Government Contract Landmines—Spotting Them Before They Explode

PART I - BASICS OUTLINE

Richard J.R. Raleigh, Jr.
Jerome S. Gabig, Jr.

Wilmer & Lee, P.A. Government Contracts Practice Group
100 Washington Street, Suite 100
Huntsville, Alabama 35801

rraleigh@wilmerlee.com
jgabig@wilmerlee.com

Government Contract Landmines—Spotting Them Before They Explode

Richard J.R. Raleigh, Jr.
Jerome S. Gabig, Jr.

PART I OUTLINE

Introduction 1

The Basics 4

I. Government Contracts 101 4

a. History 4

b. Three basic contract types 5

c. Important Statutes and Regulations 7

d. GOVCON Terminology 13

e. Government Contracts. The Players and the Process 18

f. Changes, Claims, and Adjustments 19

II. Disputes and Bid Protests 22

a. Examples of Types of Government Contracts Disputes 22

b. Bid Protests 23

III. Debriefings 29

IV. Small Business. SBA, Size, Affiliation 31

V. Teaming Agreements, Joint Ventures 33

VI. DCAA, DCAA Audits, and Allocable Cost and Payment Clauses - Incurred Cost Submissions 37

VII. Other Issues 38

a. OCI 38

b. Suspension/Debarment 39

c. Security Clearances 42

d. Foreign Contracts 43

1. Foreign Military Sales 43

2. Export Control / ITAR 44

e. SBIRs 44

VIII. Contract Disputes Act claims 45

Government Contract Landmines—Spotting Them Before They Explode

Richard J.R. Raleigh, Jr.[1]
Jerome S. Gabig, Jr.[2]

Do you know the deadline for appealing an adverse decision when a contractor who submitted a proposal is not selected? Rich Raleigh and Jerry Gabig will share how to spot "danger areas" even if you aren't well versed in the law of government contracting including practical information and real-world examples.

Sponsored by the Alabama State Bar Government Contracts Section

Introduction.

Government Contracts Law is the law related to Federal Procurements. "Procurement" describes the process whereby the government obtains goods and services from private parties that it does not produce or provide for itself. Competition in government procurement means that the government determines from whom to buy goods and services—and thus with whom to contract—by "solicit[ing] or entertain[ing] offers from two or more competitors, compar[ing] them, and accept[ing] one based on its relative value."[3]

The United States Government is the single largest procurer of goods and services in the world, and the Department of Defense (DoD) accounts for the lion's share of federal acquisitions. Redstone Arsenal in Huntsville, Alabama accounts for 9.8% of Alabama's gross domestic product.[4] The importance of government contracts to Alabama's economy is even greater when one also considers Anniston Army Depot, Montgomery's Maxwell Air Force Base, and Mobile's Austal shipbuilding complex. In the last twelve months alone, the federal government has awarded more than $12 billion in contracts to business concerns throughout the State.[5] Inevitably, with such a high volume of government contracts also comes contractual disputes; and, in a world where contract amounts can often exceed seven digits, a dispute over even a relatively small percentage of those funds can be significant.

---

[1] Richard J.R. Raleigh, Jr. is a shareholder in the Huntsville office of Wilmer & Lee, P.A., is a former U.S. Army JAG officer. He is a Past President of the Alabama State Bar and is Co-Chair of Wilmer & Lee's Government Contracts practice group. He also presently serves on the Alabama Law Institute's committee charged with updating Alabama's procurement code.

[2] Jerome Gabig is Of Counsel in the Huntsville office of Wilmer & Lee, P.A., and is a retired U.S. Air Force JAG Lieutenant Colonel. He is the Chair of the Alabama State Bar Government Contract Law Section.

[3] Ralph C. Nash, Jr., Steve L. Schooner, Karen R. O'Brien-DeBakey, and Vernon J. Edwards, *The Government Contracts Reference Book: A Comprehensive Guide to the Language of Procurement* 109-110 (2d ed. 2007).

[4] https://www.al.com/business/2018/11/redstone-arsenal-leader-sees-50000-working-on-base-in-2025.html

[5] https://www.usaspending.gov/#/state/01

The money is lucrative. But, the differences between contracts with the federal government and contracts between private companies mean that one could quickly run into problems. For example, Guy Lawson's book, *Arms and the Dudes*, and the movie *War Dogs*, tells how in early 2007 three friends in their twenties won a DoD contract to supply the Afghan military with $300 million worth of ammunition. With little or no experience, they began bidding on federal government arms contracts that they found on FedBizOpps. They won out over massive international companies like Halliburton and Blackwater. To fill the large DoD ammunition order, however, the three secretly repackaged millions of rounds of decades-old, surplus Chinese munitions, which was illegal under the government contract terms in the incorporated FAR clauses. Then "the Dudes" shipped the repackaged Chinese rounds to Afghanistan. Spoiler Alert - it was all going well until they got caught by DoD investigators and wound up with their mugshots on the front of the *New York Times*.

There are three main differences between U.S. federal government procurements and private sector contracts:

1. Federal government contracts are subject to a multitude of statutes, regulations, and policies, which are intended to encourage competition to the maximum extent practicable, ensure proper spending of taxpayer money, and advance socioeconomic goals, among other things.

2. Federal government contracts incorporate mandatory clauses that give the government special contractual rights, such as the right to unilaterally change contract terms and conditions and to terminate the contract for its convenience. The most significant of the clauses are:

   a. the "Changes" clause,
   b. the "Termination for Convenience" clause, and
   c. the "Default" clause.

3. Because of the government's status as a sovereign entity, claims and litigation follow the unique procedures set forth in the Contract Disputes Act (CDA).

Government contracts are subject to several statutes, including the Competition in Contracting Act and the Federal Acquisition Streamlining Act. In addition to statutes, there are a host of regulations which govern acquisitions by executive branch agencies. Most significant is the Federal Acquisition Regulation (FAR), which is codified in Parts 1 through 53 of Title 48, Chapter 1 of the Code of Federal Regulations. Executive branch agencies (like the DoD) may issue their own regulatory supplements to the FAR, such as the Defense Federal Acquisition Regulation Supplement (DFARS). The FAR is amended pursuant to the Administrative Procedure Act, with proposed changes issued jointly by the DoD, the General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA), in coordination with the FAR Council.

Only Contracting Officers (COs) have the authority to contractually bind the United States. This authority is vested in the executive agency, which then delegates this authority by issuing a certificate of appointment or "warrant." The warrant provides signature authority up to a specified

amount of money, or it can be an unlimited warrant. COs have the authority to award, administer, and terminate government contracts.

Government contract claims are subject to the CDA, which requires the claim to be presented first to the CO. After the CO's Final Decision, the claim may be appealed to either the United States Court of Federal Claims (COFC) or to one of the Boards of Contract Appeals (BCAs). After either venue, the claim may be appealed to the United States Court of Appeals for the Federal Circuit, and finally to the Supreme Court. The General Accountability Office (GAO) has the authority to hear bid protests, which are challenges to an award, proposed award, or terms of a solicitation of a federal contract.

If you represent a company that has a government contract or hopes to get one, how do you help them steer clear of landmines and avoid mistakes in government contracting? Some mistakes occur before a contract is even signed, because non-conforming bids or non-compliant proposals are very negative preventing one from starting a relationship with governments and also jeopardizing one's ability to maintain one long-term. Some mistakes occur during contract administration. For example, one mistake is following oral promises and directions that deviate from the contract language. Feeling pressured to act quickly, a contractor may follow direction from an unauthorized official regarding obligations under a contract. This could result in contract termination or goods and services being provided by the contractor without the contractor being entitled to reimbursement. Other examples of common mistakes in government contracting are the failure to correctly identify and submit a claim for constructive change as well as defective specification. Finally, mistakes in cost submissions and mistakes in the audit process in government contracting can be very serious - auditors have the right to come review your client's books and records, and interview employees during "floor checks", but your client would benefit from having a written request for accessing records in order to evaluate the legitimacy of the incoming request. To avoid these landmines, you and your client have to know what the government has the right to do and what rights the contractor has.

The Basics.

I. Government Contracts 101.

a. History.

i. "Government Contracts" have been around since the very first financial transactions. In the beginning, all contracts were **Fixed Price**. When World War I came around, the concept of tear down and repair contract types were introduced. There was a Fixed Price order to tear down a piece of equipment that had failed. However, the problem was identified, and a proposal was prepared to repair it.

ii. The federal government has promoted competition between offerors seeking to meet its needs since at least 1781, when the Superintendent of Finance advertised in a local newspaper for proposals from potential suppliers of food for federal employees in Philadelphia.[6]

iii. Next, a **Time and Materials (T&M)** order was issued to make the repair. This type of contract is still very common today, even at your local auto garage - a major difference is that shop usually does the diagnosis part at no charge. They look, tell you what's wrong, and do the proposal on speculation.

iv. World War II - the concept of **Cost Reimbursable** contracts was born because there simply wasn't time for definitive specifications. Contractors found themselves developing things while the specifications were being written. It's just not possible to provide a fixed price for an effort like that.

v. In the 1950s, the government forayed into R&D, like Project Mohole, an attempt to retrieve a sample of material from the earth's mantle by drilling a hole through the earth's crust to the Mohorovicic Discontinuity, or Moho. The project was suggested in March 1957 by Walter Munk, NAS member (1956) and member of the National Science Foundation (NSF) Earth Science Panel. In Project Mohole, the government gave Howard Hughes a contract to drill a hole to the center of the Earth, but ultimately, he could not do it. It was a Fixed Price contract, and rather than roll over and let the government do to him what they do to you when you fail to complete a Fixed Price contract, he sued. The resulting court case established the principle that when performance and cost risk is very high, the federal government should assume the risk, and the **Cost Type** contract was born.

vi. The DoD has experimented over the years with **Fixed Price** contracts in all kinds of areas, including R&D, mostly unsuccessfully. The last significant **Fixed Price** R&D contract was for the NAVY 8a12, the very first stealth aircraft. This was in the early 1990s, when stealth aircraft didn't exist, and it wasn't even certain that it was possible to have an aircraft that could

[6] James F. Nagle, A History of Government Contracting 49 (2d ed. 1999).

evade radar. The researchers weren't successful, and the government terminated them for default. This was eventually converted to a termination for convenience, and the last of the lawsuits were settled at over 20 years old. **Fixed Price** R&D's have never been particularly successful, but, **Fixed Price** contracts make for good press. The reality is that when the risk is very high, both cost risk and performance risk, **Fixed Price** just isn't appropriate.

b. <u>Three basic contract types.</u>

Fixed price, also called **Firm Fixed Price** and abbreviated **FFP**. **Time and Materials**, or labor hour **T&M** contracts (often Indefinite Delivery Indefinite Quantity (**IDIQ**) contracts). **Cost Reimbursement** or **Cost-Plus** type contracts.

i. **FFP:** This contract type should be used when requirements are known and can be precisely described. We also know exactly when we want it and where we want it. Cost of performance can be reasonably predicted. We know what it ought to cost and the risk is relatively low, making a fixed-price appropriate. These may also include some additional fee (additional profit) based upon success - whether that be time of completion, performance success, or other important factor.

ii. **T&M / IDIQ:** This contracting type is used when requirements are poorly described and we don't know exactly what we want or exactly when or where we want it. It is typically services; the cost of performance can be predicted with a reasonable degree of certainty with respect to the cost per hour. However, when it's going to be performed, where it's going to be performed, and which categories of labor might be used are less understood. With the unknowns, the use of individual delivery orders is appropriate. Often T&Ms are Indefinite Delivery Indefinite Quantity contracts (IDIQs). The basic contract's an empty template and the delivery orders carry the money specifications and other details.

iii. **Cost Reimbursement or Cost Plus:** This type is a good option when the requirements or ability to fulfill the requirements are uncertain. When costs cannot be predicted with any degree of certainty, a cost type contract is appropriate.

iv. There is a lot of variation within these contract types, and the contract could have a mixture of **Fixed Price** labor and **Cost Reimbursement** for other direct costs. It could also be a fixed price contract with time as a unit of measure that is really **Time and Materials**. Another deviant is **Fixed-Price** services with level of effort. There can be several combinations here and these mixed contracts are referred to as hybrids. Hybrid contracts are experiencing an increase in popularity.

v. **"The Government Spend."**
In Billions, in 2014:
Fixed Price - $281,909

Cost-Reimbursement - $143,192
Time & Materials - $17,899
Other - $ 4,475

Note that there is a lot of money in FFPs, this is not because fixed price contracts are inherently better or worse. Rather, it is because very large production and construction contracts are always fixed price - lots of money, but a relatively small number of contracts.

c. Important Statutes and Regulations.

Competition in Contracting Act of 1984 (41 U.S.C. §253; 10 U.S.C. §2304; 41 U.S.C. §403). Basics - Passed to foster competition and reduce cost.

The Competition in Contracting Act (CICA) was passed into law in 1984 as a foundation for the Federal Acquisition Regulation (FAR) and to foster competition and reduce costs. The theory was that more competition for procurements would reduce costs and allow more small businesses to win Federal Government contracts.

The Competition in Contracting Act (CICA) of 1984 generally governs competition in federal procurement contracting. Any procurement contract not entered into through the use of procurement procedures expressly authorized by a particular statute is subject to CICA. CICA requires that contracts be entered into after "full and open competition through the use of competitive procedures" unless certain circumstances exist that would permit agencies to use noncompetitive procedures.

Full and open competition can be obtained through the use of sealed bids, competitive proposals, or other procures defined as competitive under CICA (e.g., procurement of architectural or engineering services under the Brooks Act). Full and open competition under CICA also encompasses "full and open competition after exclusion of sources," such as results when agencies engage in dual sourcing or set aside acquisitions for small businesses.

Any contract entered into without full and open competition is noncompetitive, but noncompetitive contracts can still be in compliance with CICA when circumstances permitting other than full and open competition exist.

CICA recognizes seven such circumstances, including (1) single source for goods or services; (2) unusual and compelling urgency; (3) maintenance of the industrial base; (4) requirements of international agreements; (5) statutory authorization or acquisition of brand-name items for resale; (6) national security; and (7) contracts necessary in the public interest.

CICA also allows agencies to use "special simplified procedures" when acquiring goods or services whose expected value is less than $150,000, or commercial goods or services whose expected value is less than $6.5 million ($12 million in emergencies).

Issuance of orders under task order and delivery order (TO/DO) contracts is not subject to CICA, although award of TO/DO contracts is. However, the Federal Acquisition Streamlining Act (FASA) of 1994 established a preference for multiple-award TO/DO contracts; required that agencies provide contractors "a fair opportunity" to compete for orders in excess of $3,000 under multiple-award contracts; and authorized the Government Accountability Office (GAO) to hear protests challenging the issuance of task or delivery orders that increase the scope, period, or maximum value of the underlying contract.

The National Defense Authorization Act (NDAA) for FY2008 further limited the use of single-award TO/DO contracts. It also specified what constitutes a "fair opportunity to be considered" for orders in excess of $5.5 million under multiple-award contracts and granted GAO jurisdiction to hear protests of orders valued in excess of $10 million. While the provision authorizing GAO to hear such protests regarding the orders of civilian agencies sunset in May 2011, GAO recently found that it has jurisdiction over these protests because the NDAA for FY2008 amended FASA to provide that all limitations on GAO's jurisdiction over task and delivery order protests expired in May 2011, not just its authority over protests of task and delivery orders valued in excess of $10 million.

Tucker Act (28 U.S.C. §1491). Basics - principal statute governing jurisdiction of the U.S. Court of Federal Claims, where many disputes concerning federal procurements are heard and decided.

Contract Disputes Act (CDA)(41 U.S.C. §§ 7101, *et seq.*). Basics - implements a comprehensive statutory scheme for the resolution of government contract claims.

The CDA provides a framework for asserting and handling claims by either the government or a contractor. All disputes under the CDA must be submitted to either the U.S Court of Federal Claims or to an administrative board of contract appeals ("BCA"). The vast majority of board cases are handled by either the Armed Services Board of Contract Appeals ("ASBCA") or the Civilian Board of Contract Appeals. The ASBCA is generally responsible for deciding appeals from decisions of contracting officers in the Department of Defense, the Department of the Army, the Department of the Navy, NASA, and when specified, the CIA. The CBCA hears disputes from all other executive agencies except the United States Postal Service (USPS), the Postal Rate Commission, and the Tennessee Valley Authority.

The Contract Disputes Act imposes a six-year statute of limitations on all claims, whether they are asserted by the contractor or by the Government. *See* 41 U.S.C. § 7103(a)(4)(A). The limitations period begins to run upon accrual of a claim, which is "the date when all events . . . that fix the alleged liability of either the Government or the contractor and permit assertion of the claim . . . were known or should have been known." FAR 33.201.

The CDA governs post-award monetary claims, such as breach of contract, non-monetary claims, such as a claim for time or interpretation issues regarding a specification, and claims arising out of an implied-in-fact contract between the federal government and a contractor.

Anti-Deficiency Act (ADA)(31 U.S.C. § 1341). Basics - the ADA prohibits the U.S. federal government from entering into a contract that is not "fully funded" because doing so would obligate the government in the absence of an appropriation adequate to the needs of the contract.

In 1870, the original version was passed to end executive branch abuses. Agencies, particularly the military, would create "coercive deficiencies" - intentionally running out of money and obligating Congress to provide additional funds to avoid breaching contracts. Some spent

their entire budget in the first few months, funding the rest of the year after the fact with additional appropriations.

The act provided:

... that it shall not be lawful for any department of the government to expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or to involve the government in any contract for the future payment of money in excess of such appropriations.

Amendments in 1905 and 1906 mandated all appropriations to be apportioned in monthly installments and criminal penalties were imposed for violations.

Today the importance is that unless Congress has obligated the money, a Contracting Officer (or any government employee or official) can't obligate the money. The ADA is cited as the reason for a government shutdown when Congress misses a deadline for passing an interim or full-year appropriations bill, as happened recently.

Although the ADA and its predecessors are over 120 years old, no one has ever been convicted or indicted for its violation. However, agreements have been changed and reported due to ADA violations, and punitive administrative actions are routinely taken against government employees. Government employees have been fired over violations.

Service Contract Act (SCA)(41 U.S.C. §6702(a)).

- McNamara-O'Hara Service Contract Act - created in 1965
- SCA applies to contracts "the principal purpose of which is to provide services in the US through the use of service employees." (41 U.S.C. §6702(a)).
  - – "Principal purpose" is a simple majority of contract requirements • (>50% of FTEs and/or value)
- Provides protection of prevailing wages and benefits for workers.
  - On federal service contracts > $2,500
  - For contracts that incorporate the SCA clause and Wage Determination
  - Similar to protections under Davis-Bacon Act (construction) and Walsh-Healey (manufacturing)
- Enforced by DOL
- Certain types of contracts are exempt (Employment contracts providing direct service to a federal agency, Contracts for leasing of space, Public Utility Services)
- Certain types of employees are exempt (like with the Fair Labor Standards Act, e.g., like Executive Employees or Professionals)
- Basics:
  - Wage Determinations (WDs) stipulate the minimum requirements for:
    - Wages

        - Benefits:
            - Health and Welfare Fringe Benefits (H&W)
            - Vacation
            - Holiday
- SCA also requires contractors to post DOL notice WH 1313 and applicable wage determinations in a prominent area at the work site
- Health and Welfare - Employers may comply with the required benefits by providing:
    - Cash payment at the H&W rate
    - Bona fide benefits
    - Or a combination of the two
    - The hourly H&W fringe benefit rate listed in each "fixed cost" wage determination is an employer obligation separate from the hourly cash wage the employee receives. The SCA employee is not entitled to receive any portion of this fringe rate in cash, although the employer may choose to discharge its obligation by simply paying the fringe rate to the employee in cash. Nor is the employee entitled to select which benefits the employer will provide.
    - Could be health care, retirement matching, etc.

See DOL sites regarding SCA:
https://www.dol.gov/whd/govcontracts/sca.htm
https://www.wdol.gov/usrguide/sectionb.aspx

Small Business Act (15 U.S.C.S. §631). Basics - The Small Business Act of 1958 was passed for the benefit of small business concerns - to aid, counsel, assist, and protect the interests of small-business concerns in order to preserve free competitive enterprise; to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the government be placed with small-business enterprises, to insure that a fair proportion of the total sales of government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation.

In the Small Business Act of July 30, 1953, Congress created the Small Business Administration, whose function is to "aid, counsel, assist and protect, insofar as is possible, the interests of small business concerns." The charter also stipulates that SBA would ensure small businesses a "fair proportion" of government contracts and sales of surplus property.

In *Otis Steel Products Corp. v. United States*, 161 Ct. Cl. 694 (Ct. Cl. 1963), the court observed that "The Small Business Act, 15 U.S.C.S. § 631, was passed for the benefit of small business concerns."

SBA. OHA.

Size matters. North American Industry Classification System (NAICS[7]) codes.

[7] The word is pronounced "Nakes."

Socioeconomic Programs. 8(a) Program, Service-Disabled Veteran-Owned Small Business Program, HUBZone Program, Women-Owned Small Business Program.

Prompt Payment Act (31 U.S.C. §3901, *et seq.*). Basics - Congress has imposed on agencies an obligation to pay every "proper invoice" within 30 days after its receipt, and under the Prompt Payment Act, an agency that fails to pay within the required time will be liable for interest on the delinquent payment. Furthermore, while the invoice must be "proper" in order to trigger the Prompt Payment Act requirements, an agency may not impose unreasonable requirements on its submission. Regulations to implement the act are found in Federal Acquisition Regulation (FAR) Subpart 32.9.

False Claims Act (FCA)(31 U.S.C. §3729 *et seq.*). Basics - enacted in 1863 to address fraudulent claims submitted during the Civil War, the FCA is a weapon the government uses to prevent fraud, waste, and abuse. It includes a provision that permits private lawsuits - *qui tam* suits - where private individuals can step into the shoes of the government and sue for abuse.

Federal Acquisition Regulations (FAR).

According to the government, FAR is "the primary regulation for use by all Federal Executive agencies in their acquisition of supplies and services with appropriated funds." The purpose of FAR is to provide a set of consistent, uniform policies and procedures within the federal acquisition process.

FAR only governs contracts with the agencies of the Executive branch. Contracts with the Legislative branch and the Judicial branch come under separate regulations. Contracts with the Legislative branch (i.e., Congress) are governed by a document entitled "Doing Business with the Congressional Budget Office (CBO)"; contracts with the Judicial branch are governed by the Judiciary Policy – Volume 14 (Procurement). That said, most contracts with the federal government are governed by FAR and each contract will contain specific FAR clauses that are applicable to the contract. Specifically, FAR is applicable to: Solicitations (IFB, RFP, RFQ, RFI), Federal Prime Contracts, and Subcontracts under Federal Prime Contracts.

It is the contractor's responsibility to read each contract and understand each FAR clause referenced in the contract prior to signing a binding agreement.

The FAR is organized into eight subchapters with a total of 53 parts, as follows:

Description	Subchapter	Part
General Information	Subchapter A	Parts 1 – 4
Competition and Acquisition Planning	Subchapter B	Parts 5 – 12
Contract Methods and Contract Types	Subchapter C	Parts 13 – 18
Socioeconomic Programs	Subchapter D	Parts 19 – 26
General Contract Requirements	Subchapter E	Parts 27 – 33
Special Categories of Contracting	Subchapter F	Parts 34 – 41
Contract Management	Subchapter G	Parts 42 – 51
Clauses and Forms	Subchapter H	Parts 52 – 53

Two parts relevant to cost principals and contracts are FAR Parts 31 and 52. These contain the guidance on Cost Principles and Contract Clauses. A contractor must be knowledgeable in both FAR Parts 31 and 52 in order to be able to correctly allocate and record costs incurred (FAR Part 31) and abide by all contract provisions referenced in your contracts (FAR Part 52). In terms of knowing the ins and outs of each, your client's accountants typically work with FAR Part 31 and they look to their contracts department and attorneys for their expertise on matters related to FAR Part 52.

d. GOVCON Terminology.[8]

8(a)Firm - A firm owned and operated by socially and economically disadvantaged individuals and eligible to receive federal contracts under the Small Business Administration's 8(a) Business Development Program.

Affiliates - Business concerns, organizations, or individuals that control each other or that are controlled by a third party. Control may include shared management or ownership; common use of facilities, equipment, and employees; or family interest.

Best and Final Offer (BFO) - For negotiated procurements, a contractor's final offer following the conclusion of discussions.

Commercial and Government Entity (CAGE) Code - a five-character identifier for companies pursuing business with the Federal Government. The code may vary based on country. The only authorized source for obtaining CAGE codes is the DLA Logistics Information Service, located in Battle Creek, MI. There is currently no fee or associated subscription charges related to CAGE codes and they do not have an expiration date. A code is assigned for companies, and if they do not already have a CAGE Code one will be assigned by the Defense Logistics Agency (DLA) after completion of SAM registration.

Certificate of Competency (CoC) - A certificate issued by the Small Business Administration (SBA) stating that the holder is "responsible" (in terms of capability, competency, capacity, credit, integrity, perseverance, and tenacity) for the purpose of receiving and performing a specific government contract.

Contracting Officer (CO) - A person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings.

Contractor Team Arrangement (CTA) - An arrangement in which (a) two or more companies form a partnership or joint venture to act as potential prime contractor; or (b) an agreement by a potential prime contractor with one or more other companies to have them act as its subcontractors under a specified government contract or acquisition program.

Defense Contract Audit Agency (DCAA) - agency of the United States Department of Defense under the direction of the Under Secretary of Defense (Comptroller) established in 1965 to perform all contract audits for the Department of Defense. The DCAA's duties include financial and accounting advisory services for the Department of Defense in connection with negotiation, administration and settlement of contracts and subcontracts.

[8] http://govcon.net/glossary/

Defense Contracting Management Agency (DCMA) - DCMA is an independent combat support agency within the Department of Defense (DoD) responsible for ensuring Federal acquisition programs, supplies, and services are delivered on time, within cost and meet performance requirements.

Defense Acquisition Regulatory Council (DARC) - A group composed of representatives from each Military department, the Defense Logistics Agency, and the National Aeronautics and Space Administration and that is in charge of the Federal Acquisition Regulation (FAR) on a joint basis with the Civilian Agency Acquisition Council (CAAC).

Defense Contractor - Any person who enters into a contract with the United States for the production of material or for the performance of services for the national defense.

DFARS – Defense Federal Acquisition Regulations

DFAR Clause 252.219-7003 – Small, Small Disadvantaged and Woman-Owned Small Business Subcontracting Plan
DFAR Clause 252.226-7000 – Notice of Historically Black College or University and Minority Institution Set-Aside
DFARS Clause 252.226-7001 – Utilization of Indian Organizations, Indian-Owned Economic Enterprises, and Native Hawaiian Small Business Concerns

DoD – Department of Defense

DUNS - Dun & Bradstreet Number (DUNS). A DUNS number is a nine-digit identification number for each physical location of your business. As with SAM registration, obtaining a DUNS number is free; it is provided by Dun & Bradstreet and can be requested at http://fedgov.dnb.com/webform.

Fair and Reasonable Price - A price that is fair to both parties, considering the agreed-upon conditions, promised quality, and timeliness of contract performance. "Fair and reasonable" price is subject to statutory and regulatory limitations.

Federal Acquisition Regulation (FAR) - "The Federal Acquisition Regulations System is established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies. The Federal Acquisition Regulations System consists of the Federal Acquisition Regulation (FAR), which is the primary document, and agency acquisition regulations that implement or supplement the FAR." See FAR §1.101 Purpose. (See also further description in statutes and regulations section above).

Full and Open Competition - With respect to a contract action, "full and open" competition means that all responsible sources are permitted to compete.

GSA Schedules (also referred to as Multiple Award Schedules (MAS) and Federal Supply Schedules) - long-term governmentwide contracts with commercial firms providing federal, state, and local

government buyers access to more than 11 million commercial supplies (products) and services at volume discount pricing. Schedule policy and procedures are guided by two major governing regulatory documents, the FAR and GSAM. FAR – Pursuant to 41 U.S.C. 152(3), FAR Part 38 prescribes policies and procedures that GSA must follow in managing the Schedules program. FAR Subpart 8.4 prescribes ordering procedures for federal agencies when placing orders for supplies and services under Schedules. General Services Administration Acquisition Manual (GSAM) – GSAM covers GSA acquisition policies and practices.

HUBZone – Historically Underutilized Business Zone Small Business - Historically Underutilized Business Zone (HUBZone) Small Business – small business concern that appears on the List of Qualified HUBZone Small Business Concerns maintained by the Small Business Administration. These small business concerns are located in economically distressed areas.

Joint Venture (JV) - In the SBA Mentor-Protégé Program, an agreement between a certified 8(a) firm and a mentor firm to perform a specific federal contract.

Large Business - A business which in not classified as a small business by the Small Business Administration

Mentor - A business, usually large, or other organization that has created a specialized program to advance strategic relationships with small businesses.

Minority Owned Business - A small business that is at least 51 percent unconditionally owned by one or more individuals who are both socially and economically disadvantaged, or a publicly owned business that has at least 51 percent of its stock unconditionally owned by one or more historically underutilized (socially and economically disadvantaged) individuals and has its management and daily business controlled by one or more such individuals. A minority owned business is also a small business that is at least 51 percent unconditionally owned by an economically disadvantaged Indian Tribe or Native Hawaiian Organization, or a publicly owned business that has at least 51 percent of its stock unconditionally owned by one of these entities, that has its management and daily business controlled by members of an historically underutilized (economically disadvantaged) Indian Tribe or Native Hawaiian Organization, and that meets the Small Business Administration regulations.

NAICS – North American Industry Classification System - Beginning in 1997, the Standard Industrial Classification (SIC) was replaced by the North American Industry Classification System (NAICS). This six digit code is a major revision that not only provides for newer industries, but also reorganizes the categories on a production/process-oriented basis. This new, uniform, industry-wide classification system has been designed as the index for statistical reporting of all economic activities of the U.S., Canada, and Mexico.

Negotiation - Contracting through the use of either competitive or other-than-competitive proposals and discussions. Any contract awarded without using sealed bidding procedures is a negotiated contract.

Prime Contract - A contract awarded directly by the Federal government.

Protégé - A firm in a developmental stage that aspires to increasing its capabilities through a mutually beneficial business-to-business relationship.

RFP – Request for Proposal - A document outlining a government agency's requirements and the criteria for the evaluation of offers.

SAM - System for Award Management - The System for Award Management (SAM) (https://www.sam.gov) is a government-run website that serves as a central registration point for government contractors. While federal government contract opportunities have varying requirements, there is a core set of data that is required for all. Instead of repeatedly submitting the same company information with each bid, the government created systems for companies to submit this often or always required information through one source. SAM, launched around 2012, consolidated several legacy systems: the Central Contractor Registration (CCR), the Online Representations and Certifications Application (ORCA), and the Excluded Parties List System (EPLS). Any company that wants to do business with the federal government, or needs to report subcontract information, must register on SAM. SAM.gov registration is also a requirement for companies that want to obtain a GSA Schedule Contract.

SBA – Small Business Administration - US Small Business Administration mission is to maintain and strengthen the nation's economy by aiding, counseling, assisting and protecting the interests of small businesses and by helping families and businesses recover from national disasters.

SBC – Small Business Concern - Small Business Concern as defined pursuant to Section 3 of the Small Business Act and relevant regulations (typically under 500 employees or number of employees or average annual receipts do not exceed the size standard in 13 CFR Part 121). See the FAR Clause 19.102 Size standards.

SDB – Small Disadvantaged Business Concern - SDBs are at least 51% owned by one or more individuals who are both socially and economically disadvantaged. This can include a publicly-owned business that has at least 51% of its stock unconditionally owned by one or more socially and economically disadvantaged individuals and whose management and daily business is controlled by one or more such individuals. SDBs are self certified.

SDVOSB – Service Disabled Veteran Owned Small Business - A small business: (a) Not less than 51 percent of which is owned by one or more service-disabled veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more service-disabled veterans; and (b) The management and daily business operations of which are controlled by one or more service-disabled veterans or, in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran.

Small Business - A business smaller than a given size as measured by its employment, business receipts, or business assets.

Small Business Development Centers (SBDC) - SBDCs offer a broad spectrum of business information and guidance as well as assistance in preparing loan applications.

Small Business Innovative Research (SBIR) Contract - A type of contract designed to foster technological innovation by small businesses with 500 or fewer employees. The SBIR contract program provides for a three-phased approach to research and development projects: technological feasibility and concept development; the primary research effort; and the conversion of the technology to a commercial application.

Small Disadvantaged Business Concern - A small business concern that is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged. This can include a publicly owned business that has at least 51 percent of its stock unconditionally owned by one or more socially and economically disadvantaged individuals and whose management and daily business is controlled by one or more such individuals.

Subcontract - A contract between a prime contractor and a subcontractor to furnish supplies or services for the performance of a prime contract or subcontract.

WOSB Women-Owned Small Business - A small business that is: (a) That is at least 51 percent owned by one or more women, or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more women; and (b) Whose management and daily business operations are controlled by one or more women.

VOSB Veteran Owned Small Business – small business concern: (a) Not less than 51 percent of which is owned by one or more veterans (as defined at 38 U.S.C. 101(2)) or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more veterans; (b) The management and daily business operations of which are controlled by one or more veterans.

e. Government Contracts. The Players and the Process.

The Players - The United States of America (acting through an agency)

Government Contractors (private concerns doing business with the United States individually, as teams, or as joint venturers)

The Process - Contract Formation:

Two Overarching Themes:

1. Procurement Integrity
2. Fiscal Law

Procurement Steps:

Define Requirements (Methods, Types) --> Plan Acquisition --> Prep / Solicitation / Publicize -->

Issue Solicitation --> Evaluate Offers --> [Conduct Discussions] --> Award --> [Protests]

(See Chart at Ch. 1, p. 1-2, 2016 Contract Attorneys Deskbook, U.S. Army Judge Advocate General's School).

f. Changes, Claims, and Adjustments.

Through "changes" clauses, the government establishes its right to make changes in the contract's statement of work or period of performance.

The Contractor receives a right to equitable adjustments in contract cost and/or schedule.

For example, FAR § 52.243-1:

> The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:
> (1) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the Government in accordance with the drawings, designs, or specifications.
> (2) Method of shipment or packing.
> (3) Place of delivery.
>
> (b) If any such change causes an increase or decrease in the cost of, or the time required … the Contracting Officer shall make an **equitable adjustment**….

"Claim" means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, <u>or other relief</u> arising under or relating to the contract. (FAR § 2.101)

"(c) The Contractor must assert its right to an adjustment under this clause within **30 days** from the date of receipt of the written order." (FAR § 52.243-1(c))

- If contractor is unwilling to accept a change that is not within the scope of the Changes clause, consider declaratory judgment under "or other relief."
- Good example – *CliniComp International, Inc. v. United States*, U.S. Court of Federal Claims No. 17-1035C.

Constructive Changes:

- "Constructive "Change" is where the govt changes the contract but won't acknowledge it.
- Constructive changes not addressed in FAR.
- Best strategy is to observe early and put the C.O. on notice (as well as reserve right to an EA).

Clauses Allowing REAs:

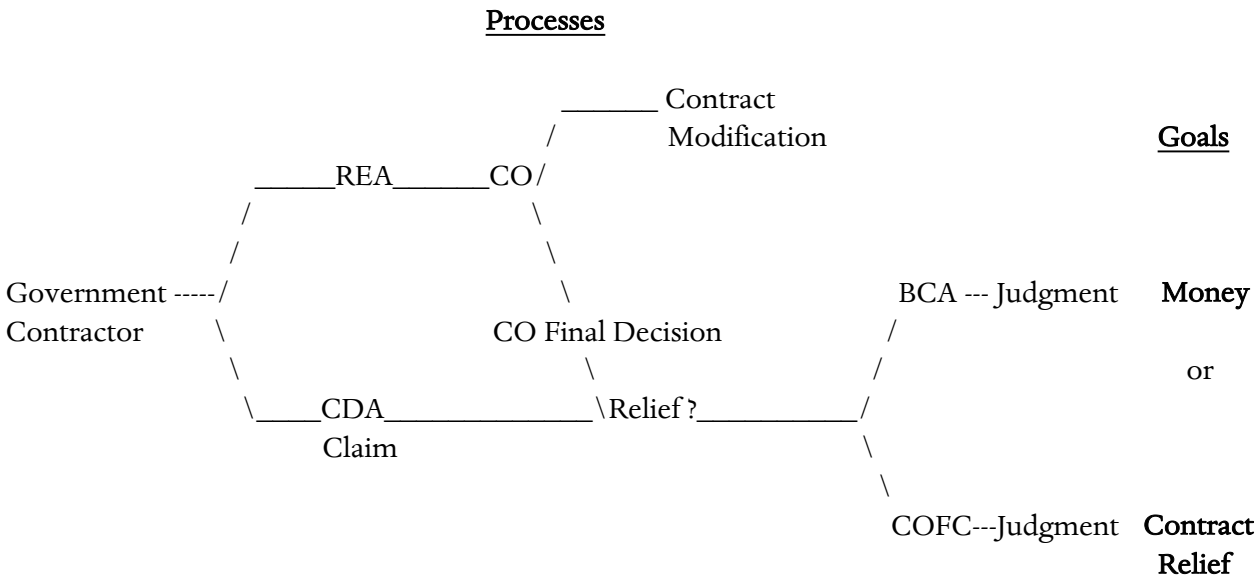
- FAR § 52.236-2 Differing Site Conditions
- FAR § 52.222-44 SCA - Price Adjustment

- FAR § 52.245-2, Government Property (Fixed Price)
- FAR § 52.242-14, Suspension of Work
- FAR § 52.242-15, Stop Work Order
- FAR § 52.242-17, Government Delay of Work

REA is the embryonic stage of a claim

- Generally, a REA is not adversarial
- Often based on other clauses
- Cost of preparing a REA (experts, accounts, attorneys) generally are allowable costs
- Make as detailed as possible
- Try to submit with 30 days
- If subject to DFARS, must include certification in § 243.204-71 if > $150,000

Request for Equitable Adjustment versus Claim under Disputes Clause

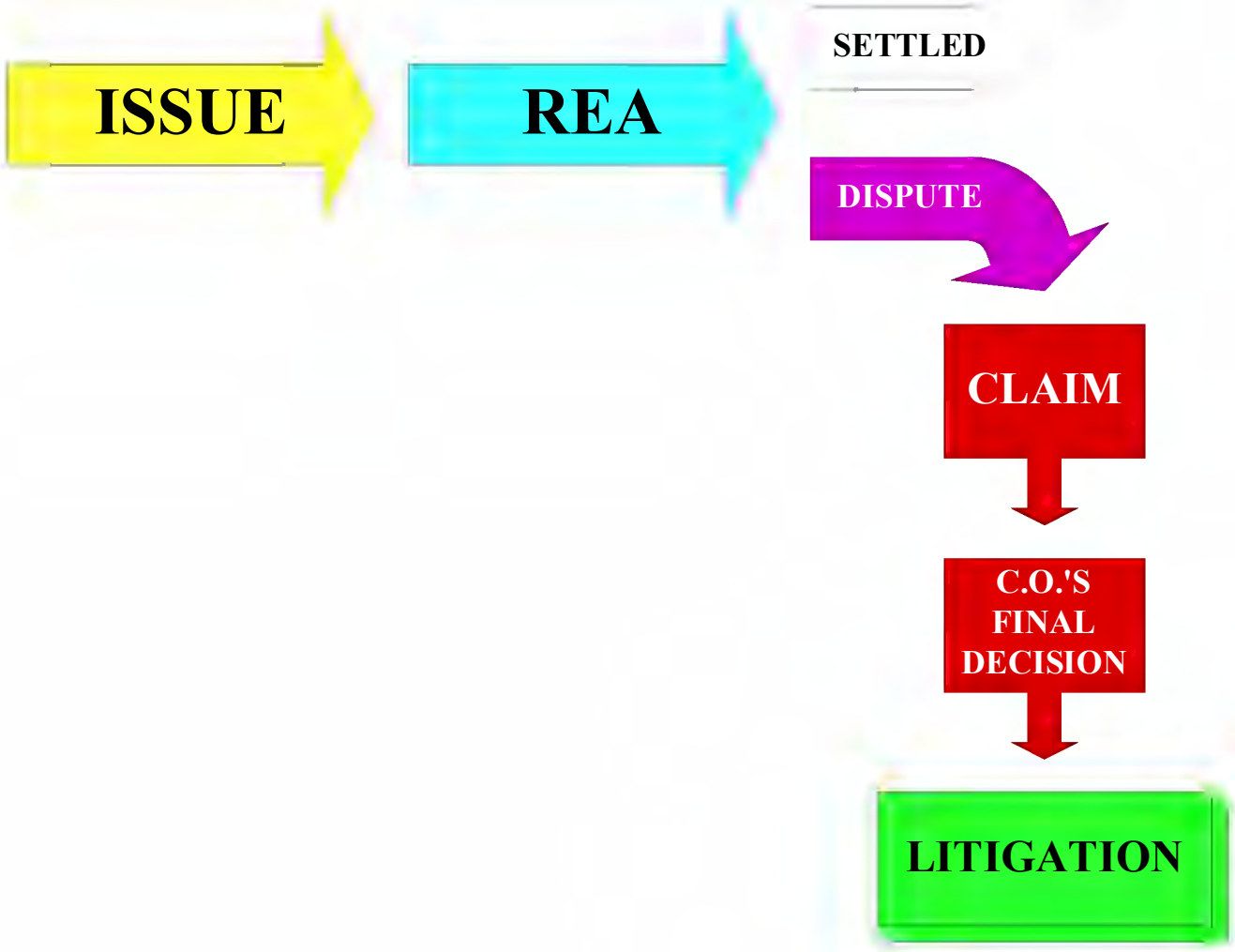


Must establish:

1. Entitlement. Has there been a change in the contractor's obligations under the contract?

2. Quantum. How much is the contractor owed?

What happens if the government and the contractor cannot agree on an equitable adjustment?



II. Disputes and Bid Protests.

a. Examples of Types of Government Contracts Disputes:

Disputes concerning solicitation and process related to planned procurements (sole source, set asides, requirements in solicitation, terms of solicitation, etc.) - for example, government agency decided only one company, XYZ Corporation, can provide the needed widgets, and ABC Corporation believes it could provide widgets that meet the agency's reasonable requirements.

Award disputes - for example, ABC Corporation won the award, and XYZ Corporation believes that it should have because of:

Missing Information. Every bidder is required to turn in a complete response to a solicitation. If the awardee was missing information in response to a solicitation it can be grounds for a protest.

Flawed Evaluation. A successful bid protest may result if an agency ignores its own stated procedures for evaluating proposals, if the agency evaluates proposers based on criteria not listed in the solicitation, fails to evaluate portions of a proposal, or fails to identify mistakes or flaws in the winning bidder's proposal.

Unreasonable Price Proposal. In a solicitation where cost is an issue, a bidder may successfully protest where a winning bidder's price proposal is so low or so different from other bidders that there is either an obvious error or an unrealistic number being proposed, or the pricing submitted does not conform to the solicitation requirements.

Small Business Issues. If the solicitation contained small business requirements, a protest may be initiated to contest a winning bidder's small business certification on various grounds such as minority status, control by third parties (affiliation), size of the small business, or the personal net worth of the small business owner.

Or others. There are an endless number of reasons why a bid protest may be initiated.

Disputes during performance - for example, the government not providing things that the contract required it to provide (GFE - government furnished equipment), delays caused by the government, discovery of faulty drawings or specifications, or government requesting things the contractor does not believe is required under the contract (constructive changes, for example).

Post-performance disputes - for example, disputes over cost submissions, past performance ratings, etc.

b. <u>Bid Protests.</u>

There are three different venues available to hear a bid protest challenging the terms of a solicitation—the agency, the Government Accountability Office (GAO), and the United States Court of Federal Claims (COFC). The agency and GAO are the most popular venues for a pre-award specifications protest. The reasons for this are two-fold: agency and GAO protests are less expensive to pursue than protests at the Court of Federal Claims and both venues offer an automatic stay of the contract award. 31 U.S.C. § 3553(c); FAR 33.103(f). Although the COFC has jurisdiction to hear pre-award protests, the cost of litigating there is high and the availability of an injunction stopping the award of the contract is not automatic.

Agency-Level Protests.

Filing an agency-level protest can be an easy way to bring up an issue with a solicitation to the agency, and in some cases may lead to a quick solicitation amendment satisfactory to both the agency and the protester. However, this post-agency-level protest must still meet the applicable filing deadlines.

Post-award agency-level protests also must be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier. FAR 33.103(e). Agencies may supplement FAR 33.103 filing deadlines with their own more stringent requirements. Agency Level Protests also provide for automatic stays. For post-award protests, the agency must suspend performance so long as it receives the protest within 10 days after contract award or within 5 days after the debriefing date offered to the protester under a timely (i.e., submitted within 3 days of award) debriefing request in accordance with FAR 15.505 or 15.506, whichever is later. FAR 33.103(f)(3).

For the debriefing request to be timely, they have to ask within 3 days of award.

For the agency-level protest to be timely after that, they'd have to submit within 5 days of the debriefing, or within 10 days of the award, whichever is later.

If the agency-level protest does not result in a resolution acceptable to the protester, it still has the ability to bring its protest to the GAO or the Court of Federal Claims.

To file a post-agency-level protest with GAO, the protest must be filed no later than 10 days after the protester had actual or constructive knowledge of initial adverse agency action. If you get a stay at agency level, you don't also get a stay at GAO. But, you can take it to COFC and ask for injunction there, assuming you acted reasonably in bringing the dispute quickly.

In the context of extended debriefings, there is such a thing as filing too soon, however. See *Celeris Systems, Inc.*, B-416890 (Comp. Gen. Oct. 11, 2018).

Thus, the **Agency Protest** process is informal. The protest is commenced with a letter from the protestor to the contracting officer invoking the process and setting forth, among other things, the legal and factual grounds of protest. An agency must stay the awarding of a contract while an agency protest is pending. Typically, there is little or no interaction between the agency and the protestor during the pendency of an agency protest. An agency must use best efforts to resolve the protest within 35 days. A protestor disappointed with the agency's decision has the ability to bring a GAO protest. So, the up-side to the agency level protest is that it is inexpensive; the down-side is that the person that just decided against you (said they were awarding to someone else) is now being asked to reverse themselves. Another up-side is that it may not feel as "adversarial" to the government employees involved (who is your client's customer). There is no "discovery." No record is prepared and provided to the protesting company or their counsel.

GAO Protests.

GAO regulations set specific, strict protest filing deadlines. Protests relating to improprieties in the solicitation itself must be filed before the bid opens or the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1). GAO Protests relating to issues other than alleged improprieties in a solicitation must usually be filed within 10 days after the basis of the protest is known or should have been known; but in the case of a competitive procurement where a debriefing is both required and requested, a protest must be filed no later than 10 days after the date of the debriefing. 4 C.F.R. § 21.2(a)(2).

For post-award protests to GAO, the agency must suspend performance (Automatic Stay) if it receives notice of the protest from GAO <u>within 10 days after contract award or within 5 days after the debriefing date offered to the protester for requested and required debriefings</u> under FAR 15.505 or 15.506, <u>whichever is later</u>. FAR 33.104(c). (Note: Debriefings are not "required" for procurements under FAR Part 13 (FAR 13.106-3(d)), or Part 14 (except 14.5 (two-step sealed bidding) FAR 14.503-1(g)). And, if it is a procurement where a debriefing is not required, but where one is requested, filing 10 days after the debriefing may be untimely.).

The **GAO Protest** process begins with a detailed letter setting forth the legal and factual grounds of protest. The agency, represented by agency counsel, is required to respond to the protest with an "agency report." The agency report is required to include a statement of facts, a memorandum of law, and a copy of the relevant documents. The protestor and any other bidders who might intervene in the protest[9] then have 10 days to respond to the agency report. The GAO is required to issue a decision resolving the protest within 100 days after the protest is filed. Although there is no formal appeal from a GAO decision, a protestor that is not satisfied with the GAO's resolution can still bring the claim at the Court of Federal Claims.

Historically, the main grounds for sustained protests at the GAO have been:

---

[9] "Intervenors" are other offerors who could have gotten the award. Typically, this is the company who was told they won. They intervene in the protest to "protect their win." If your client is the company who was told they won, they should seriously consider intervening. They can help the government respond to the protest, raise issues the government may feel uncomfortable raising (because they can't really take one company's side over the other), and "keep tabs" on what is going on in the protest.

1. Unreasonable technical evaluation
2. Unreasonable cost or price evaluation
3. Flawed selection decision

Here are some key numbers from the GAO's 2018 report to Congress:

- 2,474 – Number of total protests. The total number of cases was 2,607, but this larger figure includes claims for costs and requests for consideration.
- 622 – Number of cases decided on the merits, rather than through dismissal.
- 92 – Number of sustained protests
- 15% – Percentage of sustained protests
- 44 – Effectiveness rate (percentage sustained or where agency took corrective action)
- 0.51% – Percentage of cases with hearings

The effectiveness rate is an important metric. As GAO tells it, the effectiveness rate can be viewed as the percentage of protests in which a protester succeeded in "obtaining some form of relief from the agency" either through corrective action or a sustained protest. A corrective action is an admission from the agency that there was some flaw in the evaluation and the agency counsel thought it would lose at GAO. In other words, the effectiveness rate is a measure of whether the protester succeeded in getting another chance at winning the award.

The 44% effectiveness rate for 2018 is right around the rate for the last 4 years, which ranged from 43% to 47%.

Some have called for reform arguing that there are too many bid protests, but the total number of protests and the protest success rate have been quite steady over the last five years.

GAO Post-Award Protest Timeline:

Day 1

Award.

File protest within 10 days of award or within 5 days of a requested and required briefing to obtain a stay of contract performance. Protestor can ask that certain documents related to the record of procurement be produced.

GAO informs agency of protest and stop-work order is issued.

Provide redacted copy of protest within one day of filing.

Awardee may intervene.

Protective Order may be issued and request for admission under protective order may be submitted and granted.

Motions to dismiss may be filed and considered.

Day 25

Agency identifies documents from the record of the procurement that it intends to produce.

Agency states whether protestor-requested documents exist and whether good grounds exist for withholding documents.

Protestor must raise objections within 2 days.

Day 30

Agency report is due, including legal memorandum and Contracting Officer's state of facts, proposals, and evaluation record.

Only those persons admitted under the protective order, such as attorneys of record and expert consultants who have filed requests for admission under the protective order and had those requests granted, will be given access to the information in the record, including the findings of the agency.

Day 40

Protestor's comments (response) - which should reply and rebut the agency's explanations and provide additional information from the record to support the original grounds raised by the protest. Protestor may also raise new protest grounds that were first revealed in the record.

Day 50

Supplemental agency reports and comments.

Status conference, hearing preparations, hearing, post-hearing comments may occur. Hearings rarely occur.

Day 100

GAO decision. GAO may issue a decision before 100 days. But, rarely will they miss the 100-day deadline to issue a decision in a protest. The GAO decision is non-binding, but agencies typically follow the decision.

The **COFC Protest.**

The Court of Federal Claims is an Article I court that has jurisdiction to hear government contracts disputes primarily pursuant to the Tucker Act and the Contract Disputes Act. Claims must be brought within six years after the claim first accrues. 28 U.S.C. § 2501. The Tucker Act gives the COFC jurisdiction to decide cases challenging the conduct of government procurements and the award of government contracts. The COFC has special rules for these bid protest cases.

Deadlines in the COFC are different. There are no strict timelines for filing a protest, and the GAO timeliness rules do not apply in the COFC. However, a protester waives a challenge to a patent error in the RFP if it has not raised the issue with the government prior to the time set for receipt of proposals (the "patent ambiguity" rule). *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1315 (Fed. Cir. 2007).

In order to obtain a stay, the protester must file a motion for preliminary injunction, demonstrating that: (1) it is likely to succeed on the merits of its protest; (2) it will suffer irreparable harm absent an injunction; (3) granting the injunction will serve the public interest; and (4) the harm the protester will suffer absent the injunction outweighs the harm to the Government and third parties caused by an injunction.

While the COFC has a limitation of 6 years for the filing of claims, parties must act promptly if they seek injunctive relief. A lengthy delay in filing may affect the protester's ability to obtain a preliminary injunction and may also result in the court's barring the protest under the doctrine of laches. *Reilly v. United States*, 104 Fed. Cl. 68, 78 (2012).

Typical COFC Protest Process:

1. Agency takes procurement action (for example, awards a contract).

2. Adversely affected contractor (the contractor not receiving the award of the contract) assesses whether it will protest.

    a. Must decide whether the COFC has jurisdiction.

    b. Must decide if the contractor qualifies as an "interested party."

    c. Must decide if good grounds exist to protest.

3. Prepare Initial Protest.

4. Transmit Pre-Filing Notice - at least 24 hours in advance of filing protest.

5. File Timely Protest.

6. Confer with Attorney from DOJ assigned to case.

a. Possible voluntary stay.

b. Timelines for preparation of record and briefing.

7. Intervenor(s) may file intervene.

8. Initial Status Conference with Court. Court sets deadlines and may hear initial motions.

9. Court issues protective order.

10. Parties submit protective order applications.

11. DOJ files Administrative Record (AR).

12. Confer with DOJ

13. Protestor may amend complaint based upon information in Administrative Recrod.

14. Protestor files Motion for Judgment on Administrative Record (MJAR)

15. DOJ and Intervenor(s) Responses to Protestor's MJAR and file their own MJARs.

16. Replies.

17. Parties submit redacted versions of filings.

18. Oral argument in Court.

19. Court issues decision (initially protected, and then public after parties submit their redactions).

III. Debriefings.

What are they? A "debriefing" is the government giving a contractor a summary of its evaluation decision - a brief explanation of "why?". Whether the contractor won or lost, they have a right to request and receive a debriefing, if they timely ask for one. After putting a lot of time and money into preparing and submitting a proposal, there are plenty of good reasons a disappointed offeror should want to get a debriefing - to learn what wasn't strong in their proposal so they can develop a better proposal next time is around the top of the list. It also may reveal problems in the government's analysis and award decision that could amount to good grounds for a protest. However, even the successful offeror (the awardee) should ask for a debriefing - to find out what they did right.

What to do.

1. Always request a debriefing and do it in writing immediately after receiving notice of exclusion from competition or notice of award. (A debriefing request must be received by the agency within 3 days after receipt of notification).

2. Accept the first debriefing date offered.

3. Know what the agency is required to disclose.

4. Prepare written questions for the debriefing (see examples below) and submit them in advance.

5. Review the evaluation criteria.

6. Designate team members (do not take counsel with you) to take verbatim notes and transcribe them immediately following the debriefing.

7. Listen to the agency's debriefing presentation. Ask questions. Don't argue with the agency or try to persuade them to change their minds. Focus on learning their stated reasons for the decision and try to take away things that will help you in preparing proposals next time.

Timelines

A Debriefing is required for procurements under FAR Part 15 - Contracting by Negotiation, and for task or delivery orders exceeding $5.5 Million under FAR 16.505(b)(6).

BUT ONLY IF, ...a written Debriefing request is received by the agency within 3 calendar days after notification of exclusion from the competitive range (FAR 15.505) or notification of Contract Award (FAR 15.506).

Suggested Questions for Debriefings (do not ask if inapplicable).

1. Please describe the evaluation process used for this procurement.

2. Please identify the strengths, weaknesses, and deficiencies in our proposal for each evaluation factor and subfactor.

3. Did the agency identify any significant weaknesses in our proposal?

4. Were we compliant with all technical requirements?

5. Were there any solicitation requirements that we failed to address? If so, what were they?

6. We proposed _____ as a technical enhancement. Did the government consider this to be an enhancement?

7. Were discussions conducted? If so, were there any significant deficiencies identified by the Government during discussions not adequately addressed in our response to your Evaluation Notices?

8. In order of importance, what were the most critical evaluation criteria that distinguished our proposal?

9. What were the most critical evaluation criteria that proved to be tie breakers in the evaluation of proposals?

10. Was a cost realism analysis used? If so, please describe the process used.

11. Did the agency prepare an independent cost estimate?

12. Did the government make a cost/technical trade-off?

13. Did the government make a competitive range determination?

14. Were any areas of our proposal considered overpriced?

15. Was experience evaluated?

    a. If so, what was our rating?
    b. How was this rating used in the source selection process?

16. How did the government evaluate risk?

17. Were risks identified in our proposal?

18. How did the risk evaluation impact the rating of our proposal?

19. How was past performance evaluated?

20. What was our past performance rating?

21. How was our past performance rating applied to the source selection process?

22. Please identify any information not contained in our proposal that was used by the evaluators in evaluating our proposal.

23. What, if any, specific considerations precluded us from being selected as the awardee?

24. Was there anything missing from our proposal?

25. Is there anything we need to do to improve our next proposal?

IV. Small Business. SBA, Size, Affiliation.

What is a "Small Business"?

There are special rules that give small businesses and businesses in designated socioeconomic categories priority for certain government contracts. This can be a great advantage. But, what is a "small business"? Whether a business is "small" will depend upon the type of business and the type of contract. A construction contractor could be "small" when a copier supply company would not qualify as "small." So, one must look to the NAICS code assigned to a government contract and also consider what the size requirements are for the various certifications in the four major socioeconomic programs (SBA 8(a) Program (8(a)), Service-Disabled Veteran-Owned Small Business Program (SDVOSB), HUBZone Program, or Women-Owned Small Business Program (WOSB)).

Every solicitation or request for proposals issued by the government is assigned one NAICS code. That code has a corresponding size standard. The size standard is assigned by the Small Business Administration (SBA). Normally the government's Standard Form (SF) 1449 (which is issued for most solicitations) will tell the public what the NAICS code is, what the size standard is, and whether there is a set-aside status (and if there is what the set-aside status is). Thus, if you get the SF 1449, you should be able to determine if the contract is reserved for only SDVOSBs. And, if your company has qualified and is certified as a SDVOSB, then you are qualified to compete for the contract. Others are not.

Size is most always determined as of the date an initial bid or proposal is submitted. And size is either calculated by counting revenue (annual receipts) or employees (average number of employees). Annual receipts are essentially total income plus cost of goods sold. Average number of

employees is the number of employees on payroll for each pay period for the 12 months before the size determination or self-certification, then divided by total number of pay periods.

Size Protests and Appeals.

Size protests ensure that small businesses get the benefit of set-asides. For solicitations set-aside for small businesses, an offeror has to be a small business under the NAICS code assigned in order to qualify for the award. For example, if a company, XYZ, Inc., was a small based upon the NAICS code for a specific contract's solicitation, it could submit a proposal for the contract. A size protest challenges an awardee's size for the particular cut off for that particular solicitation. In the size protest, the protester would argue that the contract awardee should not have been awarded the contract because it is not a small business with respect to the assigned NAICS code. So, using the same example, if XYZ, Inc. knew that another company, ABC, LLC, submitted a proposal and won, but ABC, LLC was not small based upon the NAICS code for the solicitation, then XYZ, Inc. could file a size protest.

Protesters commonly raise an argument that the awardee is too large a business on its own. But oftentimes, size protests suggest awardees are "affiliated" with one or more other companies, such that the size when combined with affiliates exceeds the size standard for the assigned NAICS code. If there is a determination, as a result of a size protest, that the awardee is not a small business, it could lose the award.

A disappointed offeror can challenge size. If an offeror loses for reasons unrelated to its own size it can challenge the awardee's size. Protests by a disappointed offeror must be sent to the Contracting Officer (C.O.) within five (5) days from the date the disappointed offeror receives notice of the award. The C.O. forwards the protest to the SBA for a decision. The SBA issues a decision on the size protest. The C.O. If a contracting officer has reason to doubt the awardee's size, they can ask the SBA for a size determination. The request can be made at any time, after performance has begun or years into performance on the contract. The SBA can also initiate its own size determination, at any time if the contractor's size is in doubt.

Appeal of Size Determinations.

If the size determination is that the awardee is small, the protestor can appeal the size determination. If the determination is that the award is not small and ineligible for award, then the awardee can appeal. Any appeal of the size determination is to the SBA's Office of Hearings and Appeals (OHA). OHA overturns size decisions by SBA offices not infrequently. This is in part because size determinations are factually intensive, and the regulations are complex. The appeals are sustained frequently enough for it to be worth appealing an adverse determination, particularly if you were the awardee and another company protested your size.

Size protests and appeals of size determinations must be taken seriously. For a company that is the awardee, they need to keep their award that they have won. For a company that is small and believes the awardee is a large business, they have spent bid and proposal money and time trying to

win an award that improperly went to a large business. Size protests and appeals frequently involve complicated factual and legal questions, and thus it is always advisable for government contractors to promptly seek legal advice.

Affiliation.

"Affiliation" is essentially when the government believes a company has control or the power to control another company. See 13 CFR § 121.103, entitled, "How does SBA determine affiliation?" Affiliation could be simple - like a wholly owned subsidiary of a company. It could also exist, however, when two companies team together frequently or when one company loans the other company money with an agreement that contains payment terms that permit control over decisions. The "SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists." 13 CFR § 121.103(a)(2). "Affiliation" is a scary word for many government contractors, because if companies are considered affiliated all of their combined annual receipts are considered when size is determined. Thus, a small government contractor that is deemed "affiliated" with another company then may not be found to be small for a procurement. It is important to understand the SBA's rules concerning affiliation when advising government contractors with respect to their relationships with other companies.

V. Teaming Agreements, Joint Ventures.

Frequently two government contractors come together to perform work for the government. This could be in a number of ways, but most common are by way of teaming agreements or joint venture agreements. Teaming arrangements can be a valuable tool for businesses to use—allowing them to pool resources, management abilities, and technical knowledge. All of these elements help make a team more competitive in the bidding process. However, if not done properly, the use of teaming arrangements can lead to adverse consequences.

The FAR recognizes two distinct forms of teaming arrangements—joint ventures and teaming agreements. There are a number of considerations with respect to how to come together to go after and then perform work on government contracts.

First, since contractors spend a great deal time and effort locating and "chasing" government contracts opportunities, and then they spend more time and money on bid and proposal efforts, they want to: (1) ensure that strengths and past performance of the companies participating in the team or joint venture complement one another and make them more competitive, (2) ensure the participating companies have an understanding of how the work will be divided and how they will be compensated, (3) ensure that their agreements are enforceable commitments that bind one another, and (4) ensure the agreements are acceptable to the government.

Second, as many contractors are qualified as small businesses through various government programs, and thus have priority with respect to the award of some contracts, they must consider how coming together with other companies to perform work might make the government consider

the two businesses "affiliated." Such companies must manage their relationships carefully, so they do not go over the size limitation as a result of a government determination of affiliation - where they determine one company controls or has the power to control the other.

"Contractor team arrangement," means –

Two or more companies form a partnership or joint venture to act as a potential prime contractor; or

A potential prime contractor agrees with one or more other companies to have them act as its
subcontractors under a specified Government contract or acquisition program.

FAR 9.601

FAR 9.602(a) explicitly recognizes that teams may be desirable from the Government's standpoint.

Teaming Agreements

"Teaming Agreement" generally means a Prime Contractor / Subcontractor Team, and:

- The Prime Contractor has sole interest and complete responsibility (no privity of contract between the government and the Subcontractor.

- The teaming arrangement is controlled by:

  – Teaming Agreements; and

  – Subcontract Agreements.

(Note: The Prime Contractor generally prepares these and dictates the terms of these agreements. The Teaming Agreements are generally prepared and signed in anticipation of submission of a proposal, and then once there is an award, the two parties sign a Subcontract Agreement that supersedes the terms of the Teaming Agreement.).

- The Prime Contractor has privity of contract with the government.

- Profits and losses are earned per subcontracts.

There are two types of teaming agreements: (1) agreements that require the award of a subcontract if a prime contract is awarded, and (2) agreements to attempt to negotiate a subcontract if a prime contract is awarded. If your client is a potential subcontractor that has the negotiating leverage, it should insist on a teaming agreement that requires it to be awarded a subcontract if the

team leader is awarded the prime contract. Otherwise, a court may later consider the teaming agreement to be an unenforceable "agreement to agree." *See* Robert G. Hanseman, Catharine Kidd, "Enforceability of Teaming Agreements," 46-Fall Procurement Law. 18 (American Bar Association 2010); Michael W. Mutek, *Contractor Team Arrangements - Competitive Solution or Legal Liability: The Deskbook for Drafting Teaming Agreements* 1 (2006). *See also Cyberlock Consulting, Inc. v. Information Experts, Inc.*, 939 F. Supp. 2d 572, 2013 WL 1395742 (E.D. Va. Apr. 3, 2013) (federal court in Virginia finding, with respect to a contract being awarded by United States Office of Personnel Management and its Federal Investigative Services division, that a proposed subcontractor could not enforce its teaming partner's/proposed prime contractor's promise to negotiate a subcontract for a particular percentage of work subsequent to the award of the prime contract, and declaring that the signed teaming agreement was not an enforceable contract, it was in unenforceable "agreement to agree."), affirmed by *Cyberlock Consulting, Inc. v. Info. Experts, Inc.*, 549 F. App'x 211, 212 (4th Cir. 2014); *ATACS Corp. v. Trans World Communications, Inc.*, 155 F.3d 659, 665-66 (3d Cir. 1998); *Quandry Solutions Inc. v. Verifone Inc.*, No. 07-097, 2009 U.S. Dist. LEXIS 31459, at *45-46 (E.D. Pa. Apr. 13, 2009); *Glynn Interactive, Inc. v. iTelehealth, Inc.*, No. 2003-0449, 2004 U.S. Dist. LEXIS 3651, at *10 (D. Md. Mar. 9, 2004); *Abt Assocs., Inc. v. JHPIEGO Corp.*, 104 F. Supp. 2d 523, 532-33 (D. Md. 2000); *Int'l Cargo Mgmt. Specialists, Inc. v. EG&G Dynatrend, Inc.*, No. 91-1360, 1995 U.S. Dist. LEXIS 9577 at *43-44 (D.D.C. Mar. 31, 1995); *EG&G, Inc. v. The Cube Corp.*, 63 Va. Cir. 634, 648 (Cir. Ct. 2002).

Important provisions to consider including in teaming agreements:

- exclusivity or how other team members may be used if not exclusive;
- work split and price;
- non-solicitation of employees - prohibitions on employee raiding;
- a requirement that the prime contractor exercise a subcontractor's options for additional work or time periods for the contract if the Government exercises the prime contractor's options;
- limitation the prime contractors' right to terminate for convenience to work terminated from the prime contract by the government;
- required substitution of other work if subcontractor work is eliminated from the program;
- protection of confidential and trade secret information;
- intellectual property and proprietary rights; and
- prime sponsorship of subcontractor claims against the Government in disputes.

Joint Ventures

A "Joint Venture":

- Is a Separate Legal Entity (either partnership or separately formed LLC or Inc.) with "Members" with proportionate "interests"

- Is a "Special Purpose" entity

- Has members usually jointly and severally liable

- Has profit and losses shared proportionately

"A joint venture is an association of individuals and/or concerns with interests in any degree or proportion by way of contract, express or implied, consorting to engage in and carry out no more than three specific or limited-purpose business ventures for joint profit over a two year period, for which purpose they combine their efforts, property, money, skill, or knowledge, but not on a continuing or permanent basis for conducting business generally."

Although it requires a bit more paperwork and thought to set things up, there are several advantages for a joint venture arrangement, such as:

a. The Government can look to the resources of two (or more) companies to perform the work;

b. A minority joint venture member can exert more control over contract performance to protect its interests than in a traditional prime-sub relationship;

c. The joint venture parties receive favorable partnership income tax treatment;

d. Participating in a joint venture may allow a company to avoid any perceived stigma associated with being a subcontractor to its competitors; and

e. They Allow firms to stay smaller longer.

Joint Ventures can be either partnerships or separate LLCs or corporations. JVs involving small businesses are often formed under SBA's All Small Mentor Protégé Program or the 8(a) Mentor Protégé Program, which (if properly formed) lifts any presumptions of affiliation.

Primary Considerations:

1. Management Structure. For example, a management committee, or a project manager.

2. Party responsible for negotiating contracts.

3. Source of labor and division of labor.

There are certain requirements for joint venture agreements, such as the purpose of the joint venture, responsibilities of the parties, obliging both parties to joint venture to ensure performance, location of accounting/administrative records, performance of work, and inspection of records. One must check to ensure that all current requirements for the joint venture agreement terms are met, as the SBA changes their requirements from time to time.

VI. DCAA, DCAA Audits, and Allocable Cost and Payment Clauses - Incurred Cost Submissions.

Sometime government contracts contain the allowable cost and payment clause. If so, that triggers a requirement for an Incurred Cost Submission. The Incurred Cost Submission is used to establish a firm's indirect rates for each year. This includes fringe rates, overhead rates, General and Administrative (G&A) rates, Subcontract and Material Handling (SCMH) rates, for any contracts with the Allowable Cost and Payments clause in them. It is not determined by contract type. Contract type should be determined whether the clause is there or not, but if the clause is there, then the incurred cost submission is required, so it's worth looking in the contracts and contracts groups to determine whether the clause is there or not, and not look at what the contract type says it is.

The Defense Contract Audit Agency (DCAA) considers the Fixed Price hybrid contracts, if they have cost type features, to be cost type contracts. They look for them in the Incurred Cost Submission schedules, and they will reject the submission when they find a hybrid contract that has been "improperly classified".

Audits. The government has the right to audit contractors' books. If they ask to do so, do the following:

- Request in writing from a contracting officer before providing access to the records
- Get a letter or entrance briefing explicitly stating the scope of the audit
- Appoint a single point of contact with the auditors
- Allow auditors access to employees other than for floor checks of timecards
- Get the auditors to provide an exit briefing stating their findings
- Cooperate with the audit

VII. Other Issues.

a. OCI.

An Organizational Conflict of Interest, or "OCI", exists when work performed by a government contractor on a contract may: (a) result in an unfair competitive advantage for the contractor; or (b) impair the contractor's objectivity in performing that or other contract work. OCI or the appearance of OCI must be avoided at all costs because OCI can lead to the contractor being excluded from a contract competition, having a contract terminated, or being suspended or debarred from performing future federal contract work.

Subpart 9.5 of the FAR deals with OCIs. The responsibility for determining whether an actual or apparent OCI exists lies with the CO. The CO is responsible for identifying potential conflicts of interest and, if a conflict of interest has been identified, determining whether the OCI can be neutralized or mitigated.

There are essentially three types of OCIs:

(1) Biased ground rules – where a contractor has set the "ground rules" for a procurement by writing a procurement's statement of work, specifications, or performing systems engineering and technical direction for the procurement. (The government is not supposed to hire contractor to help develop the terms of a procurement and then let the contractor or one of its affiliates later compete for that work);

(2) Impaired objectivity – where a contractor's work under a government contract requires them to evaluate itself or a competitor, raising question concerning the impartiality of its advice to the government; and

(3) Unequal access to information – where a government contractor has access to non-public information as part of its performance on a government contract that gives it an unfair competitive advantage with other procurements.

Most OCI claims are raised in protests by competitors claiming unfair competitive advantage in a procurement or the contractor's ability to perform the work without bias. Although frequently raised, and a real concern for the government (who wants to ensure the integrity of the procurement process and is sensitive to claims such as these), the GAO and COFC rarely find that an actual OCI exists that was not properly neutralized or mitigated by the CO.

The FAR requires that COs "exercise common sense, good judgment, and sound discretion to determine whether a conflict exists and the appropriate means of resolving it." In other words, the FAR intends that the CO and accused contractor work together to identify and resolve the OCI issue as best as possible. This generally starts with an OCI inquiry letter from the CO to the accused contractor, who has a chance to investigate the alleged OCI and respond.

COs have many tools at their disposal to mitigate OCI when it arises. For example, the government often asks for mitigation plans and works with contractors to prepare and incorporate OCI mitigation plans that create firewalls within the government and the contractor's organization to ensure that competitive information does not provide the contractor an unfair competitive advantage.

It is important that contractors diligently investigate any alleged OCI and put together a comprehensive and compelling response to the OCI claims. OCIs that can be neutralized or mitigated generally do not require the disqualification of the accused contractor from a procurement, but the existence of actual OCI that cannot be adequately mitigated will likely lead to disqualification of the contractor and possibly the loss of contracting opportunities. In other words, OCI allegations should not be taken lightly.

In brief, to avoid allegations of actual or apparent OCI, contractors must: (1) analyze their activities on all government contracts; (2) ensure that those activities cannot lead a rational person to believe that actual or apparent OCI might exist due to those activities; (3) where actual or apparent OCI might exist, take steps to neutralize or mitigate that OCI as best as possible. These avoidance efforts are usually conducted through an internal investigation of a contractor's federal activities and strategies, and the subsequent development of an OCI mitigation/avoidance plan. Contractors should disclose the existence of any actual OCI discovered during an internal investigation if such OCI will provide the contractor an unfair competitive advantage in a procurement. Failing to make such disclosures creates a risk of procurement disqualification, termination, or sanctions down the road for failing to disclose the OCI.

b. Suspension/Debarment.

Suspension and Debarment is a process that protects the federal government from fraud, waste and abuse by using a number of tools to avoid doing business with non-responsible contractors. Suspensions, Proposals for Debarment, and Debarments are the most widely known tools, and those actions are published publicly via SAM. However, Hearings, Show Cause Letters, and Requests for Information are not visible to the public.

The FAR allows for contractors to be suspended or debarred for:

- Commission of fraud, embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal laws, receiving stolen property, an unfair trade practice
- Violation of antitrust statutes
- Willful, or a history of, failure to perform
- Violation of the Drug-Free Workplace Act
- Delinquent Federal taxes (more than $3,000)
- Knowing failure to disclose violation of criminal law

- Any other cause that affects present responsibility

What is the Suspension & Debarment process?

1. Cases are referred to the Suspension and Debarment Official (SDO) from many sources, including Office of Inspector General, voluntary & mandatory disclosures
2. SDO makes a decision based on the referral
3. Contractors are immediately listed on SAM (www.sam.gov) if they are suspended or proposed for debarment
4. When suspended proposed for debarment, contractors may submit matters in opposition demonstrating present responsibility
5. If requested, SDO may meet with contractor
6. If additional facts are presented, SDO makes a final decision which is provided to the contractor

What is the effect of Suspension or Debarment?

- Contractor name is published as ineligible on SAM. The suspension is effective throughout the Executive Branch of the Federal government and applies to procurement and non-procurement programs.
- Offers will not be solicited from, contracts will not be awarded to, existing contracts will not be renewed or otherwise extended for, and subcontracts requiring Government approval will not be approved for the suspended contractor by any agency in the Executive Branch of the Federal government, unless the head of the agency taking the contracting action or a designee states, in writing, the compelling reason for continued business dealings between you and the agency.
- Contractor may not conduct business with the Federal government as an agent or representative of other contractors or of participants in Federal assistance programs, nor may they act as an individual surety to other Government contractors.
- No government contractor may award to the suspended or debarred contractor a subcontract equal to or in excess of $30,000 unless there is a compelling reason to do so and the contractor first notifies the contracting officer and further complies with the provisions of FAR 9.405-2(b).
- No agency in the Executive Branch shall enter into, renew or extend a primary or lower-tier covered transaction in which the contractor is either a participant or principal unless the head of the agency grants an exception in writing. (Covered transactions defined at 41 C.F.R. Section 105-68).
- Contractor's affiliation with, or relationship to, any organization doing business with the Government will be carefully examined to determine the impact of those ties on the responsibility of that organization as a Government contractor or subcontractor.

What to do upon receiving a Suspension or Debarment letter?

- Seek legal counsel.

- Respond before the SDO makes a final decision.
- Focus on its present responsibility to contract with the Federal Government.
- Request a meeting with the SDO to discuss its present responsibility in person.
- Provide the SDO with more relevant information in defense or mitigation before SDO makes final decision.

Note: The SDO may decide to take no action against a contractor whom they feel is presently responsible. So, responding with information that shows present responsibility is important, and doing so in a timely manner is of the utmost importance. If the SDO feels that they need further information before making a decision, they have the option to send the contractor a "Request for Information" letter or a "Show Cause Letter". These should be taken very seriously. While Requests for Information do not immediately result in ineligibility and are used to gather information, and Show Cause Letters also do not immediately result in ineligibility and are used to gather current information and learn the contractor's position, if they are ignored, there is a good chance a suspension or debarment will occur. Show Cause Letters are discretionary, and are used when cause for debarment exists, but the agency wants to provide the contractor an opportunity to present information before taking action. The SDO may also decide to enter into an "Administrative Compliance Agreement," which document remedial measures taken to prevent reoccurrence and often include outside and independent review/audits by consultants.

Suspension

- Immediate Need
- A temporary measure; there is a twelve-month limit
- Usually used pending the completion of investigation or legal proceedings
- Based upon adequate evidence, usually an indictment

Debarment

- Usually three years in length
- Based upon a preponderance of the evidence, usually a conviction

c. Security Clearances.

Many individuals who apply for government work today — whether government employees, contractors, or military members — are required to go obtain a security clearance as a condition of employment. Approximately 4.3 million jobs require a security clearance and more than 1 million investigations and re-investigations are conducted each year. The government contracting companies themselves will also likely need a Facility Security Clearance (FCL) and will need to have a Facility Security Officer (FSO). An FCL is essentially a determination by the federal government that it would be in the interest of national security for a particular company or organization to access classified information. Just as national security information is classified at one of three levels (Confidential, Secret, or Top Secret), facility clearances are granted at one of those three levels.

A company can only apply for a facility security clearance when it is necessary for them to access classified information to respond to a request or perform on a contract. A company cannot apply for the FCL of its own accord. A contract is awarded to the company by either a federal government agency or by another company that already has a facility clearance of its own, and then the agency or cleared company then sponsors the uncleared company for the facility security clearance at the appropriate level of classification for the contract work.

Individuals working on certain government contracts also need security clearances. Security clearance investigations are extensive. Individuals applying for clearances should expect to have their personal lives, including their financial and criminal histories, reviewed. In doing so, the government is trying to obtain a clear picture of the individual's character and security risk. Individuals applying for a security clearance could be denied clearances due to issues related to: Finances, Alcohol or substance abuse, Criminal charges, Sexual conduct, Mental health, Foreign influence, Misuse of technology, Conflict of interest and or Security violations. Anything from traffic offenses to credit card debt, for example, can prevent an individual from being able to hold a clearance. Examples of other issues that could prevent or delay the issuance of a security clearance include dual citizenship; failing to be truthful when filling out the security clearance application (also known as the SF-86); alcohol, drug, or substance abuse issues; having family member who reside in foreign countries; and psychological problems. Once issued, the government can also suspend or revoke a security clearance for numerous reasons if the individual's ability to work in a classified environment is called into question. Thus, subsequent financial hardship, such as defaulting on a mortgage, or being charged with a criminal or traffic offense, such as driving while under the influence, could result in the subsequent revocation of a security clearance.

Attorneys can help companies and individuals with security clearance issues, including the application, revocation, and appeal process. These can involve:

- Security clearance application (SF-86 and DD Form 1879) assistance;
- Investigative interview preparation;
- Responding to interrogatories;
- Responding to a Statement of Reasons (SOR) or Letter of Intent (LOI);

- Representation at Defense Office of Hearing and Appeals (DOHA) and other hearings; and
- Appeals to the DOHA Appeals Board, the CIA, or other agencies.

If the government decides to deny or revoke a clearance, they issue a Statement of Reasons (SOR) expressing their intent. That document is provided to the government contractor's FSO who, in turn, would give it to the person whose clearance is being denied or revoked. It is very important to act promptly when a SOR is received. The contractor's employee may not be able to do their work without a clearance, which would create a problem for both the employee and the contractor. There are due process rights, one of which is to request a hearing before an Administrative Law Judge (ALJ). The security clearance applicants should always respond timely to the SOR and should generally request a hearing before an ALJ. This is the single best opportunity to get or retain a security clearance in light of the receipt of a SOR.

If one of your clients or their employees have been denied or revoked a security clearance, it is important to keep in mind that one must act quickly, as there are strict time requirements that must be met. It is important that they consult with a lawyer as soon as possible. Department of Defense (DOD) Directive 5220.6 deals with all matters regarding the Defense Industrial Personnel Security Clearance Review Program.

Cases involving appeals of denials or revocations can be found at: http://ogc.osd.mil/doha/industrial/. One example is: *In the Matter of: *** Applicant for Security Clearance*, DISCR OSD Case No. 11- 10411 (D.I.S.C.R.), 2012 WL 2402145 (May 31, 2012)(Applicant who was born in Iran and came to the United States for her education in 1978 applied for security clearance for the first time when she became employed by a government contractor. With assistance of counsel, she overcame the initial notice of denial of a clearance by showing that she became a U.S. citizen in 1994, she had a bachelor's and a master's degree from U.S. universities, she married a U.S. citizen, and has three children who are U.S. citizens, and while she visited Iran three times in 34 years, in 1992, 1998, and 2010, all of her trips to Iran were before she started working for a defense contractor. ALJ found that applicant met her "heavy burden to mitigate security concerns" and access to classified information was granted)(See opinion at http://ogc.osd.mil/doha/industrial/11-10411.h1.pdf).

d. Foreign Contracts.

1. Foreign Military Sales.

According to the Defense Security Cooperation Agency (DSCA), the principal DoD organization through which the Secretary of Defense carries out responsibilities for Security Assistance (SA):

> The Foreign Military Sales (FMS) program is the government-to-government method for selling U.S. defense equipment, services, and training. Responsible arms sales further national security and foreign policy objectives by strengthening bilateral defense relations, supporting coalition building, and enhancing interoperability

between U.S. forces and militaries of friends and allies. These sales also contribute to American prosperity by improving the U.S. balance of trade position, sustaining highly skilled jobs in the defense industrial base, and extending production lines and lowering unit costs for key weapon systems.[10]

DSCA 5105.38-M, the Security Assistance Management Manual, is the primary document through which DSCA directs, administers, and provides DoD-wide guidance to the DoD Components and DoD representatives to U.S. missions for the execution of DoD security cooperation programs.

2. Export Control / ITAR.

International Traffic in Arms Regulations (ITAR) provide that information and material pertaining to defense and military related technologies (items listed on the U.S. Munitions List (USML)) may only be shared with U.S. persons, unless authorization from the Department of State is received or a special exemption is used. One can face heavy fines if they have, without authorization or the use of an exemption, provided foreign persons with access to ITAR-protected defense articles, services or technical data. Thus, ITAR and other export control laws restrict and control the export of defense and military related technologies to safeguard U.S. national security and further U.S. foreign policy objectives.

Defense-related articles and services on the United States Munitions List (USML) are covered by the regulations, which implement the provisions of the Arms Export Control Act (AECA), and are described in Title 22 (Foreign Relations), Chapter I (Department of State), Subchapter M of the Code of Federal Regulations. The Department of State Directorate of Defense Trade Controls (DDTC) interprets and enforces ITAR. The related Export Administration Regulations (Code of Federal Regulations Title 15 chapter VII, subchapter C) are enforced and interpreted by the Bureau of Industry and Security in the Commerce Department. The Department of Defense is also involved in the review and approval process.

e. SBIRs.

The Small Business Innovation Research (SBIR) program is a federal government program that the Small Business Administration coordinates, which is intended to help certain small businesses conduct research and development (R&D). The funding takes the form of contracts or grants. And the recipient projects must have the potential for commercialization and must meet specific U.S. government R&D needs.

The SBIR program was created to support scientific excellence and technological innovation through the investment of federal research funds in critical American priorities to build a strong national economy. Approximately $2.5 billion is awarded through this program each year. The

[10] See https://www.dsca.mil/

United States Department of Defense (DoD) is the largest agency in this program with approximately $1 billion in SBIR grants annually.

SBIR Program

6 Months	24 Months	6 Months	24 Months
SBIR Phase I	SBIR Phase II	Phase II Enhancement	RIF, BAA, OTA
TRL - 3	TRL - 6	TRL - 6	TRL 7-9
Proof of Concept	Demonstrated Prototype in Relevant Environment	Demonstrated Prototype in Relevant Environment	Operational Evaluation, Qualification, and Successful Mission Operations
$150,000	$1,000,000	$5000,000	$3,000,000

Total: 60 Months and $4.6 Million

VIII. Contract Disputes Act claims.

The Contract Disputes Act governs disputes involving most federal government contracts. It requires a contractor submit their claim to a CO before a suit can be heard. The claim has to be "certified" by the contractor. There must be a final decision on the claim, or it be "deemed denied" because the CO failed to act within the time permitted by the CDA, before the contractor can file suit. Then the contractor may appeal the CO's final decision to the COFC or an administrative board of contract appeals (BCA). Claims must be brought no later than 6 years after they accrue.

Basic Timeline of CDA claim:

1. CDA claim accrues. FAR 33.201

2. Contractor submits certified claim to CO.

3. Final adverse decision by CO, or claim is deemed denied by inaction of CO for 60 days.

4. Contractor decides where to file - BCA or COFC.

5. If BCA, 90 days after the final decision (or "deemed denied") is last day to file.

If COFC, 1 year after CO decision (or "deemed denied") is last day to file.

6. Then case proceeds according to rules of the judge, who enters schedules. Matter is litigated and decided.

7. If BCA, 120 days after decision is the last day to appeal the BCA's decision to the United States Court of Appeals for the Federal Circuit (the Federal Circuit).

If COFC, 60 days after the COFC judgment is the last day to appeal to the Federal Circuit.