# THE GOVERNMENT PROCUREMENT REVIEW

Eighth Edition

**Editors**
Jonathan Davey and Amy Gatenby

THE LAWREVIEWS

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EIGHTH EDITION

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# PREFACE

It is our pleasure to introduce the eighth edition of *The Government Procurement Review*.

Our geographical coverage this year remains impressive, covering 15 jurisdictions, including the European Union, and the continued political and economic significance of government procurement remains clear. Government contracts, which are of considerable value and importance, often account for 10 to 20 per cent of gross domestic product in any given state, and government spending is often high profile, with the capacity to shape the future lives of local residents.

When we started to produce this edition, we imagined that we would be focusing in detail once again in this preface principally on the trials and tribulations of Brexit: how quickly the landscape has changed! Suddenly all talk in procurement circles in the EU and beyond centres on the exigencies of the covid-19 crisis, whether that be modifications to existing contracts to reflect the 'new normal' (for instance in the recasting of rail franchise agreements in the UK) or the tension between procurement procedures and the need for urgent procurement of PPE and other medical needs. Many national chapters also consider the changes to procurement practice and rules centring around the imperative to kick-start economies as soon as the worst of the pandemic is behind us.

All of this has resulted in specific guidance at EU level and in the US, Germany, the UK (with the publication of three Procurement Policy Notes in short order) and elsewhere. So far, the European Commission has limited its communications to clarifying the current law. In due course, however, it is possible that there will be a relaxation of procurement law to enable authorities to respond more flexibly to the unprecedented challenges they are facing, and may face in the future. By way of example of changes already effected: (1) financial thresholds were raised in parts of Germany; and (2) new legislative provisions, adopted in February and March 2020 in Greece, allow use of the negotiated procedure for the supply not just of medical equipment but also other items necessary for contracting authorities and entities to adapt to the new situation. More generally, the proposed new legislation in Italy, with a strong focus on the treatment of subcontracting, is particularly noteworthy. There are also significant procurement law developments in Russia, including an extension of circumstances in which single sourcing is permitted.

Brexit is still out there! It remains the case that the United Kingdom continues to recognise the importance of procurement law both during and beyond the transitional period. Her Majesty's Government has pronounced itself committed to the need for continued regulation of procurement and, having secured approval from the World Trade Organization, the United Kingdom will become party to the Agreement on Government Procurement (GPA) in its own right, rather than through the European Union, at the end of the Brexit transition period.

When reading chapters regarding European Union Member States, it is worth remembering that the underlying rules are set at EU level. Readers may find it helpful to refer to both the European Union chapter and the relevant national chapter, to gain a fuller understanding of the relevant issues. So far as possible, the authors have sought to avoid duplication between the EU chapter and national chapters.

Finally, we wish to take this opportunity to acknowledge the tremendous efforts of the many contributors to this eighth edition as well as the tireless work of the publishers in ensuring that a quality product is brought to your bookshelves in a timely fashion, particularly given the effects of the pandemic and consequent lockdowns in most countries covered in this work. We trust you will find it to be a valued resource.

**Jonathan Davey and Amy Gatenby**
Addleshaw Goddard LLP
London
May 2020

Chapter 15

# UNITED STATES

*Daniel Forman, Adelicia Cliffe, Judy Choi and Christian Curran*[1]

## I INTRODUCTION

Public procurement in the US is governed by a number of different statutes and regulations. Most of the statutes applicable to civilian agencies are found in Title 41 of the United States Code, and those statutes specific to military procurement are found in Title 10. In addition, government procurement policy and requirements are implemented through a uniform set of regulations, the Federal Acquisition Regulation (FAR), found in Title 48, Chapter 1 of the Code of Federal Regulations (CFR). Many agencies, including the Department of Defense (DoD), have their own supplemental regulations that supplement the FAR. The primary underlying principles are competition, transparency, integrity and fairness.

The agencies enforce federal procurement policy and rules through acquisition personnel, such as contracting officers, offices of inspectors general providing oversight to fight fraud, waste, and abuse and ensure compliance with the various statutes and regulations, and suspension and debarment officials with authority to suspend or debar contractors from doing business with the government. An additional enforcement tool, which can be invoked by a private person whistle-blower, is the civil False Claims Act (FCA), which imposes liability on persons and companies that submit fraudulent claims to the federal government.

The US has acceded to the World Trade Organization (WTO) Agreement on Government Procurement (GPA) and federal procurement regulations are largely consistent with the procurement obligations of that agreement, with some exceptions, such as contract set-asides for US small businesses and preferences for domestic products.

## II YEAR IN REVIEW

The US federal procurement system is constantly updated through legislation, including annual appropriations statutes that include new requirements or change existing requirements, agency rulemaking, and case law interpreting the laws and regulations.

The Fiscal Year 2020 National Defense Authorization Act (NDAA) included several key provisions affecting government contractors, especially as it relates to supply chain security, including development of a new cybersecurity framework applicable to the defence industrial base and pilot programmes for acquisition strategy and intellectual property. Regarding cybersecurity, the NDAA requires the DoD to undertake a top-down review of its utilisation of existing cybersecurity contractors, military, and civilian personnel, as well as develop

1 Daniel Forman and Adelicia Cliffe are partners and Judy Choi and Christian Curran are counsel at Crowell & Moring LLP.

a comprehensive framework to enhance the cybersecurity of the US defence industrial base.[2] The NDAA also addresses perceived risks with foreign ownership of companies in the US supply chain, and establishes new disclosure obligations and prohibitions where there is risk of foreign-government influence.[3] Specifically, the new requirement creates a duty for contractors and subcontractors on unclassified contracts and subcontracts above US$5 million (other than commercial item contracts) to disclose foreign ownership, control, or influence (FOCI) for assessment by the contracting agency.

Other developments from the past year further emphasise the increased focus on supply chain security. In August 2019, pursuant to Section 889 of the 2019 NDAA, the DoD, the General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA) issued an interim rule to implement Section 889(a)(1)(A)'s prohibitions at FAR Subpart 4.21. The rule bans the government from 'procuring or obtaining, or extending or renewing a contract to procure or obtain any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system.' Consistent with the 2019 NDAA, the regulation defines 'covered telecommunications equipment or services' to include, among other things, any telecommunications equipment or services produced or provided by Chinese companies Huawei or ZTE, or similar equipment produced or provided by any entity that the US Secretary of Defense reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country. Further, effective 13 August 2020, these prohibitions will be extended to prohibit entering into any contract with an entity that uses any prohibited covered telecommunications equipment or services as a 'substantial or essential component' of their systems.

This increased focus on supply chain security is also demonstrated in the FCA arena, where, in a case of first impression, a court decided that a relator's *qui tam* case against Aerojet Rocketdyne (AR) alleging, among other things, violations of the FCA stemming from AR's lack of compliance with DFARS 252.204-7012, Safeguarding Covered Defense Information and Cyber Incident Reporting, could continue past the pleading stage.[4] Then, a couple of months later, Cisco Systems agreed to pay US$8.6 million to settle allegations in *United States ex rel Glenn, et al v. Cisco Systems, Inc.* that the company violated the FCA by selling video surveillance systems to state and federal agencies that contained software flaws enabling those agencies to be hacked.

In bid protest cases, there were several notable developments in decisional law impacting competition requirements. First, in *National Government Services, Inc. v. United States*,[5] the US Court of Appeals for the Federal Circuit ruled that limitations on contract awards for an individual offeror under a multiple award contract violated competition requirements. In that case, the court found that caps on the percentage of work any one contractor could obtain violated the Competition in Contracting Act (CICA) because offerors were arbitrarily denied the ability to compete for particular work. Second, in *Blue Origin Fla., LLC*,[6] GAO sustained a protest of a solicitation contemplating that the agency's award determination for

2 See National Defense Authorization Act for Fiscal Year 2020, S.1790, 116th Congress §§ 1652, 1648 (2019).

3 id. § 847.

4 *United States ex rel. Markus v. Aerojet Rocketdyne Holdings*, No. 2:15-cv-2245 (ED. Cal. May 8, 2019).

5 923 F.3d 977, 981 (Fed. Cir. 2019), 61 Gov't Contractor ¶ 140.

6 B-417839, Nov. 18, 2019, 2019 CPD ¶ 388.

a space launch services contract would go to the pair of proposals that collectively provided the best value to the government. GAO found that the agency's evaluation scheme failed to provide offerors with a basis to compete intelligently and on a common basis given that one offeror could not know the contents of another offeror's proposal absent illegal collusion.

Additionally, in another notable bid protest decision, *Oracle America, Inc. v. United States*,[7] the Court of Federal Claims held that an offeror alleging conflicts of interest stemming from acts affecting a personal financial interest codified at 18 USC Section 208 still must demonstrate competitive injury. In this instance, the court found that Oracle failed to demonstrate competitive injury in its pre-award challenge attempting to disqualify rival bidder, Amazon Web Services, Inc (AWS), despite alleged conflicts of interest and allegations that several former AWS employees who subsequently worked for the DoD improperly tainted the procurement. The Court found that Oracle could not demonstrate that the alleged conflicts impacted the procurement, and therefore it suffered no competitive injury.

Finally, in a separate regulatory development also dealing with competition requirements, in September 2019, the DoD amended the DFARS to restrict the use of low-cost technically acceptable (LPTA) evaluation schemes for DoD contracts.[8] The DoD must 'avoid, to the maximum extent practicable' using an LPTA evaluation scheme for procurements in information technology services, personal protective equipment, and knowledge-based training or logistics services in contingency operations. The rule also creates more stringent guidelines for the use of LPTA procedures.

## III SCOPE OF PROCUREMENT REGULATION

### i Regulated authorities

All federal executive agencies are subject to the FAR, subject to a few exceptions (e.g., Federal Aviation Administration, United States Postal Service, the Tennessee Valley Authority, and Amtrak).

### ii Regulated contracts

The FAR and various agency FAR supplements govern public procurement regardless of sector, though the specific provisions that apply depend on the contract type (e.g., services versus goods versus construction, commercial items versus non-commercial items, firm-fixed price versus cost reimbursement), contract value and other considerations. With few exceptions, the FAR requires that all contracts be awarded competitively, which means that all responsible offerors are eligible to compete for award, or for awards set aside for certain types of business concerns (i.e., awards set-aside for small businesses).[9] If an agency chooses to award a contract without competition, the contracting officer must typically complete a 'justification and approval' and obtain approval for a sole source award, based on the specifically identified circumstances set forth in the FAR.[10]

Certain clauses within the FAR are only included in contracts above a certain dollar threshold. While that threshold may vary by clause, all contracts that fall below the

7 144 Fed. Cl. 88, 115 (2019), appeal pending No. 19-2326, Fed. Cir. August 28, 2019.

8 See 84 FR 50785, Sept. 26, 2019.

9 See FAR Part 6.

10 FAR 6.302, 6.303.

micro-purchase threshold (currently US$3,500, but US$10,000 for GSA[11], DoD[12]) are exempt from the requirements for competition.[13] In addition, contracts at or below the simplified acquisition threshold (currently US$150,000, but US$250,000 for GSA[14], DoD[15]) may be awarded using a simplified acquisition process and include only a limited number of FAR clauses.[16] Furthermore, the FAR allows for a streamlined acquisition process for the acquisition of 'commercial items,' as defined by FAR 2.101, which includes both items and services, and generally includes products 'of a type' offered for sale to the general public, or such products that have undergone minor modifications or modifications 'of a type' offered to the general public.

The Anti-Assignment Act, 41 USC Section 6305, prohibits the assignment of a government contract from one entity to another without the government's consent, but the FAR dictates specific procedures for executing a novation agreement among the parties (the transferee, transferor, and the government), a process that requires early and active engagement with the customer agency in the event of an internal reorganisation, merger, or an asset purchase.

Other transaction authority (OTA) refers to a set of statutes that allow certain agencies to enter into agreements which are exempt from the FAR and many statutes that apply to procurement contracts, grants, and cooperative agreements. While OTAs have been around since 1958, they have grown in popularity as the DoD has made a special push to leverage its OTA authority to quickly award contracts without having to engaging in the traditional FAR procurement process.[17] The DoD currently has permanent authority to award OTAs for research, prototype and production purposes.[18] Other agencies with OT authority include NASA and the Departments of Energy and Homeland Security.

## IV SPECIAL CONTRACTUAL FORMS

### i Framework agreements and central purchasing

Framework agreements, frequently referred to in the United States as indefinite-delivery/indefinite-quantity (IDIQ) contracts, are governed by FAR Subpart 16.5. Among other things, the solicitation for such a contract must:

*a* specify the period of the contract, including any options;

*b* specify the total minimum and maximum quantity of supplies or services the government will acquire;

*c* include a statement of work sufficiently detailed to allow a prospective offeror to decide whether to submit an offer; and

11 GSA Class Deviation 2018-01.

12 DoD Class Deviation 2018-O0018.

13 FAR 13.203.

14 GSA Class Deviation 2018-01.

15 DoD Class Deviation 2018-O0018.

16 FAR Subpart 13.3.

17 See Scott Maucion, OTA contracts are the new cool thing in DoD acquisition, Federal News Network, 19 October 2017.

18 10 U.S.C. 2371.

*d* state the procedures to be used in issuing orders, including – if multiple awards may be made – the selection criteria to be used to provide awardees with a fair opportunity to be considered for each order.[19]

There is a statutory preference for awarding multiple IDIQ contracts for the same or similar services or supplies.[20] The competition requirements in the FAR do not apply to individual orders under such IDIQ contracts, but the contracting officer has to provide each awardee with 'a fair opportunity to be considered for each award exceeding US$3,500 issued under multiple deliver-order contracts or multiple task-order contracts'.[21] The contracting officer is not required to contact each of the multiple awardees under the contract before awarding an order that does not exceed US$5.5 million, so long as the contracting officer has provided the awardee a 'fair opportunity to be considered'.[22]

While central purchasing may occur on the state and local level, each federal agency (or sub-agency or sub-component) is generally responsible for making procurements on its own behalf. However, agencies frequently make purchases using interagency contracting vehicles, through government-wide acquisition contracts (GWACs), the Multiple Award Schedules (MAS) programme, and other multi-agency contracts used by more than one agency pursuant to the Economy Act, 31 USC Section 1535.

### ii Joint ventures

In the United States, most public-private partnerships (PPPs), including joint ventures, are at the state (not federal) level, and approximately half of the states have (different) PPP-enabling statutes that, along with implementing regulations, define the procedures for establishing a PPP. The actual procurement procedures vary by state. While not as common, PPPs exist in the federal context as well, such as the National Institute of Standards and Technologies' National Cybersecurity Center of Excellence, which seeks to generate solutions for cybersecurity challenges,[23] as well as various PPP opportunities with the Department of Transportation for design and construction projects.[24] The requirements for private companies wishing to participate in a PPP vary by opportunity and agency.

## V THE BIDDING PROCESS

### i Notice

FAR Part 5 provides a central set of 'policies and procedures for publicising contract opportunities and award information'.[25] For contract actions expected to exceed US$25,000, federal agencies must post a synopsis of the contract action at a government-wide point of entry (GPE). The main GPE used for federal procurements is the System for Award

19 FAR 16.504(a)(4).

20 10 U.S.C. 2304a(d), 41 U.S.C. 253h(d).

21 FAR 16.505(b)(1)(i).

22 FAR 16.505(b)(1)(iv).

23 https://www.nccoe.nist.gov/partners/partnerships.

24 https://www.transportation.gov/buildamerica/programs-services/p3.

25 See FAR 5.000.

Management (SAM) website found at beta.sam.gov.[26] The USASpending.gov site is also used by the US government as a repository for awarded contracts. Agencies are generally required to post a notice of proposed contract action for at least 15 days prior to the issuance of a solicitation for proposals or bids and must provide for a minimum response time of 30–45 days.[27] For contracts utilising procedures other than full and open competition, a synopsis of the sole-source decision must be posted depending on the type of contract.[28]

### ii Procedures

Government agencies must utilise procedures for full and open competition of contracts wherever possible. The parameters of competition are delineated in CICA, 41 USC Section 253 and FAR Part 6. The two main types of competitive procedures are sealed bids and competitive proposals.[29]

For sealed bidding procedures under FAR Part 14, offerors must submit a bid in response to an invitation for bids issued by the agency. Bids are opened publicly by the agency and evaluated without discussions. Award is made based on price and 'price-related factors' included in the invitation for bids, and is made to the lowest priced bidder found to be responsive based on the criteria set forth in the invitation.[30]

Negotiated procedures under FAR Part 15 are more commonly used in competitive procurements. Under these procedures, offerors must submit proposals responding to specific instructions and evaluation criteria supplied in the solicitation.[31] Once offerors submit proposals, agencies have the option to engage in exchanges with offerors in order to clarify points in their proposals or raise significant weaknesses or deficiencies.[32]

Different procedures govern the more limited situations where full and open competition is not used. For example, federal supply schedule contracts with the General Services Administration are governed by specific procedures in FAR Part 8.4. Task and delivery orders issued under IDIQ contracts are governed by FAR Part 16. Small business contracts are governed by specific procedures set forth in FAR Part 19.

### iii Amending bids

Bids submitted under sealed bidding procedures may be amended or withdrawn if notice is provided prior to the time set for bid opening.[33] Similarly, under negotiated procedures, proposal revisions or modifications must be received by or before the time set for submission of proposals.[34] Proposals submitted under negotiated procedures may also be revised after submission in response to discussions with the agency.[35]

26 The main GPE switched from the Federal Business Opportunity (FedBizOpps) website to SAM.gov in 2019.
27 FAR 5.203.
28 FAR 5.301.
29 FAR 6.102.
30 FAR 14.101.
31 FAR 15.304.
32 FAR 15.306(a), (d).
33 FAR 14.303.
34 FAR 15.208(a).
35 FAR 15.307.

## VI ELIGIBILITY

### i Qualification to bid

Under FAR Part 9, only contractors that are found to be responsible by the procuring agency may bid on government contracts. Agencies will evaluate an offeror's financial resources, record of performance, operational controls, means of performance, and its record of integrity and business ethics when determining responsibility.[36] In situations where particular skills or resources are necessary, agencies may include additional 'special standards' in the solicitation.[37]

In addition, some procurements may be restricted to small businesses or small businesses with certain socioeconomic preferences (i.e., women-owned, veteran-owned, etc.). Procurements for classified defence programmes are limited to companies that meet certain standards for classified programmes. Agencies may also limit the issuance of certain solicitations to holders of existing GWAC or IDIQ contracts.

### ii Conflicts of interest

Agencies are required to evaluate proposals for potential Organizational Conflicts of Interest (OCI) 'as early as possible' in the procurement process and must 'avoid, neutralize, or mitigate significant potential conflicts before award'.[38] In certain circumstances, OCI's may also be waived by an agency at the request of the contracting officer and by approval of the 'agency head or designee'.[39] OCIs arise in three main scenarios: (1) impaired objectivity; (2) biased ground rules; or (3) unequal access to information.[40] An impaired objectivity OCI arises where a contractor is in a position to evaluate its own or its competitor's performance or products. A biased ground rules OCI arises where a contractor, as part of one government contract, sets the rules for another contract that it then bids on. An unequal access to information OCI arises where an offeror gains access to competitively useful non-public information under one contract that can be used to obtain another contract (e.g., competitor proprietary information, government confidential information, etc.).

Offerors may also be conflicted through a related doctrine known as 'unfair competitive advantage'.[41] An unfair competitive advantage is related to the same principle as an unequal access to information OCI, where access to competitively advantageous non-public information is obtained through a former government official.

Personal conflicts are dealt with through a variety of separate restrictions on US government employees that restrict their activities once they leave government service. The FAR also requires contractors to prevent personal conflicts of interest of their employees, providing specific restrictions on contractor employees that perform 'acquisition functions' that are 'inherently' governmental.[42] Contractors participating in such functions must have specific procedures in place to screen for personal conflicts.

36 FAR 9.104-1.

37 FAR 9.104-2.

38 FAR 9.504(a)(2).

39 FAR 9.503.

40 FAR 9.505-2 (Biased Ground Rules); FAR 9.505-3 (Impaired Objectivity); FAR 9.505-4 (Unequal Access to Information).

41 See *Health Net Federal Services, LLC*, B-401652.3, B-401652.5, 4 November 2009, 2009 CPD ¶ 220.

42 FAR 3.1102-3.

### iii Foreign suppliers

Public procurement in the US is largely open to foreign companies, because historically, the US has placed restrictions on the procurement of foreign-origin supplies, services, and materials, through domestic preference regimes, and not the citizenship of the company providing the good.

Although US laws and regulations allow foreign companies to compete in the US government market, certain restrictions apply to contracts that implicate national security concerns. This includes contracts that require access to classified information, which are wholly limited to US companies and US citizen employees, and contracts that require access to items that are subject to US export controls. For contracts requiring access to classified information, there are certain steps that a foreign corporation can take to insulate a US subsidiary from FOCI, allowing the government to award the US subsidiary contracts that require access to classified information. With respect to export controls, certain activities may trigger a requirement for a US presence and export authorisation.

## VII AWARD

### i Evaluating tenders

Agencies are required to include the standards and evaluation criteria used for evaluating offerors in the solicitation. For sealed bidding procurements, the agency will award to the lowest bidder that satisfies the requirements in the invitation for bids. For negotiated procurements, solicitations can include a variety of factors for evaluation but, at a minimum, must address price/cost, quality, past performance (with limited exceptions), and the extent of small and disadvantaged business concern participation (where subcontracts are used). Procurements can be evaluated on an LPTA basis, although, as discussed above, its use is increasingly limited. Many negotiated procurements are decided on a best value basis, and require the agency to conduct a trade-off between cost and non-cost factors if award is made to a higher-rated but higher-priced offeror. Agencies must document the rationale for their evaluation and selection decision.

### ii National interest and public policy considerations

The United States has historically given preference to products made in the United States under the Buy American Act (BAA); however, the US has opened up its government procurement to reciprocal international competition, through multilateral and bilateral trade agreements (such as the WTO GPA), as implemented by the Trade Agreements Act (TAA). The BAA effectively acts as an evaluation preference for 'domestic end products', or 'domestic construction materials', which are products 'manufactured' in the United States and for which more than 50 per cent of the total cost of the components are for components produced or manufactured in the United States (though the component test is waived for commercially available off-the-shelf items).[43] The TAA, which applies to acquisitions over certain dollar thresholds, waives the BAA for the acquisition of end products or services from 'designated countries' (including those countries with which the US has entered into bilateral or multilateral agreements opening up government procurement for reciprocal treatment), and prohibits the acquisition of end products or services from 'non-designated countries'. The

43 FAR 25.003, 25.101.

TAA requires products to be wholly made or 'substantially transformed' in the United States or a designated country.[44] There are distinct domestic preferences that apply to procurement by the DoD, and to state and local projects funded by federal grants.

The United States has a policy to provide maximum practical opportunities in its acquisitions to small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business and women-owned small business concerns.[45] Agencies are required to set-aside certain contracts for small business concerns when there are expected to be at least two small businesses that can perform the work or provide the products being purchased.[46] This policy for contracting with small business concerns flows down to subcontracts as well; contracts exceeding certain dollar thresholds are required to subcontract with small business concerns to the maximum practicable extent and, if certain conditions are met, submit to the government a small business subcontracting plan that indicates the contractor's goals for small business subcontracting.[47]

The government also implements numerous public policy considerations through its procurement policy, including policies for equal employment opportunity,[48] non-discrimination because of age[49] and anti-human trafficking.[50]

## VIII INFORMATION FLOW

The FAR encourages agencies to engage with industry to identify and resolve concerns during the procurement process. In the acquisition strategy phase, this includes seeking input through requests for information or issuing a draft solicitation requesting feedback from industry. Once the solicitation is issued, agencies will often provide for a question and answer period and will incorporate responses in the solicitation, to clear up any issues with interpretation prior to bid submission.

In negotiated procurements, after proposals are submitted, the agency can engage in several different types of exchanges with offerors.[51] Clarifications are often used to clear up ambiguities in an offeror's proposal through the issuance of questions that do not allow proposal revisions. Agencies may also engage in discussions, which provide an opportunity for offerors to materially revise or modify their proposals. Discussions must be meaningful, equal and not misleading, and must address significant weaknesses and deficiencies identified by the agency. If engaging in discussions, the agency must establish a competitive range of the most highly rated proposals. Offerors who are not included in the competitive range are required to be notified of their exclusion. If the agency intends to award without discussions, it must so state in the solicitation.

Offerors in negotiated procurements are entitled to request a debriefing if they are eliminated from consideration prior to award or after the award is made.[52] A debriefing provides the offeror with an overview of its evaluation, the rationale for award, and any

44 FAR 25.225-5.
45 See FAR Subpart 19.2.
46 FAR 19.502-2.
47 See FAR Subpart 19.7.
48 See FAR Subpart 22.8.
49 See FAR Subpart 22.9.
50 See FAR Subpart 22.17.
51 FAR 15.306.
52 FAR 15.505 and 15.506.

significant issues that may have prevented it from being selected for award. The debriefing will normally include the awardee's price, overall technical rating, and ranking of offerors if any such ranking was developed, but not specific information about the awardee's proposal or evaluation. DoD now allows offerors to ask additional questions after their initial debriefing, and expansion of debriefing rights is expected to follow in civilian agencies.

## IX CHALLENGING AWARDS

Disappointed bidders can challenge an agency's award by filing a bid protest. There are several different forums for protest including the contracting agency, GAO and the US Court of Federal Claims (COFC). The terms of the particular procurement may affect which forum a contractor can and should select. For example, task or delivery order protests generally cannot be brought at COFC (except in very limited circumstances), and such protests at GAO are otherwise limited to orders over US$25 million for defence agency procurements and US$10 million for civilian agencies.[53]

GAO tends to be the most popular forum for bid protests. For Fiscal Year 2019, 2,198 protests were filed at GAO. Of those, 587 cases went to a decision on the merits, and 77 cases were decided in the protester's favour. This is an effective sustain rate of 13 per cent; however, 44 per cent of protests are considered to have been resolved 'effectively', meaning they were either sustained or the agency took corrective action.[54]

### i Procedures

The procedures for a bid protest vary by forum. To have standing to protest, a protester must demonstrate that it is an 'interested party' to the procurement, meaning that it has submitted a bid or proposal and has a direct economic interest in the award decision.[55] Essentially, a protester must demonstrate that it would be 'next in line' for award if it prevails in its protest.

GAO has well-established procedures governing protests. A protester at GAO must file its protest within 10 days of when it knew or had reason to know of its grounds for protest. In the post-award context, a protest must be filed within 10 days of award or within 10 days of a required debriefing. If a debriefing is requested and required, the protest may not be filed prior to the debriefing date. CICA also provides for an automatic stay of performance if the protest is filed within 10 days of award or five days of a required debriefing, which may be overridden by the agency under limited circumstances. Any stay-override can be challenged at COFC. Once the protest is filed, the agency must respond by filing its agency report (the response to the protest arguments) within 30 days of filing. The protester then has 10 days to file comments to the agency report. Supplemental protests can also be filed if new information becomes available as long as they are independently timely (filed within 10 days of when the protester knew or should have known of the basis for its protest). GAO protests must be decided within 100 days of filing.

For COFC protests, there is no similar deadline to file a protest, but protesters generally file as quickly as possible. There is no automatic stay of performance for protests filed at COFC. In order to stay performance, protesters must either negotiate an agreement with the agency to voluntarily stay performance, or litigate a motion for preliminary injunctive

53 FAR 16.505(a)(10).

54 See 4 C.F.R. Part 21, Bid Protest Regulations.

55 GAO Bid Protest Annual Report to Congress for Fiscal Year 2019, 5 November 2019.

relief. Protesters must demonstrate immediate and irreparable harm to receive an injunction. COFC is not subject to the same 100-day decision deadline as GAO, but protests at COFC are heard and decided on an expedited schedule.

Decisions from the agency, GAO, or COFC can also be reviewed further or appealed in the event of an adverse decision. If you lose an agency challenge, you can refile your protest with GAO, and after that COFC (although you only get one CICA stay, which expires at the end of your first protest with the agency or GAO). Adverse COFC decisions can be appealed to the US Court of Appeals for the Federal Circuit.

### ii Grounds for challenge

In order to prevail, a protester must show that the agency's decisions were arbitrary or unreasonable. A protester must also demonstrate competitive prejudice for a protest to be viable, meaning that but for the alleged error, it would have had a substantial chance of receiving the award.

Common protest grounds include challenges to the reasonableness of the agency's technical, past performance, or price evaluations, disparate treatment of offerors, flaws with the discussions process, errors with regard to the agency's responsibility determination, challenges to the awardee's qualifications, conflicts (OCIs, unfair competitive advantage, etc.), and flaws in the agency's best value determination or trade-off decision. In GAO's annual report to Congress for FY 2019, GAO indicated that the most 'prevalent reasons for sustaining protests during the 2019 fiscal year were: (1) unreasonable technical evaluation; (2) inadequate documentation of the record; (3) flawed selection decision; (4) unequal treatment; and (5) unreasonable cost or price evaluation'.[56]

### iii Remedies

Remedies for bid protests vary by forum. GAO may only make recommendations regarding an agency's corrective action if it sustains a protest, but as a matter of practice, all agencies follow the recommendation because otherwise they must report to Congress. Common GAO recommendations include re-evaluation of proposals, reopening discussions and the submission of a new selection decision. COFC protests are decided by court order for declaratory or injunctive relief. In either forum, winning a protest will not necessarily result in award to the protester, but such directed awards are possible (if exceedingly rare). Successful protesters may also be able to recoup bid and proposal costs, and reasonable attorney's fees. Punitive damages are not permitted.

## X OUTLOOK

Cybersecurity and supply chain security continues to be a focus of government agencies, and we expect to see new and evolving evaluation criteria and contract requirements related to these issues. For cybersecurity, the DoD is in the process of rolling out the Cybersecurity Maturity Model Certification (CMMC) programme, which requires all contractors subject to DFARS 252.204-7012 to obtain a certification issued by an independent third party. In January 2020, the DoD released its CMMC framework, and is expected to start training third-party assessors in the spring of 2020. In addition, the National Institute of Standards

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and Technology (NIST) issued a draft of NIST SP 800-171B, designed to protect controlled unclassified information (CUI) from advanced persistent threats, and details 33 'enhanced' controls that would apply to contractors handling CUI that is part of a 'critical program' or is a 'high value asset'.

Separately, there will likely be a continued emphasis by the US government in battling procurement fraud. This is evidenced by the recent formation of the Procurement Collusion Strike Force (PCSF) by the DOJ, which will focus on detecting, investigating and prosecuting antitrust crimes in public procurements, such as bid-rigging conspiracies and related fraudulent schemes, by recipients of government procurement, grant, and programme funding. The PCSF will train and educate procurement officials nationwide to recognise and report suspicious conduct in public procurements.

Finally, the US procurement landscape will undoubtedly be impacted by the covid-19 pandemic and the residual effects of the pandemic on government and private industry. As many states shut down non-essential businesses and the federal government deals with the impact to existing contracts, there will likely be a large-scale impact in the form of delay and disruption claims, emergency procurements, and the use of private industry to fulfil demand for essential equipment and healthcare-related goods.

**Appendix 1**

# ABOUT THE AUTHORS


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Daniel R Forman is a partner in Crowell & Moring's Washington DC office and is co-chair of the firm's government contracts group. He is also a member of the firm's management board. Dan's practice focuses on a wide variety of government procurement law, including bid protests, False Claims Act and *qui tam* litigation, investigations of potential civil and criminal matters, ethics and compliance, contract claims and disputes, GSA schedule contracting and small disadvantaged business contracting. Dan is also experienced in negotiating and drafting teaming agreements and subcontracts, as well as providing counselling on the interpretation of FAR clauses and solicitations. Dan's practice also focuses on state and local procurement matters, including State False Claims Act issues, lobbying and contingency payment compliance. He has been involved in bid protest litigation in six states and the District of Columbia. Dan has been named one of the top lawyers in the government contracts field by *Chambers USA*. Dan was also honoured as a 2015 Law360 MVP and named on BTI Consulting Group's list of 'Client Service All-Stars'. In 2017, Dan was named a 'leading lawyer' in government contracts by *The Legal 500 United States*.


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