Businesses Engaging in Federal Government Contracting



Size

- SBA's size standards define whether a business entity is small and, thus, eligible for Government programs and preferences reserved for “small business” concerns
- Size standards have been established for types of economic activity, or industry, generally under NAICS codes
 - Services: measured by average annual receipts over the last most recently completed five fiscal years (effect of Runway Extension Act)
 - Manufacturing: measured by average number of employees for each of the pay periods for the preceding completed 24 calendar months
 - * Section 863 of FY2021 NDAA: lengthened the lookback for employee-based size standards from 12 to 24 months



Size Certification

- Contracting officers/higher tier contractors must assign one NAICS code to a solicitation for prime contract or subcontract
- When responding to a solicitation, size is measured from the date of submission of the initial proposal that contains cost/price
- Two ways a size cert is made via FAR 52.219-1, Small Business Program Representations:
 - Expressly in the proposal
 - Via incorporation of the entity’s SAM reps & certs
- **Under FAR 52.219-1, “small business concern” = a concern *including its affiliates***



Affiliation (13 C.F.R. § 121.103)

- In determining a concern's size, SBA counts the receipts and/or employees of the concern whose size is at issue ***and all of its domestic and foreign affiliates***
- Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both
- It does not matter whether control is exercised, so long as the power to control exists
- Control may be affirmative or negative:
 - Negative control includes, but is not limited to, instances where a minority shareholder has the ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders



Affiliation (13 C.F.R. § 121.103)

- In determining whether affiliation exists, SBA considers factors such as
 - Ownership,
 - Management,
 - Previous relationships with or ties to another concern, and
 - Contractual relationships
- SBA considers the totality of the circumstances, and may find affiliation even though no single factor is sufficient to constitute affiliation



Size Certification

Register Entity

Core Data

Assertions

- Goods and Services
- Size Metrics**
- EDI Information
- Disaster Response Information
- Review Assertions

Representations and Certifications

Points of Contact

Submit Registration

[Back to Workspace](#)

Assertions

Size Metrics Unique Entity ID: [REDACTED]

Page Description

Please enter worldwide organizational size information for your entity. This is inclusive of your parent organization, all branches, and all affiliates worldwide, and not just the size data for the location represented by the specific Unique Entity ID you are registering.

- If you enter Location information below, the numbers you enter for worldwide must be greater than or equal to the numbers entered for Location.

The worldwide size metrics you enter here will be used to calculate your small business size status by industry (represented by NAICS Code) based on the Small Business Administration (SBA) Table of Size Standards.

- The Small Business Administration (SBA) may use this information for programs such as HUBZone and Small Business Size Status Determinations.

Mandatory fields are marked with an asterisk or star symbol. Complete all mandatory fields before continuing to the next page.

Note: Penalties for misrepresentation as a small business include fines of not more than \$500,000 or imprisonment for not more than 10 years, or both; administrative remedies; and suspension and debarment as specified in subpart 9.4 of title 48, Code of Federal Regulations.

Add NAICS Codes:*

Search for NAICS Code:

NAICS Code	Description	Action
541990	All Other Professional, Scientific, and Technical Services	<input type="button" value="ADD"/>
541940	Veterinary Services	<input type="button" value="ADD"/>
541930	Translation and Interpretation Services	<input type="button" value="ADD"/>
541922	Commercial Photography	<input type="button" value="ADD"/>

NAICS Codes Selected

Mark as Primary	NAICS Code	Description	Action
<input checked="" type="radio"/>	541380	Only the first 100 characters of the description are shown Testing Laboratories	<input type="button" value="REMOVE"/>



Worldwide:

Annual Receipts (in accordance with [13 CFR 121](#)):* \$

Number of Employees (in accordance with [13 CFR 121](#)):*

Location (Optional):

Annual Receipts (in accordance with [13 CFR 121](#)): \$

Number of Employees (in accordance with [13 CFR 121](#)):

NAICS Code	Name	NAICS Exception	Size Standard	Small Business?
541611	Administrative Management and General Management Consulting Services		\$16,500,000.00	Y



Socioeconomic Status at the Federal Level

- 8(a)/Small Disadvantaged Businesses (13 C.F.R. § 124.1)
 - 9 year program for socially and economically disadvantaged firms
 - Section 869 of FY2021 NDAA provides for an additional year for firms in 8(a) program during COVID
 - Requires Formal Certification (preapproval) by SBA
 - **SBA recently published a proposed rule that would make several changes to the ownership and control requirements for 8(a) participants (87 FR 55642)**
 - A firm may represent that it qualifies as an SDB if it believes in good faith that it is owned and controlled by one or more socially and economically disadvantaged individuals
- HUBZone (13 C.F.R. § 126)
 - Requires Formal Certification (preapproval) by SBA
 - Principal office located in a HUBZone **and** 35% of employees living in HUBZones
 - 20% if performing “HUBZone contract”
 - Concern must represent that it will “attempt to maintain” 35% during contract performance



Socioeconomic Status at the Federal Level

- SDVOSB/VOSB (13 C.F.R. §§ 125.11-125.16)
 - Generally, a concern must be at least 51% unconditionally and directly owned and controlled by one or more service-disabled veterans
 - Currently – a self-certification except for VA Contracts
 - Section 862 of FY2021 NDAA phases out self-certification, requires SBA to roll out a certification program for SDVOSBs/VOSBs **** SBA issued a proposed rule to implement this directive on July 6, 2022 (87 FR 40141)**
 - VA determines Service Disability – SBA determines size, if protested
- WOSB/EDWOSB (13 C.F.R. § 127.200)
 - Not less than 51% unconditionally and directly owned and controlled by one or more women who are United States citizens
 - Woman/Women Directly Own, Control & Manage Daily Operations
 - As of October 15, 2020, self-certification no longer available; WOSBs/EDWOSBs must be certified by SBA or a third-party



Other Socioeconomic Status

- USDOT's Disadvantaged Business Enterprise (49 C.F.R. Part 26)
- State and Local
- Commercial



Key Concepts for Other Small Businesses Interacting with Small Businesses



Teaming with a Small Business Prime Contractor

- From a proposal perspective – ostensible subcontractor rule (13 C.F.R. § 121.103(h))
 - Test 1: Is the subcontractor proposed to perform the primary and vital requirements of the contract?
 - Test 2: Is the SB prime unusually reliant on the subcontractor?
 - Is the subcontractor the incumbent (and is ineligible from a size or status perspective to bid on the recompete)?
 - Whether the prime planned to hire a large majority of the workforce from the subcontractor?
 - Whether the prime’s proposed management worked for the proposed subcontractor on the incumbent contract?
 - Whether the prime lacks relevant experience, and is obliged to rely on its more experienced subcontractor to win the contract?
 - ** All aspects of the relationship are taken into consideration
- If the answer is yes to either: the subcontractor is deemed the “ostensible subcontractor” of the SB prime
 - To determine eligibility for the set-aside: must aggregate the prime and subcontractor’s receipts or employee count



Teaming with a Small Business Prime Contractor

- From a performance perspective
 - Small business prime must perform a minimum level of work, i.e., there are limitations on subcontracting (13 C.F.R. § 125.6) – implemented via FAR 52.219-14
 - Non-manufacturer rule (13 C.F.R. § 121.406) – **via 2021 rulemaking, FAR clause 52.219-33 added to implement the non-manufacturer in contracts**



Teaming with a Small Business Prime Contractor

- Old methodology (in old versions of FAR 52.219-14)
 - Prime contractor responsible for the specified percentage of cost of performing the contract (with variations depending on whether it is a contract for services, supplies, construction, or specialty trade construction)
 - For example, for services, at least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern
- New methodology (in 13 C.F.R. § 125.6 and FAR 52.219-14 (SEPT 2021))
 - Effective September 10, 2021, FAR part 19 now reflects the new methodology for calculating compliance with the limitations on subcontracting
 - For services, prime will not pay more than 50% of the amount paid by the government to it to firms that are not similarly situated
 - Any work that a similarly situated subcontractor further subcontracts will count towards the 50% subcontract amount that cannot be exceeded



Subcontracting to a Small Business

- FAR 52.219-9, Small Business Subcontracting Plan, must be included if:
 - The contract is worth more than \$750,000 (or, more than \$1.5 million if it's for construction of a public facility)
 - There are capable small businesses who could do subcontract work at a fair market value, without significantly disrupting performance
- Other than small businesses can rely in good faith on the self-certifications made by subcontractors for size and most statuses with limited exceptions



Subcontracting to a Small Business

- Reporting requirement:
 - Summary Subcontracting Report: summary report submitted annually to each agency
 - Supposed to be executed and approved by the CEO
 - Individual Subcontracting Report: specific to an individual contract and submitted biannually for review by the contracting officer on that contract



Mentoring a Small Business

- SBA's mentor-protégé program (13 C.F.R. § 125.9)
 - Review and approval process
 - Designed to enhance the capabilities of protégé firms
 - Mentors must provide business development assistance, and
 - Improve the protégé firms' ability to successfully compete
 - Assistance may include:
 - Technical and/or management assistance
 - Financial assistance in the form of equity investments and/or loans
 - Subcontracting
 - Joint venturing as SB, SDVOSB, WOSB, 8(a), etc. on set-aside/sole source opportunities



Mentoring a Small Business

- Problem areas or red flags of mentor-protégé program
 - Failure to provide required assistance
 - “Informal” mentoring
 - Assistance beyond that which has been reviewed and approved by SBA
- Problem areas for joint venturing
 - Ensuring joint venture agreement complies with the regulations
 - Complying with the performance work requirements



Enforcement Mechanisms and Risk



The Government's Enforcement Tools

- The civil False Claims Act
 - Low bar for liability coupled with draconian sanctions
 - Presumption of loss rule (15 U.S.C. § 632(w)(1))
 - “In every contract [or] subcontract ... which is set aside, reserved, or otherwise classified as intended for award to small business concerns, there shall be a **presumption of loss** to the United States based on **the total amount expended on the contract [or] subcontract** ... whenever it is established that a business concern other than a small business concern **willfully** sought and received the award by **misrepresentation**.”
 - The FCA's qui tam provisions
- Criminal prosecution
 - Presumption of loss rule applies for sentencing purposes
- Collateral consequences
 - Suspension and debarment



Risks for Large Businesses

- Large businesses are an obvious target
 - Deep(er) pockets
 - Jury appeal and headlines: Large company deprived small and disadvantaged businesses of work reserved for them
- Common allegations – when small business is prime contractor:
 - Misrepresentation of status by small business as prime, with large as subcontractor
 - “Pass-through” fraud, with large as subcontractor performing the work
 - Fraud based on violation of affiliation/control rules, including via joint venturing
- Common allegations – when large business is prime contractor:
 - Falsely certifying compliance with subcontracting plan related to use of small business subcontractors
 - Small subcontractor not actually performing and benefiting from work



Small Business Participation and Past Performance Evaluation and Reporting



New Past Performance Reporting and Evaluation Considerations

- SBA Final Rule - 87 FR 43731 – Purpose is to help SBs have qualifying past performance
 - Issued 7/22/2022
 - Effective 8/22/2022
 - NOT retroactive
- Revisions to 13 C.F.R. 125.3 and new 13 C.F.R. 125.11 (no update to FAR 52.219-9 yet)
 - Prime contractor, upon request from a first-tier small business subcontractor, must provide the subcontractor with a rating of the subcontractor's past performance
 - Requires contracting officers to consider certain types of past performance for small businesses “similarly to a prime-contract past performance”
 - JV of which the SB was a member
 - SB performance as a first-tier subcontractor



Past Performance Reporting

- Evaluation Factors
 - Same five evaluation factors as Contractor Performance Assessment Reporting System (CPARS): Technical; Cost control; Schedule/timeliness/management of business relationships; Other
 - Prime contractors are required to use the five-scale rating system at FAR 42.1503(b)(4): Exceptional, Very Good, Satisfactory, Marginal, and Unsatisfactory
- No SBA Template
 - SBA did not provide a standardized template
- Use of Additional Evaluation Factors is not Foreclosed
 - Can add additional evaluation mechanics, but must include the CPARS factors
 - Prime must provide rating within 15 days of subcontractor's request



Implications of New Requirements

- Penalties for Disregarding Evaluation Requirements
 - Termination for default; withholding of award fees; lower past performance ratings; liquidated damages for failing to make a good faith effort to comply with subcontracting plans; and even debarment (if the failure is willful or repeated)
- Risk of positive and negative bias in evaluations
- No administrative process to dispute evaluations, but subcontractor can at least choose not to rely on them
- Addition of new pre- and post-award bid protest issues



Questions?



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Government Contracts M&A

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Agenda

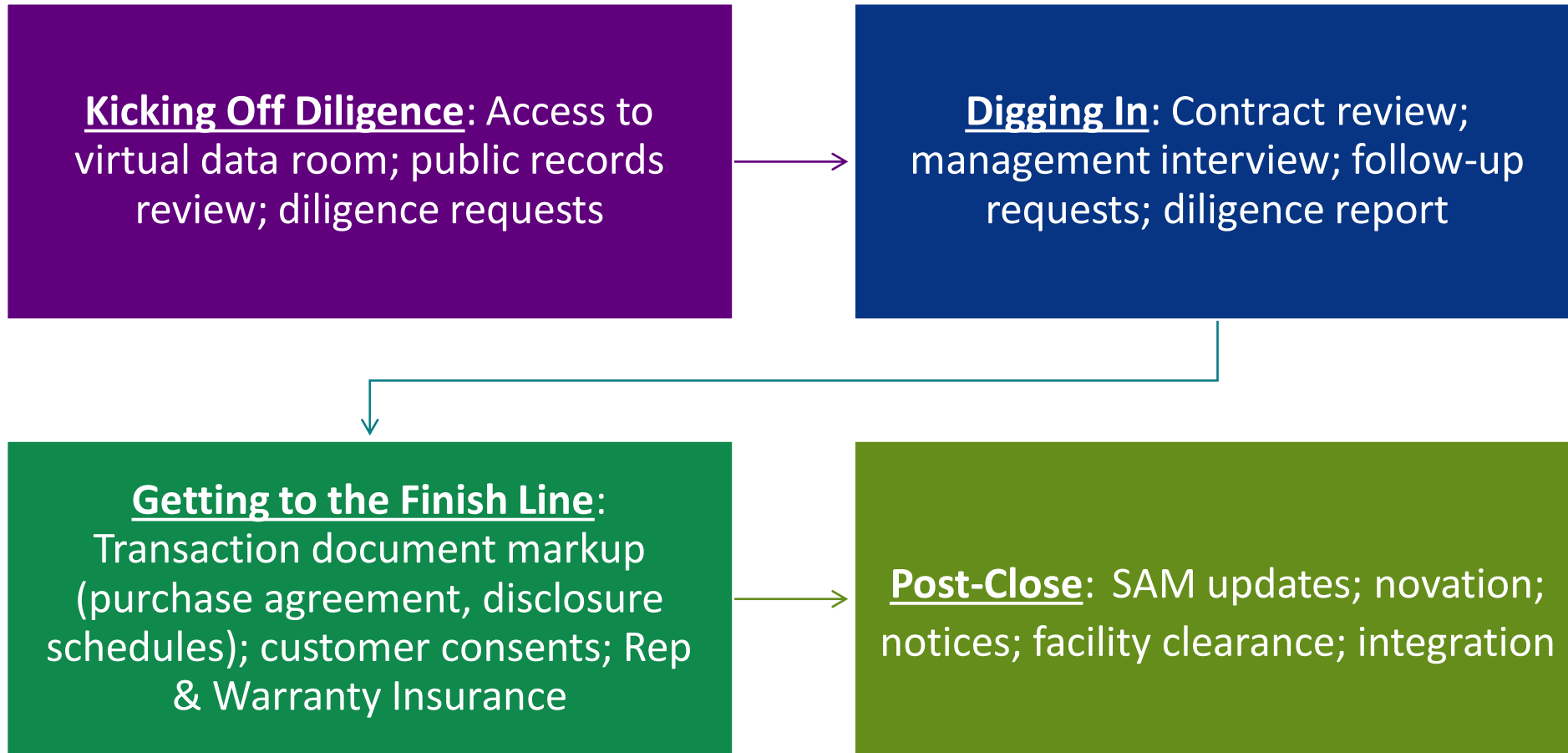
- Lifecycle of a GovCon Deal
- “Red Flags” in Due Diligence
- Contract Review Practice Tips
- Rep & Warranty Insurance



Lifecycle of a GovCon Deal



Lifecycle of a GovCon Deal



“Red Flags” in Due Diligence



Unique Risks to Assess in Government Contracts

- Cost and Price Issues
- Intellectual Property
- Cybersecurity
- Small Business and Socio-Economic Issues
- Past Performance Issues/Litigation/Investigations
- Facility Clearances
- Required Policies and Procedures
- Hotline/Whistleblowing
- Labor and Employment Requirements
- Supply Chain/Domestic Preference/889 Requirements
- National Security Considerations



Cost and Pricing Issues

- What is the contract mix?
 - Fixed price?
 - Cost reimbursement?
- Cost Accounting Standards (CAS) Requirements (FAR Part 30)
 - FAR 52.230-2, Cost Accounting Standards
 - FAR 52.230-3, Disclosure and Consistency of Cost Accounting Practices
 - FAR 52.230-6, Administration of Cost Accounting Standards, etc.
- Truthful Cost or Pricing Data/TINA
- Ongoing Audits or Investigations



Intellectual Property Considerations

- IP/Data Rights Schemes
 - Unlimited, Government Purpose Rights (GPR), Restricted or Limited Rights, Specifically Negotiated Licenses, Commercial Items
 - Other Transaction Authority (OTA), Small Business Innovation Research (SBIR)
- Non-Standard IP Terms
- Identifying Key IP
- Markings on Data Deliverables
- Tracking and Documenting Sources of Funding



Cybersecurity

- Subject to DFARS 252.204-7012?
- Compliant SSP/POA&M in place?
 - System Security Plan
 - Plan of Action and Milestones
- What Level of CMMC does the seller plan to attain?
 - Cybersecurity Maturity Model Certification



Small Business and Socio-Economic Issues

- **Size Certifications**

- Check the Company's certifications on the System for Award Management (SAM) as small and any additional socio-economic status

- **Affiliation Analysis**

- Request the Company's affiliation analysis, if any, as well as the basis for socio-economic certifications

- **Mis-Certification**

- If mis-certification re: size or status, analyze scope of issue: prime/sub, set-asides, reasonable basis

- **Impact of Loss of Status**

- Analyze how loss of status might affect the Company's current contracts and future opportunities



Performance Issues, Investigations/Audits, Disputes

- Past Performance Issues

- Terminations
- Negative Contractor Performance Assessment Reporting System (CPARS) ratings
- Cure Notices

- Audits & Investigations

- Government/prime/internal audits
- Internal/external investigations

- Disputes & Litigation

- Claims/Request for Equitable Adjustment (REA)
- Potential bases for False Claims Act liability



Other Compliance Issues

- Code of business ethics and conduct
- Government contracts policies/procedures
- Hotline/Whistleblowing
- Labor/employment requirements (AA/EEO/SCA/DBA)
- Supply Chain/Domestic Preference/889 requirements



National Security Considerations

- There are various national-security related considerations in terms of diligence as well as closing/integration considerations
- Facility clearance/personnel clearances
- Export controls
 - Key compliance area
 - Active authorizations to transfer?
- Foreign ownership control or influence (FOCI) considerations
 - FOCI mitigation for cleared companies
 - National security reviews by the Committee on Foreign Investment in the U.S. (CFIUS)



Government Contract Review

Practice Tips



Key Aspects of Government Contracts Review

- Determining Scope of Review
- Focusing the Contract Review
- Classified/Unclassified Review
- Consent and Notification Requirements
- Indemnities and Liquidated Damages
- Organizational Conflicts of Interest (OCI)
- Compliance Obligations



Determining the Scope of Government Contract Review

- How does the **type of business** impact the contract review?
- What does the target's **contract portfolio** look like?
 - How many government contracts? What types? (Prime/sub, joint venture agreements, teaming agreements, etc.)
- Negotiated materiality threshold vs. Top 10/20/30
 - Targets may push back on providing their entire portfolio, especially in the early stages of diligence or in an auction scenario.
 - Need to understand the business and regulatory risks associated with reviewing only a subset of the portfolio.



Focusing the Government Contract Review

- Identify Key Risks
 - Start by scoping CIM/CIP/MP, if any, to identify key risks, as well as SAM, FAPIIS, VDR contents
- Prioritize Issues
 - Any issues client wants to prioritize? (e.g. CAS, foreign ownership issues, IP etc.)
- Reference Financial Models
 - Reconcile with contracts & prioritize highest-revenue or long-term relationships



Focusing the Government Contract Review, cont.

- Identify Pipeline/Pending Proposals
 - Are there material proposals? OCI concerns that require more scrutiny?
- Identify Standard Flowdowns and Missing Incorporated Terms
 - Have all the terms and flowdowns been provided? Are there incorporated T&Cs that have not been provided?
- Cross-Check Against Publicly Available Award Information
 - USAspending; FPDS



Key Concerns with Classified Contract Review

- Do you have the **right resources in place** to review a classified contract if the target has any?
- Need to consider “**black box**” contracts and associated lack of transparency
- To **mitigate uncertainty** associated with lack of transparency if no classified review: earn-out provision to incentivize future performance; robust representations
- Consider whether **customer calls** to agencies are possible/practical



Consent, Notice, and Novation Requirements

- Consent vs. Notification vs. Novation

- Differences are material. Need to understand timing and process
- **Assignment Definitions:** Be mindful of the definition of “assignment” and whether it can cover changes in ownership or mergers/acquisitions/stock purchases and in what context
- **Novations:** Transferring a U.S. government contract without consent of the government is a violation of the Anti-Assignment Act (41 U.S.C. § 6305)
 - Novation processes are agency specific and can take considerable time and cooperation between both the buyer and the seller

- Consider how the target’s customers may view the transaction

- Customer calls can be key to providing comfort that the transaction will be met with a positive reaction



Important Considerations with Indemnities or Liquidated Damages

- Are these provisions **overbroad** and do they represent outsized risk?
- Does the business line lend itself to **abnormal indemnity risk**?
- Is there a **history with a particular customer or agency** that would amplify risk concerns here?



Organizational Conflicts of Interest (OCI)

- What is an OCI?
 - Unequal Access to Information
 - Biased Ground Rules
 - Impaired Objectivity
- Do any contracts require **OCI mitigation plans**? Have any been filed? Prior OCI issues with the company?
- Does the target's portfolio overlap with prior or existing contracts the buyer has performed?
 - Need to examine current portfolio to ensure there are not direct or indirect conflicts. E.g., is the buyer developing agency specifications/RFPs in the area that the target is performing or vice-versa?



Compliance Obligations

- Which regulatory regimes apply?
 - Important to understand that even if a prime contract contains certain provisions, some may not apply to particular business lines.
 - This can also serve as a road map for how to structure diligence of the company's business and compliance systems/policies/procedures.
- Do you need particular subject matter experts to dive deeper into niche issues?
 - Are the contracts subject to heavy cyber/data privacy regs?
Labor/Employment issues?



Other Provisions to Look for in Government Contracts

- Exclusivity and non-compete provisions (teaming agreements, subcontractor arrangements)
 - Be mindful of downstream restrictions on competition
- MFC/MFN
- Performance guarantees, minimum purchase requirements
- Trade/Export control issues, etc.



Representation & Warranty Insurance



Representation & Warranty Insurance (RWI)

- What is it?
 - Covers liability stemming from Seller breach of reps and warranties
 - Increasingly common in deals of moderate or significant \$ value
- Who pays?
 - Typically Buyer but can be negotiated
- Prepare diligence memo with RWI in mind
 - Consider any potential diligence gaps and possible exclusions
- RWI call: Probes sufficiency of diligence
- Common exclusions: small business mis-certification, significant compliance gaps (cyber/-7012)



Post-Closing Issues

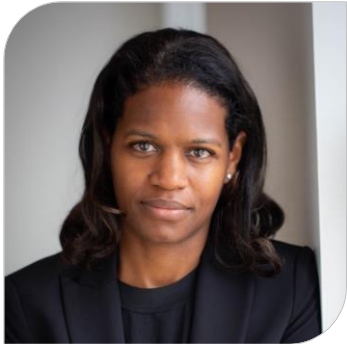


Post-Closing Issues

- Update SAM/re-certify size/status
- Notices/consent requests to customers
- Novation package, if applicable
- Facility clearance: changed condition submission
- DDTC notice, transfer of export authorizations
- Integration



Thank You



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Agenda

- Contract Changes
 - Scope
 - Commercial Items
 - Delays
- Terminations
 - Termination for Convenience
 - Termination for Default
- Disputes
 - Requests for Equitable Adjustment
 - Claims
 - Contract Disputes Act Overview



Contract Changes

Changes and Delays



Changes

What kind of changes are permissible?

- **Bilateral v. Unilateral**
 - The government generally does not need a contractor’s consent to change the contract, but the CO must have the appropriate authority
 - FAR 43.102(a): Only contracting officers acting within the scope of their authority are empowered to execute contract modifications
- **Deductive v. Additive**
 - Generally permissible if “in the general scope of the contract”
 - Within the Scope: cardinal change (breach) versus permissible change (FAR 52.243)
 - Scope Creep: changes to contract scope that generally occurs when the scope is not properly defined or contains ambiguous terms
 - Remember the importance of defining terms during contract negotiation
 - *ex. Contract requires a metal roof (tin or platinum)*
- **Express v. Constructive Changes**
 - Formal SF30 change orders
 - Implied change required



Changes

Commercial Item Changes

- Flowed down to commercial item subcontractors
 - FAR 52.244-6, *Subcontracts for Commercial Items* (“To the maximum extent possible...”)
 - FAR 52.212-1, *Commercial Items* (flowed down)
- Under the Commercial Item Clause (FAR 52.212-4), changes must be **agreed to bilaterally**.
 - If CO issues a **unilateral** direction/change to the **prime**, how does the prime “direct” its commercial subcontractor to perform that unilateral change?
 - What is the Prime’s liability? What about the Government’s liability?
- Calculating equitable adjustment to perform the change:
 - Actual cost plus profit, or another calculation?
 - *United Launch Services, LLC*, ASBCA No. 56850, June 2016
 - Actual costs + profit (standard) = \$60M.
 - Re-price all FFP CLINs = \$400M



Delays

- **Common Types of Delay**

- **Excusable delays:** government-caused delays, stop work orders, and delays outside of the contractor's control; remedies apply
- **Inexcusable delays:** delays within the contractor's control (or that contractor should have foreseen); no remedies

- **Excusable Delays (FAR 52.249-14)**

- Defensive only
- **Examples:** fires, floods, epidemics, strikes, freight embargos, unusually severe weather, "acts of God"
- **Remedies:** schedule adjustment, no costs

- **Government-Caused Delays (FAR 52.242-17)**

- "Any" CO action "or inaction" that affects performance and causes cost or schedule impacts
- **Examples:** Government-imposed quarantines; delays caused by slow or unavailable government personnel; limitations on site access; subcontractor/supplier interruptions
- **Remedies:** broad remedies including standby costs, extension, etc. No profit on standby costs (for 52.242-17 delays)

- **Stop Work Orders (FAR 52.242-15)**

- Can be issued for 90 days (or more by agreement)
- When the period ends, the contractor must resume or the CO must terminate the work
- **Remedies:** equitable adjustment + profit



Protecting Your Rights

What do you need to know?

- **Key Actions Up Front:**
 - Timely recognition of the change
 - Prompt notification of Contracting Officer
 - Reserve claims for money and time
- **Document all Communications:**
 - Understand the original contract requirements
 - Document the Government actions / inactions
- **Duty to Proceed:**
 - **Disputes clause (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.”



Terminations

For Convenience and Default



Termination for Convenience

- Not common in the commercial market
- FAR Part 49 gives the Government broad authority to terminate without cause
 - No termination where the price of the undelivered portion is less than \$5,000
 - Can be partial termination
- Contractor's recovery limited to:
 - costs incurred,
 - profit on work performed,
 - costs of preparing termination settlement proposal,
 - continuing costs, and
 - subcontractor costs
- Other option: no-cost settlement instead of termination for convenience where
 - Contractor amenable
 - No government property
 - No debts due the government



Termination for Convenience

Commercial Item Contracts

- FAR Part 12.4 / 52.212-4(I)
- **Payments to Contractor:**
 - “percentage of the contract price reflecting the percentage of work performed prior to the notice of termination”
 - Compare: Part 49 (work delivered and accepted)
 - *TriRAD Techs. Inc.*, ASBCA No. 58855 (Feb. 23, 2015)
 - “Reasonable charges . . . that have resulted from the termination”
 - Does not require compliance with CAS or contract cost principles
 - Can be demonstrated using the contractor’s “standard record keeping system”
 - FAR Part 49 provisions are only “guidance”



Termination for Convenience

Procedure

- **Notice of Termination**
 - In writing, by the CO
 - Including: effective date of termination, scope of termination, and any special instructions
- **Contractor Obligations Upon Notice:**
 - Stop work as specified in the Notice of Termination
 - Notify the TCO of any special circumstances that preclude the stoppage of work
 - Partial termination: contractor is obligated to continue the unterminated work and should promptly submit REA for impact of termination on unterminated portion of the contract
 - Discontinue placing further orders on the terminated portion of the contract
 - Notify subcontractors
 - Provide termination notices
 - Ensure that scope of subcontractor termination is consistent with the prime contract termination
 - Notify employees
 - Settle outstanding liabilities in connection with termination
 - Promptly submit termination settlement proposal
 - Ensure proper care of inventory



Termination for Default

Grounds for Default Termination

- FAR 49.402-3 lists factors agency must consider before termination
 - Factors are highly discretionary
 - Termination will be upheld if basis for it existed at time of termination, even if that basis was not listed in termination notice
- **Examples of grounds for termination for default include:**
 - Repudiation
 - Failure to deliver or proceed
 - Severe progress problems
 - Defective products
 - Failure to comply with other contract provisions



Termination for Default

Cure Notice, Show Cause, and Termination Notice

- **Cure Notice**

- Required
- Must be in writing, list bases for termination
 - T for D may be improper if written cure notice not issued, or if termination based on ground not mentioned in cure notice
- Cure period: 10 days, unless performance expired or cure period would be futile (repudiation)
- Response to Cure Notice: contractor must cure the default *or* give “adequate assurance” of performance, and government must fully evaluate response

- **Show Cause**

- encouraged if T for D but not required; contractor not entitled to response period
- issuance after due date does not impact gov’t’s right to T for D for failure to timely deliver

- **Termination Notice:**

- Required to include grounds for default, liability for excess procurement costs, and right to appeal
- Government’s failure to comply with termination notice requirement not fatal to T for D unless contractor prejudiced



Termination for Default

Consequences of a Default Termination

- **Significant Contractor Impacts:**
 - Costs associated with unaccepted or undelivered work
 - Any progress, partial, or advance payments
 - Excess re-procurement costs
 - Liquidated damages
 - Reputational/past performance harm, up to and including possible debarment
- **Considerations**
 - T for D is a species of forfeiture; Government is held to “strict accountability in using this sanction”
 - T for D is a government claim, meaning contractor must file timely appeal
 - Successful challenge can convert T for D to T for C
 - Not arbitrary, based on a judgment on the merits, consideration of the alternatives, free from outside influence
 - Will permit recovery of costs incurred (but still not anticipated profit unless termination was in bad faith) and remove reputational stain



Protecting Your Rights

What do you need to know?

- Key Actions Up Front:
 - In Termination for Convenience:
 - Timely response to notice
 - Reserve claims for money and time
 - In Termination for Default:
 - Timely and effective cure
 - Seek conversion of T for D to T for C
- Document all Communications
- Duty to Proceed:
 - **Disputes clause (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.”



Disputes

Requests for Equitable Adjustment, Claims, and Appeals



Request for Equitable Adjustment

Presenting an REA

- Elements of an REA:
 - Not defined by statute or regulation
 - Case law provides further guidance
 - Written demand
 - Seeking as a matter of right
 - Payment of money
 - Adjustment of contract terms
 - Other relief
- Not certified, except certain Department of Defense contracts
 - DFARS 252.243-7002
 - Short: Good Faith, Accurate, Best of Knowledge/Belief
- If granted, remedy is contract bilateral modification with relief sought or negotiated
- If denied, can convert to claim



Claims

Presenting a Claim

- Claims can be filed by the Contractor *or* the Government
- Elements of a Claim:
 - Written demand
 - For a Contracting Officer’s “final decision”
 - Submitted to the Contracting Officer
 - Seeking as a matter of right
 - Payment in a sum certain
 - Adjustment of contract terms
 - Other relief
 - *Actual Costs v. Projections: effects of claim may be ongoing—need a cut off date between past and future (project for future)*
- Claims are certified if over \$100,000
 - Signed by authorized person
 - Certification can be corrected if defective
 - Revisions permitted



Disputes

Contract Disputes with the Government

- Contract Disputes Act applies to all disputes arising under or related to a contract
- The submission of a claim initiates the “disputes” process under the Contract Disputes Act, implemented by FAR 52.233-1, Disputes
- Claims must be filed within 6 years of accrual, FAR 33.201
 - Claim has accrued when all events that fix the alleged liability
 - Do not need fixed damages for claim to have accrued
- **Contractor Claims**
 - Contractor submits claim and receives Contracting Officer’s written final decision
 - Contractor has the right to appeal the final decision (within **90 days** for Boards of Contract Appeals, **12 months** for Court of Federal Claims) pursuant to 41 U.S.C. § 7103(e)
- **Government Claims**
 - Contracting Officer makes final decision in writing
 - Contractor has the right to appeal the final decision (within **90 days** for Boards of Contract Appeals, **12 months** for Court of Federal Claims) pursuant to 41 U.S.C. § 7103(e)
 - *Note:* to preserve all defenses, contractor should file a certified claim presenting them to CO for final decision



REA versus Claim

<u>REA</u>	<u>REA</u>	<u>CDA Claims</u>
Format	<ul style="list-style-type: none"> • Written demand • Seeking as a matter of right <ul style="list-style-type: none"> • Payment of money • Adjustment of contract terms • Other relief 	<ul style="list-style-type: none"> • Written demand • For a Contracting Officer’s “final decision” • Submitted to the Contracting Officer • Seeking as a matter of right <ul style="list-style-type: none"> • Payment in a sum certain • Adjustment of contract terms • Other relief
Timing	No time limit – but must be converted to a claim before the 6-year statute of limitation expires	<ul style="list-style-type: none"> • Contractor or Government must file a claim within 6 years • Government must issue final decision within 60 days of claim submission or set firm response deadline • Contractor must appeal final decision within 90 days (Boards of Contract Appeals) or 12 months (Court of Federal Claims)
Interest	No interest	Interest beginning from the date of claim submission
Cost Allowability	Costs of REA settlement is allowable	Costs of claim preparation and litigation is generally unallowable
Implication of Denial	Can convert to certified claim	Can appeal to Boards of Contract Appeals or Court of Federal Claims



Litigation

Board and Court Litigation and Appeals

- Appeal under FAR 52.233-1 disputes clause to the:
 - Board of Contract Appeals (90 days from final decision to file Notice of Appeal)
 - Court of Federal Claims (1 year from final decision to file a Complaint)
- Election binding, subject to consolidation of related claims

Litigation

Board and Court Litigation and Appeals

- **Standard of Review of CO Decision:**
 - Explicitly De Novo at the Court of Federal Claims 41 U.S.C. § 7104(b)
 - Parties start with “clean slate” before the Boards
 - 41 U.S.C. § 7103(e) provides that any findings of fact by the CO are not binding in any subsequent proceeding
- **Appeals to Federal Circuit:**
 - 120 days from receipt of Board of Contract Appeals decision (41 U.S.C. § 7107(a)(1))
 - 60 days of entry of Court of Federal Claims Judgment (28 U.S.C. § 2107)



Litigation

	<u>Court of Federal Claims</u>	<u>Boards of Contract Appeals</u>
<u>Timeline</u>	<ul style="list-style-type: none"> 12 months after receipt of final decision 	<ul style="list-style-type: none"> 90 days after receipt of final decision
<u>Standard of Review</u>	<ul style="list-style-type: none"> Explicitly De Novo at the Court of Federal Claims 41 U.S.C. § 7104(b) 	<ul style="list-style-type: none"> Parties start with “clean slate” before the Boards 41 U.S.C. § 7103(e) provides that any findings of fact by the CO are not binding in any subsequent proceeding
<u>Length of Cases</u>	<ul style="list-style-type: none"> Average is 3 years 	<ul style="list-style-type: none"> Average is 1 year or more
<u>CO’s Ability to Settle</u>	<ul style="list-style-type: none"> No 	<ul style="list-style-type: none"> Yes
<u>Judges</u>	<ul style="list-style-type: none"> Article I court 16 judges, serving 15-year terms, and an additional 10 active senior judges Single judge decides case 	<ul style="list-style-type: none"> Article I tribunal Experienced judges specializing in government contract disputes Single judge presides over admission of evidence, but decisions are made by a 3-judge panel
<u>Who Litigates on Behalf of the Government</u>	<ul style="list-style-type: none"> Department of Justice 	<ul style="list-style-type: none"> Agency Attorneys
<u>Alternative Dispute Resolution Procedures</u>	<ul style="list-style-type: none"> Yes, voluntary and several types 	<ul style="list-style-type: none"> Yes, voluntary and several types Some may aid in ADR before issuance of final decision



Questions?



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Intellectual Property Rights When Contracting with the U.S. Government

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Overview

- Data rights v. patent rights
- Rights allocation in technical data and computer software under FAR/DFARS
 - Different rules for DoD/civilian agencies
 - Unique treatment of commercial items
 - Protecting your rights (Government IP disputes)
- Patent rights
 - Most agencies the same
- Grants & cooperative agreements
- IP in other transactions



Rights in Technical Data and Computer Software – Rights Allocation

- Contractor gets title
- USG gets a license
- General categories of government license rights in computer software & technical data
 - Unlimited rights
 - Government purpose rights (DoD Only)
 - Restricted rights (computer software) / Limited rights (technical data)
 - Specifically negotiated rights
 - Commercial licenses



Unlimited Rights

- USG has the rights to do whatever it wants with the software/tech data
 - E.g., Right to publish in The New York Times
- USG can grant third parties rights as well



Limited Rights in Technical Data

- May be reproduced or used within the USG
- May not be disclosed outside the USG or used for manufacture
- Exceptions
 - FAR (FAR 52.227-14, Alt. II)
 - Exceptions listed in the contract!
 - DFARS Exceptions (DFARS 252.227-7013(a)(14))
 - Emergency repair
 - To USG support contractor
 - To foreign government if in the interest of the U.S.
 - Subject to certain restrictions & contractor notification



Restricted Rights in Computer Software

- USG may:
 - Use a computer program with one computer at one time
 - May not be accessed, at one time, by more than one terminal or CPU
 - Transfer to another USG agency computer
 - Make copies for safekeeping (archive), backup, or modification purposes
 - Modify computer software
 - Generally may not disclose to competitors
 - Permit service contractors to use computer software to diagnose/correct deficiencies, or to modify to respond to urgent tactical situations
 - Disclose to contractors for emergency repair and overhaul
 - FAR 52.227-14; DFARS 252.227-7014(a)(15)



Government Purpose Rights

- DFARS concept only
- Right to use within the USG without restriction
- Right to authorize other to use for any USG purpose
 - Primarily for reprocurement purposes
- Convert to unlimited rights after a period of time
 - Default is 5 years, but may be extended by the parties



Specifically Negotiated Rights

- USG is not tied to standard FAR & DFARS rights allocation
- May negotiate USG license rights between unlimited & Limited/Restricted
- At a minimum: Limited/Restricted Rights
- Generally must include license agreement as part of the contract, but *see Ciyasoft Corp., ASBCA Nos. 59519, 59913 (2018)*



Determining the USG's License



- *Was the data first produced in performance of the contract?*
- *Did the USG pay for the development?*

General Rules: Technical Data

	Unlimited Rights	Limited Rights	Government Purpose Rights
Civilian Agencies (FAR)	<ul style="list-style-type: none"> ➤ First produced in performance of USG contract irrespective of funding 	<ul style="list-style-type: none"> ➤ Not developed in performance of USG contract; and developed at private expense 	<ul style="list-style-type: none"> ➤ N/A
DoD (DFARS)	<ul style="list-style-type: none"> ➤ Item, component or process developed exclusively with USG funds ➤ Tech data created exclusively with USG funding where contract does not require development, manufacture, construction or production of items, components, or processes 	<ul style="list-style-type: none"> ➤ Item, component, or process developed exclusively at private expense ➤ Tech data created exclusively at private expense where contract does not require development, manufacture, construction, or production of items, components, or processes 	<ul style="list-style-type: none"> ➤ Item, component, or process developed with mixed funding i.e., some USG and some private/indirect funding ➤ Tech data created with mixed funding where contract does not require development, manufacture, construction, or production of items, components, or processes
Civilian & DoD	<ul style="list-style-type: none"> ➤ Other specific categories e.g. form, fit & function data; manuals or instructional and training materials for installation, operation, routine maintenance or repair (OMIT data) 		

General Rules: Computer Software

	Unlimited Rights	Restricted Rights	Government Purpose Rights
Civilian Agencies (FAR)	<ul style="list-style-type: none"> ➤ First produced in performance of USG contract, irrespective of funding 	<ul style="list-style-type: none"> ➤ Not developed in performance of USG contract; and developed at private expense 	<ul style="list-style-type: none"> ➤ N/A
DoD (DFARS)	<ul style="list-style-type: none"> ➤ Developed exclusively with USG funds ➤ S/W documentation required to be delivered under the contract ➤ Corrections or changes to s/w or documentation furnished by USG 	<ul style="list-style-type: none"> ➤ Software developed exclusively at private expense ➤ Software exclusively at private expense where contract does not require development, manufacture, construction, or production of items, components, or processes 	<ul style="list-style-type: none"> ➤ Software developed with mixed funding i.e., some USG and some private/indirect funding ➤ Software created with mixed funding where contract does not require development, manufacture, construction, or production of items, components, or processes



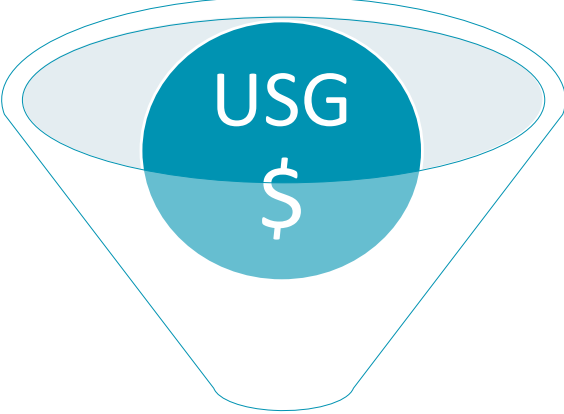
Private Expense Determination

- Developed exclusively at private expense
 - “development was accomplished entirely with costs charged to indirect cost pools, costs not allocated to a government contract, or any combination thereof” DFARS 252.227-7013(a)(8), 252.227-7014(a)(8)
 - Indirect cost pools include IR&D and B&P
- Developed exclusively at U.S. Government expense
 - Direct contract charges
- Segregability
 - Private expense determinations should be made at the lowest practicable level (e.g., software subroutine)
- For fixed price contracts, if costs exceed fixed price, additional costs not considered for rights allocation



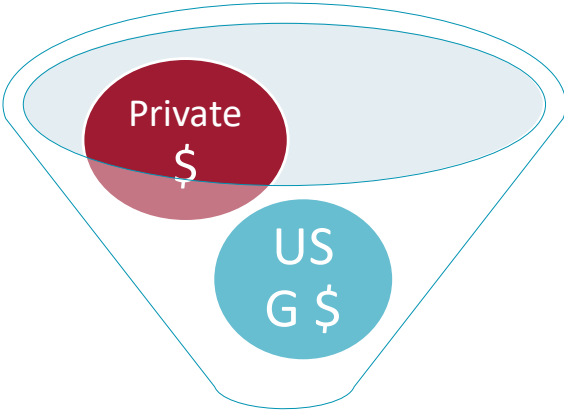
Private Expense Determination

Module A



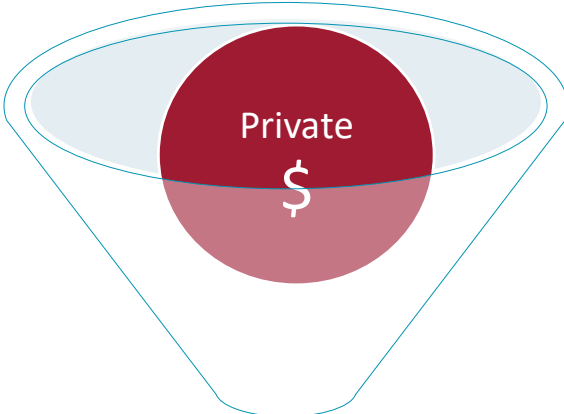
Unlimited Rights

Module B



Government Purpose Rights

Module C



Limited/Restricted Rights

When is an Item, Component, or Process “Developed”?

- An item, component, or process exists and is workable
- The item or component must have been constructed or the process practiced
- Workability is generally established when the item, component, or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended

DFARS 252.227-7013(a)(7)



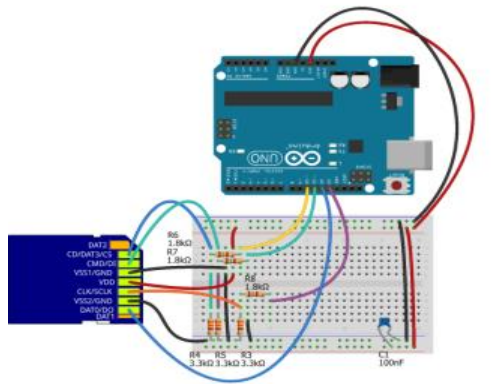
When is Software “Developed”?

- Computer program (e.g., object code)
 - Successfully operated in a computer and tested
 - To demonstrate to reasonable persons skilled in the art
 - Program can reasonably be expected to perform its intended purpose
 - Computer software (e.g., source code)
 - No operation required
 - Only “tested or analyzed”
 - Computer software documentation
 - Written in any medium
- DFARS 252.227-7014(a)(7)



Examples of “Developed”

- ***Applied Devices Corp., B-187902, 77-1 CPD ¶ 362***
 - Breadboard of a radar set deemed developed.
 - Subsequent government funds to convert to a manufactured item did not give government unlimited rights.
- ***Dowty Decoto, Inc. v. Dept. of the Navy, 883 F.2d 774 (9th Cir. 1989)***
 - Aircraft “repeatable holdback bars” achieved workability prior to government funded improvement improved performance.



Traps for the Unwary

- Marking requirements
- Maintaining records
- Other data rights clauses



Notice/Marking

- Must provide notice and mark all noncommercial data exactly as required or risk a grant of unlimited rights to the government
 - Unlabeled data is unlimited rights data
 - Must use the required FAR/DFARS labels
 - Exception to marking: the “combat” scenario for computer software



Data Assertions Table

- Proposal must include table identifying what data/software is being delivered with other than unlimited rights. For example (DoD procurement)

Identification and Assertion of Restrictions on the Government's Use, Release, or Disclosure of Technical Data or Computer Software.

The Offeror asserts for itself, or the persons identified below, that the Government's rights to use, release, or disclose the following technical data or computer software should be restricted:

Technical Data or Computer Software to be Furnished With Restrictions*	Basis for Assertion**	Asserted Rights Category***	Name of Person Asserting Restrictions****
(LIST)*****	(LIST)	(LIST)	(LIST)

- Excerpt from DFARS 252.227-7017



Government Challenge Procedures

- Pre-challenge request for information
- Challenge must:
 - Must be in writing
 - Must provide basis for the challenge
- The Contractor is required to respond within 60 days providing justification for the marking
- The Contracting Officer may
 - Extend the time for a response
 - Request additional supporting documentation
- The Contracting Officer must issue a final decision
- USG will honor the asserted restriction during the challenge process and through any appeal of the final decision
- USG deals directly with subcontractors/suppliers in challenging such restrictions



Maintaining Records

- DFARS 252.227-7019(b):

“The Contractor shall maintain records sufficient to justify the validity of any markings that assert restrictions on the Government’s rights to use, modify, reproduce, perform, display, release, or disclose computer software delivered or required to be delivered under this contract and shall be prepared to furnish to the Contracting Officer a written justification for such restrictive markings in response to a request for information....”



Other Data Rights Clauses

- Beware of other data rights clauses, such as:
 - FAR 52.227-17, Rights in Data – Special Works
 - Reach-Back Clauses:
 - FAR 52.227-16, Additional Data Requirement
 - DFARS 252.227-7027, Deferred Ordering of Technical Data or Computer Software
 - Agency-specific clauses, for example:

DATA RIGHTS. The Government has unlimited rights to all documents/material produced under this contract. All documents and materials, to include the source code of any software and associated documentation produced under this contract shall be Government owned and are the property of the Government with all rights and privileges of ownership/copyright belonging exclusively to the Government. The Contractor shall not use or sell these documents and materials without written permission from the KO. The Contractor shall not use materials supplied by the Government for any other purpose. The materials shall be the sole property of the Government. This right does not abrogate any other Government rights.

Commercial vs. Noncommercial

- Contractors often want their products to be deemed commercial items
 - Rights grant is generally more narrow
 - Generally, standard commercial license terms apply
 - Government often resists the following provisions:
 - Definition of contracting parties
 - Contract formation
 - No click wrap licenses
 - No website license
 - Attach all licenses to contract
 - Indemnification
 - Automatic renewals of term-limited agreements
 - Future fees or penalties
 - Unilateral termination or modification by supplier
 - Choice of law/forum
 - Confidentiality of agreement terms
 - Control of infringement actions



Commercial vs. Noncommercial

- DFARS 252.227-7015 Technical Data – Commercial Items
 - Government may use, modify, release, etc. “within the Government only” and shall not use for manufacturing or release outside the Government without Contractor’s consent
 - Exceptions:
 - Unlimited rights in inter alia:
 - Unmarked data
 - Form, fit, and function data
 - Necessary for operation, maintenance, installation, or training
 - May release to covered support contractors
 - May release or disclose if necessary for emergency repair or overhaul of the commercial item
- FAR 52.227-19, Commercial Computer Software License
 - Purports to take precedence over commercial software licenses
 - Grants restricted rights in software
 - Requires contractors to label their commercial software with a specific FAR legend



Patent Rights

- Background & Definitions
- Procedural Requirements for Perfecting Title
- Allocation of Rights to Subject Inventions



FAR Allocation of Rights to Subject Inventions

- “Subject Invention” is any invention of the contractor *conceived or first actually reduced to practice* in the performance of work under a USG contract” (FAR 27.301)
- Two core issues:
 - Who gets the title to subject inventions?
 - What rights does the other party get?
- Application of the Bayh-Dole Act
- Allocation of rights defined by the applicable patent rights clause in the USG contract

FAR Allocation of Rights to Subject Inventions

- For most agencies, Contractor may retain title, but must timely:
 - Disclose invention to Government
 - Elect to retain title
 - File a patent applicationFAR 52.227-11
- Dept. of Energy and NASA generally requires large businesses to obtain a waiver in order to retain title to subject inventions
 - U.S. Competitiveness clause
 - Normally requires that any products embodying a subject invention or produced through the use of a subject invention must be “manufactured substantially in the United States”



FAR Allocation of Rights to Subject Inventions

- USG license rights when contractor retains title
 - Minimum: Nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practice for, *or on behalf of*, the USG throughout the world
 - May have additional rights to sublicense to any foreign government or international organization to effectuate treaties or international agreements



FAR Allocation of Rights to Subject Inventions

- USG’s “march-in rights”
 - Where contractor acquires title, USG can require contractor to license, or USG may license to others itself:
 - If contractor has failed to take adequate steps for practical application
 - To alleviate health or safety concerns
 - To meet requirements for public use
 - To meet domestic production preference

FAR 27.302(f)



FAR Allocation of Rights to Subject Inventions

- Contractor's license rights if USG takes title:
 - Revocable, nonexclusive, royalty-free license
 - Extends to domestic subsidiaries and affiliates
 - Includes right to sublicense
 - Transferable only with CO approval
 - May be revoked or modified by the USG to achieve expeditious practical application
- But Contractor receives no license if it fails to disclose subject invention and USG takes title



Grants & Cooperative Agreements

What are not consider a Grant or Cooperative Agreement

- Procurement contracts -- Principal purpose “is to acquire (by purchase, lease, or barter) property or services for the direct benefit of the United States Government” (31 U.S.C. 6303)
 - Governed by the FAR and agency supplements, e.g., DFARS
- Also does not include an agreement that provides only:
 - Direct U.S. Government cash assistance to an individual;
 - A subsidy;
 - A loan;
 - A loan guarantee; or
 - Insurance(31 U.S.C. 6302; 2 C.F.R. 200.24; 2 C.F.R. 200.51)



Grants & Cooperative Agreements

IP Rights

- Patent rights
 - Generally Bayh-Dole applies
- Rights in data and computer software
 - Government gets government purpose rights



IP Issues in Other Transactions (OTs)

- OTs: E.g., Prototype OTs, Space Act Agreements
- Generally, IP rights are negotiable in OTs
- But, many agencies will use the FAR/DFARS IP rules as starting point in negotiations



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Topics To Cover

- Liability and Damages Framework
- Qui Tam Provisions
- Retaliation
- Investigations and Litigation



False Claims Act

- False Claims Act (“FCA”) – 31 U.S.C. §§ 3729 – 33
 - Since 1986, the FCA has been the Government’s primary civil enforcement weapon for combating fraud, waste, and abuse
 - \$3-4 billion recovered annually in recent years
 - Treble damages and penalties up to ~\$25,000 per claim
 - 700+ cases filed annually (~90% by whistleblowers), and rising government actions, investigations, and referrals



Offenses Under the FCA

- **False Claim – knowing submission** of a false claim to the Government or a recipient of Government funds, or **causing** another to submit a false claim.
- **False Record or Statement – knowingly making** a false record or statement material to a false claim.
- **Reverse False Claim – knowingly making** a false record or statement material to an obligation to pay money to the Government, or knowingly and improperly avoiding an obligation to pay money to the Government.
- **Conspiracy – conspiring to do** any of the above.



FCA Liability – 4 Elements of a False Claim

1. An individual or company presents (or causes to be presented) a “claim” for payment;
2. The claim is false or fraudulent;
3. The individual or company knew that the claim was false or fraudulent; and
4. The falsehood was material to the decision to pay the claim – i.e., it was “capable of influencing” the payment.*

*See *Universal Health Servs., Inc. v U.S. ex rel. Escobar*, 579 U.S. 176 (2016) (discussing the requirements to plead and prove materiality and setting forth examples that are strong evidence of a lack of materiality).



Common FCA Theories

- Labor and Material Overcharging
- False Certifications of Compliance
- Implied False Certifications
- Defective Product/Product Substitution
- Unauthorized Substitution of Personnel / Unqualified Personnel
- Misrepresentations in Proposals / Fraudulent Inducement
- Kickbacks



Areas of Enforcement

- Government Contracts / Procurement
- Health Care
- Small Business / Set-asides
- Supply Chain and Subcontractors
- Cybersecurity
- Financial Sector
- Research grants
- COVID-19 / Pandemic Funds (CARES Funds, PPP Loans, PPE, etc.)
- Trade / customs



Recent Government Contractor Settlements

- *Navistar Defense LLC*
 - May 2021: \$50 million to settle allegations of fraudulent inducement for its pricing of a contract mod for armored vehicles
- *United States ex rel. Fox Unlimited Enterprises, LLP v. TriMark USA, LLC, et al.*
 - February 2022: \$48.5 million settlement to resolve allegations that a contractor worked with three small businesses to obtain access to VOSB and SDVOSB set-aside contracts that the contractor was not eligible to bid on its own
- *MOX Services LLC*
 - March 2022: \$10 million to settle allegations that it charged for subcontractor materials that it did not provide and received kickbacks
- *Aerojet Rocketdyne Holdings Inc.*
 - April 2022: \$9 million to resolve allegations that it misled the government about its compliance with cybersecurity regulations



Knowledge and Materiality

- Knowledge – Specific intent is not required. FCA scienter requires only:
 - Actual knowledge
 - Deliberate ignorance; or
 - Reckless disregard of the truth or falsity of the information.
 - “gross negligence plus”; not honest mistakes or good faith misinterpretations
- Materiality
 - “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property”
 - *Escobar*:
 - minor/insubstantial noncompliance is not sufficient
 - Government entitlement to decline payment is not sufficient
 - “[I]f the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material.”



Damages, Penalties, and Collateral Consequences

- Measure of FCA damages: Difference between what the government actually paid and what it should have paid absent the alleged FCA violation, ***trebled***
 - In certain cases, single damages can be set at the entire value of the contract or payments made
- Penalties of \$12,537 to \$25,076 ***per claim***, irrespective of actual damages
- Collateral consequences of liability can be pervasive
 - Disclosure requirements, including on future procurements
 - Suspension and debarment
 - Reputational



FCA – *Qui Tam* Provisions

- FCA actions may be brought by private citizens (whistleblowers called “relators”) under *qui tam* provisions (31 U.S.C. § 3730)
- Government Claims vs. Relator’s Claims
 - Settlement Implications
- Procedure:
 - Relator must file a complaint under seal
 - Relator must also serve written disclosures on DOJ describing “substantially all material evidence and information the person possesses”
 - DOJ has 60 days to investigate and make intervention decision (extensions are common)



FCA – *Qui Tam* Provisions

- Government Action (following investigation)
 - Intervene in the case and assume primary responsibility for the litigation
 - Decline intervention, allowing relator to prosecute the case (government remains the party in interest)
 - Move to dismiss the case (even if relator objects) – *see* 31 U.S.C. 3730(c)(2)(A)
 - Seek settlement (with or without relator’s consent)
 - Relator’s objection to settlement will be overruled if settlement is found to be fair, adequate and reasonable
- Bars to *Qui Tam* Actions
 - Public Disclosure
 - First-To-File Rule
 - Statute of Limitations – up to 10 years



FCA – *Qui Tam* Provisions

- Whistleblower Rewards Available:
 - “Relator’s Share” of 15-25% of recovery in intervened cases and 25-30% of recovery in non-intervened cases;
 - Relator can also recover “reasonable” attorney’s fees and costs; and
 - Where retaliation claim is involved:
 - Reinstatement;
 - Double back pay w/ interest
 - Special damages, including attorney’s fees



FCA – *Qui Tam* Provisions

- Potential Relators / Whistleblowers – Just Look Around
 - Former employees
 - Current employees
 - Billing personnel
 - Officers
 - Non-employees
 - Competitors
 - Industry insiders
 - Government auditors



FCA – *Qui Tam* Provisions

- Because the relator's suit must be filed under seal, you will not know that you've been sued or whether the whistleblower is your (current) employee
- DOJ often takes years to investigate before making its intervention decision
 - This may or may not involve direct contact with the defendant
- Whistleblower can funnel evidence to the U.S. while remaining an employee



FCA – *Qui Tam* Provisions

- Protections for Whistleblowers

- Relief from Retaliatory Actions – 31 U.S.C. § 3730(h)

- Applies if employee/contractor/agent is “discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against”
 - “because of lawful acts done by the employee, contractor, agent . . . in furtherance of [an FCA action] **or** other efforts to stop 1 or more [FCA] violations”
 - 3-year statute of limitations

- Required elements:

- Relator engaged in protected activity
 - Employer knew of the protected activity; and
 - Employer took adverse action against relator as a result of these acts



FCA – Retaliation

- Similar protections in FAR clauses and other statutes
 - Defense Contractor Whistleblower Protection Act (DCWPA), 10 U.S.C. § 2409
 - NDAA Antiretaliation Provision, 41 U.S.C. § 4712
- Protects disclosures of information that the contractor's employee reasonably believes is evidence of:
 - gross mismanagement of a DoD contract or grant;
 - a gross waste of DoD funds;
 - an abuse of authority relating to a DoD contract or grant;
 - a violation of law, rule, or regulation related to a DoD contract; or
 - a substantial and specific danger to public health or safety.



FCA – Retaliation

- What conduct is protected or “in furtherance of” a FCA action?
 - Not required to be preparing to file FCA *qui tam* suit or to have provided information to the government
 - “Objective” test: conduct is “protected” if it could reasonably lead to a viable FCA action or the employee reasonably believed that the employer was violating or soon would violate the FCA
 - Investigating or collecting information can count
 - Mere belief that company has committed fraud does not automatically render an employee’s acts protected
- Best practices for avoiding retaliation claims



FCA – Investigations / Litigation

FCA Investigations can begin in various ways

- **Qui tam suits:** refers to cases filed under seal by a relator (i.e., a whistleblower) pursuant to 31 U.S. Code § 3730 (b).
 - The qui tam complaint typically remains under seal while the government performs its investigation.
 - The statute provides for 60 days, but the government can request extensions and the seal period can last for years.
- **Government initiated investigations:** cases are often referred to DOJ by other government entities. For example:
 - Data analysis
 - Office of Inspector General Reports
 - Criminal investigations
 - Government Audits (e.g., DCAA)
- **Internal Complaints:** refers to complaints made by potential whistleblowers



FCA – Investigations / Litigation

Civil Investigative Demands

- Pre-litigation investigative tool the Department of Justice (DOJ) uses to obtain evidence of potential violations of the False Claims Act (FCA)
- DOJ can use CIDs to obtain:
 - Production of documents and electronically-stored information;
 - Written interrogatory responses; and
 - Sworn deposition testimony including “corporate representative” depositions (akin to Rule 30(b)(6) depositions)

United States Department of Justice
Washington, D.C. 20530

TO: [REDACTED]

Civil Investigative
Demand No. [REDACTED]

This Civil Investigative Demand is issued pursuant to the False Claims Act, 31 U.S.C. §§ 3729-3733, in the course of a False Claims Act investigation to determine whether there is or has been a violation of 31 U.S.C. § 3729. The False Claims Act investigation concerns allegations that [REDACTED] knowingly presented false claims to the United States by inflating its indirect costs rate in order to receive higher payments on contracts with the United States Department of Defense (DoD). In particular, this investigation concerns allegations that [REDACTED] resulting in the inflation of [REDACTED] indirect cost rate and subsequent false claims.

This Demand requires you to provide documents to the Federal Government and to respond to interrogatories. This is the original of the Demand; no copies have been served on other parties. The information and documents provided in response to this Demand may be shared, used, and disclosed as provided by 31 U.S.C. § 3733.

FCA – Investigations / Litigation

Why Was My Company Served With a CID?

- Under § 3733, the Attorney General, or a designee, can issue a CID if there is reason to believe a person or entity is in possession of documents or information relevant to an FCA investigation.
- The government typically uses CIDs to gather information needed to make a decision as to whether to file an FCA lawsuit or intervene in a case filed by a relator.
- A CID is a **pre-litigation** tool and courts have found that it is no longer available once the government files suit.



FCA – Investigations / Litigation

Who is Authorized to Issue a CID?

- Between 1986 and 2009, only the Attorney General was authorized to approve a CID.
 - *United States v. Witmer*, 835 F. Supp. 208, 218 (M.D. Pa. 1993) (“Congress clearly did not intend the CID to be used routinely.”).
- But this all changed after 2009, when Congress broadened the government’s FCA investigative powers with the passage of FERA.
 - Now, CIDs can be issued by the Director of the Civil Fraud Section or any one of the 93 U.S. Attorneys.
- **Upshot:** The number of CIDs issued every year has increased dramatically since the passage of FERA.



FCA – Investigations / Litigation

Resolution Strategy

- How to resolve an FCA investigation or qui tam complaint
- Government role – friend or foe?
 - Intervention / declination
 - Dismissal authority
 - Settlement
- Litigation Strategies



FCA – Investigations / Litigation

Resolution Strategy

- Early Resolution of a Qui Tam
 - Convincing the government not to intervene
 - Decreases likelihood of liability/recovery
 - Increases likelihood of voluntary dismissal or a successful defense
 - Importance of credibility and cooperation with government counterparts
 - Opportunity to make a presentation to DOJ
 - Settlement considerations



FCA – Investigations / Litigation

Resolution Strategy

- Seeking government dismissal
 - “The government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.” 31 U.S.C. 3730(c)(2)(a)
 - Courts vary on whether government has an “unfettered right” to dismiss or must at least identify a “valid government purpose”
- Motions to Dismiss for Failure to State a Claim and/or to Plead Fraud with Particularity and specificity



Questions?



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