

## Chapter 50A

### Government Contracts

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<sup>1</sup>The views and opinions expressed in this chapter are those of the authors and do not necessarily reflect the official policy or position of any entities with which they are affiliated. The authors are grateful for the assistance of Amelia Schmidt in the research of this chapter.

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**§ 50A:1 Scope note**

One of the major forces in the U.S. economy is the U.S. Government. From procuring major weapons systems to funding development of innovative technologies in the medical and energy markets, spending by the U.S. Government drives an ever-increasing portion of U.S. economic activity. It is a rare company that does not find itself at some point

pursuing business with the U.S. Government. Many inside counsel will therefore find themselves called upon to counsel a client seeking U.S. Government contracts.

Woe awaits any counsel who does not understand the peculiar features of doing business with the U.S. Government. Fundamental to understanding Government contracts is the realization that the U.S. Government procurement market is a true monopsony: There are many potential suppliers but only one customer, at least for products designed and developed for Government use. Even when the Government buys commercial products, it does so in quantities that give it substantial buying power. This gives the U.S. Government leverage to insist on the use of its own terms and conditions in contracts and the ability to resist provisions that may be routine in typical commercial transactions. Any counsel who approaches a U.S. Government opportunity with the idea that it is no different from other commercial contracts that counsel may have previously negotiated will at best create needless inefficiency in the contracting process and at worst cause the client to lose U.S. Government contracts or become the target of a criminal investigation.

The practice of Government contract law affords extensive opportunities for partnering between inside and outside counsel. Inside counsel new to U.S. Government contracts will want to rely heavily on outside counsel expert in the standard U.S. Government terms and conditions to understand the way in which these standard provisions are construed. Use of outside counsel in the interpretative process will likely decline as inside counsel gains a working understanding of the standard terms. Nonetheless, the extent to which the U.S. Government has regulated the contracting process, extending, for example, to the processes contractors use to develop their pricing, makes it unlikely that even a reasonably seasoned inside counsel will ever have sufficient expertise to handle all of the major issues that can arise in the award and performance of a U.S. Government contract. It should therefore be no surprise that even the most experienced inside counsel involved in U.S. Government contracts maintain regular relations with experienced outside counsel who can augment their knowledge of U.S. Government contract law and assist in some of

the more nuanced and complex aspects of their practice, such as cost accounting and pricing issues discussed below.<sup>1</sup>

This chapter provides an overview of the U.S. Government contracting process from bidding and award through performance to the resolution of disputes.<sup>2</sup> It then suggests approaches to optimizing the use of inside and outside legal resources in addressing the key stages of the contracting process.<sup>3</sup> Finally, the chapter focuses in detail on the major issues likely to arise in the various stages of the contracting process, pointing out key partnering decisions that must be addressed at each stage.<sup>4</sup>

### § 50A:2 Preliminary considerations

Government contracting in the Americas is older than the United States itself. Even prior to the Declaration of Independence, the Continental Congress set up federal armories and several of the colonies undertook the manufacture of arms.<sup>1</sup> Supplying the soldiers of the Continental army became a major undertaking of the colonies and the Continental Congress. While an in-depth review of the early history of procurement practices during the Revolutionary war is beyond the scope of this chapter, the early procurement system faced problems with fraud and product quality that would be familiar to any observer of the current government contracts system. Benjamin Franklin reportedly observed that “There is no kind of dishonesty into which otherwise good people more easily fall, than that of defrauding the government.”<sup>2</sup>

In 1787, the U.S. Constitution provided a permanent basis for military Government contracting, providing in Article 1,

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#### [Section 50A:1]

<sup>1</sup>See §§ 50A:20 to 50A:23.

<sup>2</sup>See §§ 50A:8 to 50A:11.

<sup>3</sup>See §§ 50A:2 to 50A:7; 50A:12 to 50A:13.

<sup>4</sup>See §§ 50A:15 to 50A:41.

#### [Section 50A:2]

<sup>1</sup>Sandy Keeney, *The Foundations of Government Contracting*, *Journal of Contract Management* at 9 (Summer 2007).

<sup>2</sup>Sandy Keeney, *The Foundations of Government Contracting*, *Journal of Contract Management* at 9 (Summer 2007).

Section 8 of the U.S. Constitution federal authority to “provide for the common defense and general welfare of the United States,” “to raise and support armies,” and “to provide and maintain a navy.” The establishment of the Departments of War and the Treasury in 1789 provided the bureaucracy necessary to support the procurement process.<sup>3</sup> One of the earliest procurement statutes came into existence in 1808, when the Congress passed legislation prohibiting procurement officials from awarding contracts in which they or their associates had a financial interest.<sup>4</sup>

From this origin in military contracting, government contracting now affects broad swaths of the U.S. economy, ranging from the military, through energy and natural resource policy to health and human services. The Government Accountability Office (previously, the General Accounting Office) reported that the federal government spent approximately \$518 billion on the procurement of products and services in fiscal year 2008.<sup>5</sup> It is not surprising that many businesses have come to rely on the federal government for a significant portion of their revenues.

### § 50A:3 Preliminary considerations—The nature of the client’s business

In assessing the legal support that a particular client needs in its efforts to obtain U.S. Government contracts, it is important to have an understanding of the nature of the client’s business. There are three levels of involvement in federal government contractors. There are several large corporations that derive the majority of their revenues from the U.S. Government and other governments (“major government contractors”). These businesses are largely those that devote themselves to supplying military products and services. Examples of such companies include Lockheed

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<sup>3</sup>Sandy Keeney, *The Foundations of Government Contracting*, *Journal of Contract Management* at 12 (Summer 2007).

<sup>4</sup>Sandy Keeney, *The Foundations of Government Contracting*, *Journal of Contract Management* at 13 (Summer 2007).

<sup>5</sup>Testimony of William T. Woods, Director Acquisition and Sourcing Management Before the Subcommittee on Contracting Oversight, Committee on Homeland Security and Governmental Affairs, U.S. Senate, United States Government Accountability Office, Document No. GAO-09-1032T (September 29, 2009).

Martin, Northrop Grumman or foreign-based contractors like BAE. A second group of federal government contractors are those which receive contracts from the federal government worth several billion dollars but also have substantial commercial businesses. (“mixed government-commercial contractors”). Examples of such companies include Boeing, which is a major Department of Defense contractor but also is a leading manufacturer of commercial aircraft, or Honeywell, which is also a major defense contractor but sells a diverse array of commercial products. A third group of federal government contractors are those companies that are principally commercial businesses that also sell some of their products for use by the federal government. (“commercial contractors”). Such companies would include medical product companies, oil and gas companies or engineering and construction contractors.

**§ 50A:4 Preliminary considerations—The nature of the client’s business—Major government contractors**

The nature of each client’s business with the federal government will heavily influence the legal support structure used by the client and ultimately the nature of the opportunities for partnering between inside and outside counsel. Major government contractors typically employ a large number of lawyers who have substantial experience in government contracts. These lawyers generally have a background of employment with a federal agency that regularly conducts large procurements, such as the military agencies, the General Services Administration or the Department of Energy, or with one of the larger law firms with a substantial government contracts practice. These lawyers typically are co-located with major business units, rather than centrally located at the corporate headquarters or a regional business headquarters. There have been some notable cases in which government contractors maintained centrally located legal staffs at the corporate headquarters. The contractors proceeded with the belief that a centralized legal staff would build collegiality and provide a greater range of legal talent to assign to new matters than would be the case where one or a few lawyers shares offices with a local business. In several cases, these corporations have shifted to a decentralized approach and moved lawyers out to being co-located with the

clients. They found that any advantages of collegiality and bench strength were outweighed by the loss of immediacy in the client relationship. Simply put, the old adage “out of sight, out of mind” remains accurate, and the businesses discovered that clients were less likely to call lawyers located away at the corporate headquarters or called them too late to permit the lawyers to address issues proactively.

Lawyers for major government contractors are capable of handling much of their client’s day-to-day legal work without assistance from outside counsel. They will call on outside counsel either because they encounter an unusual legal issue on which they do not have significant experience or a particular project demands more time than they have available in light of their other professional commitments. Even in these situations, however, inside counsel will typically remain involved in the matter to manage the work of outside counsel. Inside counsel may be tempted to turn certain matters over to outside counsel and turn their attention to their other responsibilities, leaving outside counsel alone to work directly with non-legal business staff. This should be avoided. Inside counsel should play a key role in ensuring the efficient handling of all matters. They know their organization far better than even long-time outside counsel and can make sure that outside counsel receive prompt support from the business. Moreover, inside counsels’ general expertise in government contracts should equip them to monitor the tasks that outside counsel undertake and ensure that outside counsel are not spending the client’s money on tasks that are not essential to resolve the issues for which outside counsel has been retained. Moreover, where outside counsel has been retained because inside counsel lacks experience in a particular area, remaining involved may provide the inside counsel with the opportunity to learn the area of law and thus be able to handle future matters in the area with less reliance on outside counsel.

**§ 50A:5 Preliminary considerations—The nature of the client’s business—Mixed government-commercial contractors**

The mixed government-commercial contractors face a choice in structuring their legal staff. They can decline to differentiate between their various businesses, government or commercial, and hire inside lawyers with broad com-

mercial experience with the expectation that their legal staff will over the long run counsel different types of businesses, both government and commercial. Or, they can treat their government businesses much like standalone major government contractors and hire lawyers with substantial government contracts expertise from federal agencies or law firms with government contracts practices. Many mixed businesses have tried to use a staff of commercial generalists but usually augment their staff by hiring lawyers with government contracts expertise. Some mixed contractors may have a general counsel with no prior experience in government contracts who assumes that government contracts differ little from commercial contracts. Such a general counsel may then staff government business units with competent commercial lawyers who nonetheless disappoint clients who find their inside counsel largely incapable of handling difficult government contracts issues without consulting with outside counsel. Businesses often voice such disappointment after finding that they are regularly paying substantial outside counsel bills because of inside counsel's inability to handle many issues on their own. Mixed businesses typically find it beneficial to include some inside counsel with substantial government contracts expertise in their staff.

**§ 50A:6 Preliminary considerations—The nature of the client's business—Commercial contractors**

Commercial contractors face particular challenges in developing an inside legal staff. The volume of their government business may be insufficient to justify hiring a lawyer with expertise in government contracts. Yet, the complexity and significant liabilities involved in government contracts make it easy for a relatively modest amount of government contract business to be a big source of problems for the business. The best approach for such businesses is to designate one of their inside lawyers as the corporation's government contracts specialist —even though that lawyer may have had little prior government contracts experience —in hopes that the lawyer may acquire sufficient rudimentary understanding of government contracts as to be able to handle some of the more routine counseling needs of its government businesses over time, or at least to spot issues and obtain outside counsel assistance before the issues

become major problems. The inside lawyer will need to “shadow” outside counsel on assignments until able to take on new rudimentary assignments with reduced involvement by outside counsel. Ultimately, it is probably unavoidable for commercial contractors to remain heavily reliant on outside counsel.

**§ 50A:7 Preliminary considerations—The nature of the government contracts bar**

Those unfamiliar with government contracts law are likely be surprised by the highly specialized and concentrated nature of the government contracts bar. It is typical to find a number of law firms in a city of any significant size that have substantial expertise in such practice areas as mergers and acquisitions, litigation, taxation or estate planning. By contrast, there are few cities in the United States in which one will find a significant number of lawyers with government contracts expertise. Unsurprisingly, the city with the greatest concentration of government contracts lawyers is Washington D.C., a city in which the major procuring agencies and government contracts tribunals are headquartered. A few other cities, often near major military facilities or federal agency offices, may have a limited number of lawyers with substantial government contracts expertise. Yet other cities with otherwise large private bars may have almost no private lawyers with substantial government contracts experience.

As a consequence, businesses looking to identify competent outside government contracts counsel face particular challenges. Businesses may need to look beyond their normal local outside firms and engage counsel in Washington, D.C. Moreover, a business that is predominantly a commercial operation may lack access to information on qualified outside government contracts counsel. It is crucial for anyone seeking government contracts counsel for the first time to obtain references on any lawyer purporting to have significant government contracts expertise in order to evaluate the true depth of that expertise. Consideration should be given to contacting the law department of a major government contractor to seek their recommendation of counsel. Inside counsel can also use computerized research tools to identify those lawyers handling significant cases that result in reported decisions available on-line. A lawyer who has

handled several cases before the major government contracts tribunals, such as the U.S. Court of Federal Claims or the Armed Services Board of Contract Appeals, is likely to have—or have partners who are likely to have—expertise in the Government contracts issues the commercial contractor faces.

Without regard to the size or substantive focus of the inside legal staff, it is important for the inside lawyer to cultivate a relationship with outside counsel experienced in government contracts. Legal issues can arise at any point in the contracting process and usually require prompt responses. Experienced inside government contracts counsel will be able to resolve many of these issues without the involvement of outside counsel. Yet even experienced inside government contracts counsel will occasionally encounter legal issues to which they have had no prior exposure, given the extraordinary extent to which the government has regulated the contracting process. Counsel's ability to provide a prompt response to a client inquiry may be impeded if counsel has not previously cultivated a relationship with experienced outside government contracts counsel and must therefore spend time identifying appropriate counsel while the client waits for an answer to a problem. This on-going relationship is one of the fundamental inside-outside counsel partnering opportunities in government contracts. Over the years, inside counsel's exposure to outside counsel's expertise will allow the inside lawyer to expand his own expertise while working with outside counsel in addressing client issues. Inside counsel will be able to handle an increasing number of issues without extensive use of outside counsel, while still maintaining access to outside counsel for consultation on more difficult, non-routine issues. Moreover, outside firms with a substantial government contracts practice will often generate a significant volume of publications and alerts on issues of interest to the entire government contracts community that inside counsel will obtain by virtue of being a regular client of the firm. Finally, given the prevalence of client conflicts in the representation of government contractors, particularly major defense contractors, having an established relationship with an outside firm may facilitate availability of capable representation in the event of protests or disputes.

**§ 50A:8 Preliminary considerations—The relevant government agency**

Broadly speaking, there are three categories of government agencies involved in the performance of government contracts. First, all government agencies involved in procurement have contract administration staff that plan and conduct procurements, administer the resulting contracts and “closeout” contracts once they are completed. Second, in light of the extensive government regulation of contract costs, many government agencies retain auditors and other accounting specialists to monitor and regulate the costs that contractors seek to recover under government contracts. Third, given the government’s focus on attacking fraud and waste on government contracts, there are several government agencies that specialize in investigating and prosecuting alleged intentional misconduct under government contracts.

**§ 50A:9 Preliminary considerations—The relevant government agency—Contract administration**

Space will not permit a description of all of the government agencies involved in contract administration. Each agency that enters into procurement contracts of any significant size will have established contracting offices. While such contracting offices include personnel with titles ranging from contracts specialist to technical representatives, the key individual assigned to each contract is known as the contracting officer.<sup>1</sup> Other government personnel are assigned to the contract to assist the contracting officer and provide recommendations on how the contracting officer should exercise authority in the performance of the contract.

Importantly, the contracting officer is generally the only government official assigned to a contract who has the ability to bind the government.<sup>2</sup> The head of the procuring agency delegates to the contracting officer the authority to bind the government on contract matters, providing to the

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**[Section 50A:9]**

<sup>1</sup>48 C.F.R. § 1.603-3(a).

<sup>2</sup>48 C.F.R. § 2.101.

contracting officer what is typically called a “warrant” or a “certificate of appointment” to document the grant of authority.<sup>3</sup>

Ascertaining the extent of the contracting officer’s authority is important. In commercial contracts, the concept of apparent authority can be used as a basis for recognizing an agreement with a party whose representative entering into the agreement in fact had no authority but was put into a position in which an outside party might reasonably assume the representative has the authority to bind its principal.<sup>4</sup> The concept of apparent authority does not apply in government contracts, so that it falls to the contractor to ascertain the extent of the authority possessed by the government officials with whom it deals.<sup>5</sup> This policy of precluding anyone other than the authorized contracting officer from binding the government “avoids the chaos and lack of protection for . . . government interests which would result if a contractor were allowed to rely on the authority of any one of dozens or potentially hundreds of government ‘agents’ who might have some relationship with the contract”.<sup>6</sup>

There are several different types of contracting officers, including the procurement contracting officer (“PCO”), the administrative contracting officer (“ACO”) and the termination contracting officer (“TCO”). The PCO handles the award and performance of the contract, the ACO is responsible for general administrative decision-making, such as supervision of the contractor’s accounting system and the TCO administers contract terminations.

While inside and outside counsel may have regular contact with the government’s contract administration office, day-to-day contact with the government’s contract administration staff will usually be handled by the contractor’s non-legal staff, such as contract administrators or finance personnel. Counsel will typically interface with the government’s contract administration staff only at the invitation of the contractor’s contract administration or finance personnel.

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<sup>3</sup>48 C.F.R. § 1.601; 1.603-3.

<sup>4</sup>Restatement, Second, Agency § 8.

<sup>5</sup>Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384, 68 S. Ct. 1, 92 L. Ed. 10, 175 A.L.R. 1075 (1947).

<sup>6</sup>Inter-Tribal Council of Nevada, Inc., IBCA 1234-78, 83-1 BCA ¶ 16,433 at 81,746.

**§ 50A:10 Preliminary considerations—The relevant government agency—Contract audit**

Equally important to prospective contractors under contracts on which the government regulates contract cost recovery are government auditors. For the Department of Defense and NASA, the government auditor will usually be part of the Defense Contract Audit Agency (“DCAA”).<sup>1</sup> For other agencies, the agency may obtain audit assistance from its inspector general or auditors hired into the contracting function.<sup>2</sup> In the contracting process, auditors will examine a potential contractor’s costs in both the pre-and post-award phases. In the pre-award phase, the auditor will review cost and pricing data submitted by the contractor and prepare a report for the contracting officer identifying areas in which the data may indicate that the contract price is higher than appropriate.<sup>3</sup> In the post-award phase, the auditor will review the successful contractor’s books and records to ensure that the government received all relevant cost and pricing data in negotiating the contract price.<sup>4</sup> For cost reimbursement contracts, auditors also confirm that costs charged to the contract were, in government contracts parlance, allocable and allowable. The auditor will also be involved in the oversight of the contractor’s accounting system and review of contractor claims. As with the government’s contract administration offices, inside and outside counsel will typically interface with government auditors only at the invitation of the contractor’s contract administration or finance personnel.

**§ 50A:11 Preliminary considerations—The relevant government agency—Investigative oversight**

A third but equally important participant in government contracts is the federal government investigative community.

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**[Section 50A:10]**

<sup>1</sup>Defense Contract Audit Manual (DCAM) § 1-201, 15-106.

<sup>2</sup>5 U.S.C.A. App. § 1-11.

<sup>3</sup>See DCAM § 9-805 (noting that the auditor “should be involved in preaward economic decisions,” although “it may not always be possible to do an audit evaluation before the contract is executed”); 14-111; 14-909(f).

<sup>4</sup>See DCAM §§ 4-304.3; 10-600.

The government has passed a number of statutes that make violations of government contract rules civil or criminal offenses.<sup>1</sup> As a result, it is important for counsel to be familiar with the various investigative agencies that have jurisdiction over contracts awarded to counsel's client. In military procurements, agents of the Department of Defense Inspector General ("DOD-IG") as well as agents of the contracting agency's investigative services, such as the Navy Criminal Investigative Service ("NCIS"), the Army Criminal Investigative Command ("CID") or the Air Force Office of Special Investigations ("OSI") and traditional law enforcement agencies such as the Department of Justice and FBI, provide oversight. Unlike the situation with government contract administration or audit personnel, counsel will usually be the primary interface with government investigative personnel. As government investigative personnel focus on issues that can result in criminal liability, it is appropriate for the primary interface with such investigators to be an individual with considerable legal experience who can evaluate the seriousness of the issue being pursued by the investigators and advise the contractor on appropriate strategies in response. The partnering opportunities present in government investigations are discussed below in § 50A:34.

### **§ 50A:12 Preliminary considerations—Fee arrangements**

The ultimate justification for partnering between inside and outside counsel is that it delivers the greatest value to the client for amounts spent on legal services. Part of the partnering equation is the legal fee arrangement under which the partnering takes place.<sup>1</sup> A business that is staffed with inside counsel who are very experienced in government contracts may need to use outside counsel only for occasional advice. Such a business may find that it is administratively

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#### **[Section 50A:11]**

<sup>1</sup>*See, e.g.,* the False Claims Act, 31 U.S.C.A. §§ 3729 to 33; Anti-Kickback Act, 41 U.S.C.A. §§ 51 et seq.; False Statements Act, 18 U.S.C.A. § 1001; Special Plea in Fraud, 28 U.S.C.A. § 2514.

#### **[Section 50A:12]**

<sup>1</sup>*See generally* Chapter 8, "Fee Arrangements" (§§ 8:1 et seq.).

easiest to procure legal services on an hourly fee basis. Yet, in government contracts, law firms and their clients have made extensive use of alternative fee arrangements in response to particular situations in which outside counsel play a more regular role in counseling the business and in litigation matters.

There are several other types of fee arrangements that have been developed as an alternative to hourly rate based billing practices for government contracts work. These include volume discounts, fixed fees, blended rates, contingent fees and holdbacks. Volume discounts involve a commitment by the business to send all or a substantial portion of its outside legal requirements to a particular firm in exchange for a negotiated reduction in the outside firm's billing rates. Such an arrangement is most appropriate for a business with a significant volume of regular requirements for outside counseling. A business with modest amounts of government contracts business may lack a sufficient volume of work for outside counsel to entice an outside firm to commit to a discount off regular billing rates. A business that has a substantial volume of government contracts, however, will likely find that it has sufficient regular need for outside counsel to attract outside law firms willing to offer discounts in exchange for receiving all of the business' legal requirements. Such an arrangement may allow the business to avoid hiring additional inside staff or allow inside counsel to address other aspects of the business. The extensive government regulation of the contracting process creates work volumes that are particularly favorable for negotiating volume discounts.

Businesses with substantial government contracts legal work have also experienced success in using fixed fee task billing. There are a variety of recurring situations in government contracts practice. For example, businesses may routinely respond to government audit reports, review standard terms and conditions in bidding on government contracts or enter into teaming arrangements with other firms to bid on government procurements. Outside counsel with experience in such matters may be willing to offer a fixed price in exchange for handling recurring issues. Of course, where a matter turns on unique and complex factual issues, an outside firm may be unable to develop a fixed fee that it is comfortable will represent fair compensation for a

particular engagement. For example, a firm that has handled a number of proceedings in which the business has filed protests against government contract award decisions may nonetheless be hesitant to offer a fixed fee for handling such proceedings because of its experience that such proceedings vary greatly in their complexity and duration.

Outside firms may also be willing to reduce their hourly fees in exchange for an agreement by the business to pay a bonus or success fee in the event the firm obtains a successful outcome. Such an arrangement is most often employed in handling the prosecution of claims against the government under the disputes procedures of government contracts. In such an arrangement, the outside firm will spend time at the outset of an engagement, potentially on a fixed fee basis, assessing the likelihood that the business will obtain a recovery from the government. If the outside firm determines that the claim has merit, it may be willing to reduce its fees in exchange for a share in the recovery or a success fee that varies based on the level of recovery. This early assessment may also assist the business in evaluating the merits of its claim. The business may decline to pursue a claim if it is unable to interest an outside firm in a success fee arrangement, with such disinterest serving as a good barometer of the claim's merits.

**§ 50A:13 Preliminary considerations—Use of non-legal staff**

No discussion of partnering between inside and outside counsel in government contracts matters would be complete without a discussion of the use of non-legal in-house staff. Typically fact-sensitive, government contract issues often cross functional lines, involving issues of accounting, engineering or product quality in addition to purely legal issues. The resolution of contract accounting issues, for example, may require the review of the business' practices for cost allocation. It will be critical to involve finance department personnel in such a review, as their expertise in cost accounting is likely to exceed that of counsel. Issues involving product quality will often require the involvement of engineering or manufacturing personnel who can provide the expertise in product design and manufacturing necessary to determine whether a product meets contract specifications. While in most cases inside counsel will be

heavily involved in such issues, it is not unheard of for an outside lawyer with a long-term involvement in a particular business to work directly and without the involvement of inside counsel with finance, engineering or manufacturing personnel to resolve an issue. This scenario may involve the ultimate inside-outside counsel partnering, as the inside business client begins to regard inside and outside counsel as interchangeable parts of a single team. Obviously, inside counsel will be hesitant to allow outside counsel with whom he has had a limited history to work directly with the inside client without oversight, for fear that the outside counsel may “over-lawyer” the matter or otherwise generate unnecessary legal expenses. Nonetheless, given the close working relationship that frequently arises between inside and outside counsel in government contracts practice, inside counsel may find that such an arrangement provides the most efficient staffing of particular matters.

**§ 50A:14 Overview of principal legal issues in government contracts counseling**

A full understanding of inside-outside counsel partnering opportunities in government contracts practice requires an awareness of the statutory and regulatory foundation on which the government awards contracts. Given its position as a monopsony, the government has dictated certain features by passing legislation and/or promulgating regulations that mandate the terms on which contracts must be awarded. For example, there is nothing to preclude private parties from agreeing to the award of a contract that provides compensation to the contractor for the costs it incurs in performance plus a fee or profit computed as a percentage of the costs incurred in contract performance. Savvy clients will avoid such a cost-plus a percentage of the costs contract, however, because basing a contractor’s profit on a percentage of incurred costs motivates the contractor to run-up costs in order to increase its profit. Government contractors cannot hope to receive such a contract. The government has passed laws that preclude the use of “cost

plus percentage of cost” contracts in federal contracting.<sup>1</sup> This is one of but many examples of the government’s use of its monopsony power to dictate the terms on which contracts must be formed and performed.

What follows in §§ 50A:15 and 50A:16 is an overview of the basic statutory and regulatory provisions governing the award and performance of government contracts. This overview will provide a basis for understanding the review of key substantive government contract problems that begins in § 50A:17 of this chapter.

### **§ 50A:15 Overview of principal legal issues in government contracts counseling— Statutory framework**

One of two basic procurement statutes governs virtually all federal government contracting. The Armed Services Procurement Act<sup>1</sup> governs procurements by the Departments of Defense, the Army, the Navy, and the Air Force, the Coast Guard and the National Aeronautics and Space Administration. With certain exceptions, the Federal Property and Administrative Services Act<sup>2</sup> governs procurements by all other federal agencies. The agencies whose procurements are not governed by these two statutes are (1) those, such as the Tennessee Valley Authority<sup>3</sup> and the Federal Aviation Administration,<sup>4</sup> that are authorized to conduct procurements under certain independent statutory bases, and (2) those that do not operate with appropriated funds, such as military service post exchanges. The two basic procurement statutes are not identical, notwithstanding ef-

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**[Section 50A:14]**

<sup>1</sup>10 U.S.C.A. § 2306.

**[Section 50A:15]**

<sup>1</sup>10 U.S.C.A. §§ 2302 et seq.

<sup>2</sup>41 U.S.C.A. §§ 251 et seq.

<sup>3</sup>16 U.S.C.A. § 831h (b).

<sup>4</sup>The Federal Aviation Administration Reauthorization Act of 1996, P. L. 104-264, Sec. 226.

forts over the years to bring these statutes into closer conformity.<sup>5</sup>

All federal government procurements are also subject to the Congressional appropriations process. Article 1, Section 9, Clause 7 of the Constitution provides that “no money shall be drawn from the treasury, but in consequence of appropriations made by law.” This provision restricts federal agencies from entering into contracts unless Congress has appropriated funds for the contract. This principle has been codified in the Anti-Deficiency Act.<sup>6</sup> While an overview of the Congressional appropriations process is beyond the scope of this chapter, it is important to understand that the first step in the federal contract process begins in Congress with an appropriation.

**§ 50A:16 Overview of principal legal issues in Government contracts counseling—Regulatory framework**

Notwithstanding the existence of different statutory authority for military and civilian agency procurements, Congress has mandated that federal procurements be governed by a single set of regulations.<sup>1</sup> Congress established the Federal Acquisition Regulatory Council to promulgate the federal government-wide procurement regulations, which are known as the Federal Acquisition Regulation (“FAR”).<sup>2</sup> The major federal agencies have issued regulations to supplement the FAR in various respects. 41 U.S.C.A. § 421(c), however, limits these supplementary regulations to those necessary to satisfy “the specific and unique needs of the agency” or “implement government-wide policies within the agency”.

As discussed in § 50A:33 below, the statutes and regulations specify a particular procedure for resolving disputes under government contracts that entails submission of a formal claim, a written final decision by the contracting of-

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<sup>5</sup>See the Federal Acquisition Streamlining Act of 1994, P. L. 103-355; the Klinger-Cohen Act of 1996, P. L. 104-106.

<sup>6</sup>31 U.S.C.A. § 1341 (a).

**[Section 50A:16]**

<sup>1</sup>41 U.S.C.A. § 405 (b).

<sup>2</sup>41 U.S.C.A. § 421 (b).

ficer, and appeal by the contractor to one of two forums — the U.S. Court of Federal Claims or the agency board of contract appeals.

§§ 50A:17 through 50A:39 of this chapter will consider the most common issues that arise under federal contracts, noting the key statutory and regulatory provisions relevant in each area.

### **§ 50A:17 Review of key substantive problems**

The opportunity for partnering between in-house and outside counsel in government contracts matters is heavily dependent upon the nature of the issue. A partnering approach that is effective in addressing one government contracts issue may prove to be ineffective in other issues. Partnering decisions will typically be influenced by the complexity and frequency of an issue being addressed, with in-house counsel becoming increasingly reliant on outside counsel as issues become more complex and/or uncommon. §§ 50A:18 through 50A:39 will consider approaches for inside-outside counsel partnering in the context of a specific government contract issues.

### **§ 50A:18 Review of key substantive problems—Bid and proposal activity**

Generally, the government awards contracts through either sealed bidding or competitive negotiations.<sup>1</sup> Given the heavily regulated nature of government contracting, most of the relevant bid provisions are set forth in regulations, including standard forms. In this regard, the contract award process differs greatly from that of private contracting. There is little opportunity to negotiate bid or contract provisions. That is not to say that a business will find little reason to involve legal counsel in the bid and proposal process. Business personnel will typically want to obtain guidance from counsel on the interpretation of key provisions in the solicitation for bids that may affect the cost of performance. Counsel may also assist business personnel in evaluating whether the business meets certain eligibility requirements for contract award.

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**[Section 50A:18]**

<sup>1</sup>10 U.S.C.A. § 2304 (a)(2); 41 U.S.C.A. § 253 (a)(2).

One example of an issue that may arise in the bid and proposal stage of a procurement is an organizational conflict of interest (“OCI”). Government OCI rules attempt, among other things, to limit the extent to which a contractor that has knowledge of or assisted in preparation for a procurement may actually bid on the resulting contract opportunity. The concept is that a contractor that is allowed to bid on a contract it is helping the government prepare will have a conflict between its obligation to assist the government in preparing the best specifications possible and its interest in writing specifications that give it the best chance of winning the ensuing procurement. For instance, a contractor that prepares complete specifications for an item already in production may not furnish that item to the government as a prime or subcontractor for a period of time.<sup>2</sup> In this scenario, the contractor could give itself an unfair competitive advantage by writing the specifications around its product, so that only its product could meet the specifications. Similarly, a contractor that provides system engineering services in preparing specifications or other contracts requirements in certain contracts cannot receive either prime or subcontracts under the resulting procurement.<sup>3</sup> The applicability of such restrictions is usually flagged by the inclusion of a provision in the solicitation for bids that addresses anticipated OCIs and indicates the extent to which the contractor may be restricted from participating in subsequent procurements, but counsel must be attuned to the OCI rules because controlling regulations may compel the application of OCI restrictions even where not addressed in the solicitation.<sup>4</sup>

A client that does not involve its counsel in reviewing bids and proposals may overlook the OCI clause and not realize that it is jeopardizing its chances of competing for a production contract by assisting in the development of specifications for the production contract — a costly mistake as production contract revenues typically dwarf those of procurement consulting contracts. An inside counsel who is new to government contracts risks hurting a client’s future growth prospects if it does not consult with experienced

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<sup>2</sup>48 C.F.R. § 9.505-2.

<sup>3</sup>48 C.F.R. § 9.505-1.

<sup>4</sup>48 C.F.R. § 9.507-1; -2.

outside counsel in the face of a potential OCI situation. Using outside counsel exclusively to assist in the preparation of bids and proposals also risks OCI mistakes. Outside counsel will typically lack a good understanding of the contractor's entire organization and may miss potential OCI issues out of ignorance of how the contractor's other businesses may be potential competitors for contracts resulting from the specifications that the contractor is developing for the government. Thus, effective review of bid and proposal activity requires coordination between inside and outside counsel. Neither forgoing the use of counsel or relying exclusively on either inside or outside counsel is likely to address OCI issues as effectively as employing a team of inside and outside counsel with heavy client involvement.

Inside counsel with significant government contract experience will usually be able to handle most of most bid and proposal issues without involving outside counsel. Less experienced inside counsel, however, will likely need to refer at least some issues, such as an OCI issue, to experienced outside counsel. In this regard, it is advisable for inside counsel who lacks significant government contract experience but anticipates regular involvement in government contracts issues to identify and cultivate a relationship with experienced outside counsel well in advance of encountering specific bid and proposal issues. Such issues may require immediate resolution, not permitting time for efforts to identify and retain experienced outside government contracts counsel. Even experienced government contracts counsel will typically cultivate long-term relationships with outside counsel so that outside counsel has a significant familiarity with the business based on past assignments and can promptly address issues as they arise. Partnering is therefore a long-running relationship rather than a case-by-case arrangement.

Failing to develop such a relationship can pose particular problems in addressing time-sensitive bid and proposal issues because of the added number of potential outside counsel conflict of interest present in assignments relating to bid and proposal work. Government contracts lawyers generally encounter fewer client conflict issues than do commercial lawyers because counsel rarely encounter a conflict when the government is the adverse party, as outside counsel will rarely have done any work for the government. The bid and

proposal area is an exception. Counsel may represent several contractors and thus have a conflict of interest in advising a particular client in a procurement on which other clients are bidding. Obviously, having a long term relationship does not prevent an outside counsel from representing other contractors and thus having conflicts among clients. But an outside counsel that receives regular work from a particular client may avoid work from that client's biggest competitors so as to avoid conflicts.

### **§ 50A:19 Review of key substantive problems—Bid protests**

One aspect of the bid and proposal process that provides particular opportunities for inside-outside counsel partnering is the bid protest process. Bid protests really have no analogue in commercial contracts. Most commercial contract lawyers accept without dispute a customer's right to exercise unfettered discretion in contract award decisions and would never counsel a client to challenge a contract award decision in court, even where the decision appears arbitrary or capricious. In government contracts, however, the Government Accountability Office, headed by the Comptroller General of the United States, has long asserted jurisdiction to review disputes over contract awards under its statutory authority in 31 U.S.C.A. §§ 3526 and 3529 to settle and adjust the accounts of government agencies and render advance decisions concerning the legality of payments.<sup>1</sup> In addition, federal courts have recognized an implied contract between the government and its prospective contractors to consider all responsive bids fairly and honestly.<sup>2</sup> Under this theory, a contractor may sue for breach of this implied contract in the Court of Federal Claims when the government fails to follow the rules on a contract competition.<sup>3</sup> Finally, potential contractors dissatisfied with a contract

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#### **[Section 50A:19]**

<sup>1</sup>11 Comp. Gen. 220 (A-39095) (1931); 10 Comp. Gen. 480 (A-36067) (1931).

<sup>2</sup>Keco Industries, Inc. v. U. S., 203 Ct. Cl. 566, 492 F.2d 1200, 30 A.L.R. Fed. 334 (1974); Heyer Products Co. v. U.S., 135 Ct. Cl. 63, 140 F. Supp. 409 (1956).

<sup>3</sup>Heyer Products Co. v. U.S., 135 Ct. Cl. 63, 70, 140 F. Supp. 409 (1956).

award decision may file a protest with procuring agencies, all of whom have established procedures for resolving protests against contract awards administratively.<sup>4</sup> Thus, counsel needs familiarity with the variety of avenues available for contesting federal contract award decisions.

The grounds for challenging a contract award are varied and numerous. Prospective contractors may protest the bid or proposal requirements, asserting that the government has used unreasonably restrictive specifications that exclude otherwise qualified potential contractors,<sup>5</sup> used ambiguous specifications,<sup>6</sup> omitted data required for a proper bid,<sup>7</sup> or “bundled” several types of products together in a single procurement, thereby excluding prospective contractors that offer some but not all of the combined products.<sup>8</sup> There are also a wide range of challenges to the agency’s conduct of the procurement, including lack of meaningful government discussions with participating offerors,<sup>9</sup> unequal application of solicitation requirements,<sup>10</sup> and failure to consider positive past performance information regarding the unsuccessful offeror.<sup>11</sup>

Of particular importance to inside counsel are the rules specifying the time for challenging a contract award. The statute giving the Court of Federal Claims jurisdiction to hear contract award challenges provides that the Court has jurisdiction “to entertain such an action without regard to whether the suit is instituted before or after the contract is awarded.”<sup>12</sup> This language might lead counsel lacking experience in government contracts to conclude that the client need not concern itself with identifying potential defects in

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<sup>4</sup>Exec. Order No. 12979, 60 Fed. Reg. 55171 (October 25, 1995).

<sup>5</sup>Kohler Co., Comp. Gen. Dec. B-257162, 94-2 CPD ¶ 88 (unreasonable to restrict engine procurement to four cycle engines).

<sup>6</sup>North Am. Reporting, Inc., 60 Comp. Gen. 64 (B-198448), 80-2 CPD ¶ 364.

<sup>7</sup>Wood-Ivey Systems Corp., 50 Comp. Gen. 50 (B-169977).

<sup>8</sup>National Customer Eng’g., 72 Comp.Gen. 132 (B-251135), 93-1CPD ¶ 225.

<sup>9</sup>AINS, Inc., B-400760.4, 2010 CPD ¶ 32 (January 19, 2010).

<sup>10</sup>Gentex Corp., B-291793, .2, 2003 CPD ¶ 66 (March 25, 2003).

<sup>11</sup>Raymond Assocs., LLC, B-299496, B-299496.2, 2007 CPD ¶ 107, (May 29, 2007).

<sup>12</sup>28 U.S.C.A. § 1491(b).

the bid or proposal requirements until after the procurement has been conducted and the apparent winning bidder or offeror identified. This is an error. The Court of Federal Claims has adopted timeliness principles long used by the Government Accountability Office in holding that contract award challenges based on defects apparent on the face of the request for bids or proposals must be filed before the date on which bids or proposals are due.<sup>13</sup> The idea behind this rule is that a potential bidder or offeror who identifies a defect in a request for bids or proposals should be required to alert the procuring agency to the potential problem before bids or proposals are due so that the agency can consider the challenge and —if appropriate—amend the challenged request before the due date, thus avoiding a procurement that must be re-competed because of flaws in the terms of the requests for bids or proposals. This principle has important implications for inside counsel. Inside counsel need to be proactive in educating their clients on the importance of involving counsel immediately upon identifying a defect on the face of a request for bids or proposals. The client needs to understand that it may lose valid bases for challenging an award if it fails to raise challenges to the terms of a request for bids or proposals in a timely fashion. Most sophisticated contractors will make counsel standing members of bid or proposal teams in order to increase the likelihood that all grounds for challenging a procurement are preserved.

Bid protests provide a fertile area for partnering. One factor driving partnering in bid protests is the law on the protection of proprietary information during protests.<sup>14</sup> Resolving a bid protest may require a review of the competing contractors' bids or proposals to assess compliance with the government's solicitation terms. This review poses a risk to the integrity of the procurement in that competing contractors may gain an unfair advantage in the rest of the procurement competition or other competitions if they see

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<sup>13</sup>CC Distributors, Inc. v. U.S., 38 Fed. Cl. 771, 782, 42 Cont. Cas. Fed. (CCH) P 77180 (1997); Allied Technology Group, Inc. v. U.S., 39 Fed. Cl. 125, 139, 41 Cont. Cas. Fed. (CCH) P 77179 (1997), *aff'd*, 173 F.3d 435 (Fed. Cir. 1998).

<sup>14</sup>See generally GAO Guide to Protective Orders (June 2009), <http://www.gao.gov/special.pubs/d09770sp.pdf>; Rules of the Court of Federal Claims 5.2(e), 26(c).

the technical approach taken by their competitor and can alter their bid or proposal to offset any advantages the approach may have given the competitor. Accordingly, the bid protest tribunal will typically issue a protective order at the beginning of a protest restricting access to contractor technical information to outside counsel and other individuals who are not involved in competitive decision-making for the client. While this rule does not restrict inside counsel per se from an active role in the protest,<sup>15</sup> it imposes significant restrictions on the role most inside counsel can play in a protest because they typically have at least some involvement in advising the key business decision-makers.<sup>16</sup> The only situation in which inside counsel might be permitted to access a competitor's information under a protective order is where the inside counsel is not assigned to the business unit involved in the protest, such as where the lawyer is part of a corporate litigation team. Such lawyers, however, typically have little experience in federal contract bid protests and federal procurement law and are not able to provide significant assistance in a bid protest.

As a result, inside counsel will almost always need to partner with outside counsel in handling a bid protest. Although inside counsel typically will not be able to learn the details of the protest because of the protective order, they can nevertheless perform an important function by using their knowledge of the protesting business to facilitate outside counsel's efforts to understand the business' position in the procurement. Moreover, the inside counsel may have been involved in counseling the business in preparing the bid or proposal and thus be a fact witness. As bid protests are typically conducted on an expedited basis so as to not delay the proposed procurement more than necessary, the contractor will want a full staff assigned to the protest.

#### **§ 50A:20 Review of key substantive problems— Defective pricing**

Perhaps the best evidence of the monopsonistic nature of government contracts is the Truth In Negotiations Act. A

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<sup>15</sup>U.S. Steel Corp. v. U.S., 2 Fed. Cir. (T) 46, 730 F.2d 1465, 1468, 5 Int'l Trade Rep. (BNA) 1955, 73 A.L.R. Fed. 238 (1984).

<sup>16</sup>Allied-Signal Aerospace Co., B-250822, B-250822.2, 93-1 CPD ¶ 201 at 9 (February 19, 1993).

consumer would never think of asking a consumer electronics company to provide the data relevant to its retail prices as a condition of agreeing to purchase a consumer product. Yet the government does exactly that in regulating the award of certain larger government contracts. As enacted in September, 1962, the Truth in Negotiations Act (known as “TINA”) required potential contractors for military contracts having a value of \$100,000 or more to submit “cost or pricing data” and certify that to the best of their knowledge and belief the cost or pricing data submitted were accurate, complete and current.<sup>1</sup> These provisions were subsequently made effective to civilian procurements as well.<sup>2</sup> Over the years, the threshold value for application of TINA increased from \$100,000 to the current value of \$700,000.<sup>3</sup> The requirement for the submission of cost or pricing data applies to all contracts above the dollar threshold unless the contract is exempt from the TINA requirements because (1) there is adequate price competition for the contract (two or more responsible potential contractors),<sup>4</sup> (2) the prices proposed are set by law or regulation (and are thus not subject to negotiation),<sup>5</sup> (3) the contract is for a commercial item customarily used by the public or nongovernmental entities<sup>6</sup> or (4) the head of the agency waives compliance with TINA.<sup>7</sup>

If TINA applies, the potential contractor is obligated to produce all relevant cost or pricing data prior to the award of the contract or as of such other date as agreed to between the parties.<sup>8</sup> The term “cost or pricing data” is defined broadly. The regulations define the term as including:

all facts that, as of the date of price agreement or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price, prudent

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**[Section 50A:20]**

<sup>1</sup>E-Systems, Inc., ASBCA No. 17557, 74-2 B.C.A. (CCH) ¶ 10,782 at 20 (1974); 10 U.S.C.A. § 2306a.

<sup>2</sup>41 U.S.C.A. § 254b.

<sup>3</sup>48 C.F.R. § 15.403-4 (a)(1).

<sup>4</sup>48 C.F.R. §§ 15.403-1(b)(1); (c)(1).

<sup>5</sup>48 C.F.R. § 15.403-1(b)(2).

<sup>6</sup>48 C.F.R. § 2.101; 15.403-1(b)(3).

<sup>7</sup>48 C.F.R. § 15.403-1(b)(4).

<sup>8</sup>48 C.F.R. 15.403-4.

buyers and sellers would reasonably expect to affect price negotiations significantly. . . . Cost or pricing data are factual, not judgmental; and are verifiable. While they do not indicate the accuracy of the prospective contractor's judgment about estimated future costs or projections, they do include the data forming the basis for that judgment. Cost or pricing data are more than historical accounting data; they are all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred.<sup>9</sup>

This definition includes “vendor quotations; nonrecurring costs; information on changes in production methods and in production or purchasing volume; data supporting projections of business prospects and objectives and related operations costs; unit-cost trends such as those associated with labor efficiency; make-or-buy decisions; estimated resources to attain business goals; and information on management decisions that could have a significant bearing on costs”.<sup>10</sup>

Compliance with TINA is enforced through standard contractual provisions that provide the contracting officer with the authority to adjust the contract price to reflect the consequences of a contractor's failure to disclose “complete, accurate, and current” cost or pricing data.<sup>11</sup> Any failure to disclose complete accurate or current cost or pricing data is known as “defective pricing”. Typically, the contracting officer will decide to reduce a contract price to reflect the nondisclosure of cost or pricing data only after a process of extensive auditing and negotiation. The Defense Contract Audit Agency or other audit agency will review the contractor's books and records in an effort to identify any cost or pricing data not previously disclosed by the contractor. (Statutes provide civilian and military agencies with the right to audit the contractor's records relating to the pricing or performance of the contract, including all subcontracts.<sup>12</sup>). After completing its review, the audit agency will issue a report to the contracting officer identifying any situations in which the contract price may have been increased because of the contractor's failure to provide complete accurate and cur-

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<sup>9</sup>48 C.F.R. § 2.101.

<sup>10</sup>48 C.F.R. § 2.101.

<sup>11</sup>48 C.F.R. § 52.215-10.

<sup>12</sup>10 U.S.C.A. § 2313; 41 U.S.C.A. § 254d.

rent cost or pricing data. An example is a situation in which, prior to agreement on the contract price, the contractor obtained a vendor quote that was lower than the quotes it disclosed during the contract price negotiations.<sup>13</sup> Before issuing a decision, the contracting officer will typically provide the contractor with the audit agency's report and invite comments thereon. The contracting officer will often meet with the contractor and representatives of the audit agency to evaluate the contractor's response to the audit agency report. The contracting officer will then issue a final decision, which will become final and binding on the contractor unless it appeals the decision to the Court of Federal Claims or board of contract appeals.

Given the possibility that the contractor may have to appeal an unfavorable contracting officer's decision, most contractors choose to involve counsel at the earliest stages of cases involving potential defective pricing. Inside counsel will typically become involved after the business receives from the contracting officer for comment the DCAA audit report alleging defective pricing. Inside counsel will want to assess the risk posed by the allegations quickly. Inside counsel new to government contracts will likely want to have outside counsel review the audit report and advise on the degree of risk posed by the allegations. More experienced inside counsel may decide to handle routine allegations, for example, involving undisclosed vendor quotes or labor records from prior contracts, without using outside counsel. If inside counsel determines that the audit report raises somewhat novel or untested allegations, he may involve outside counsel to assist in crafting the legal arguments for the client's response to the audit report and in meeting with government counsel and the DCAA to present those arguments and attempt to negotiate a favorable resolution. Finally, inside counsel may bring in outside counsel to handle litigation if its client is unable to settle the allegations and is forced to appeal an adverse contracting officer's decision to a court or board of contract appeals. Even if the allegations are routine, inside counsel may decide that other work assignments will prevent him from being able to devote

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<sup>13</sup>See *U.S. v. United Technologies Corp., Sikorsky Aircraft Div.*, 51 F. Supp. 2d 167 (D. Conn. 1999); *Sparton Corp.*, ASBCA No. 11363, 67-2 BCA ¶ 6539.

sufficient time to the appeal to handle the matter without outside counsel.

An effective strategy employed by more sophisticated counsel to reduce the likelihood of defective pricing allegations is called a “sweep”. If counsel who is involved in the bid or proposal process becomes aware that the client’s negotiation team has reached agreement on price with the government, he or she will work with the contract administration personnel to have each major function (engineering, manufacturing, procurement, finance) update the cost or pricing data previously provided to the government to identify more current data that the client may have received while the contract was being negotiated. The contracts administrator will then submit the updated cost or pricing data to the government and indicate whether the new data would likely have had any effect on the negotiated price. While this may lead the government to re-open negotiations, this outcome is still preferable to getting embroiled in protracted defective pricing litigation. Moreover, experience indicates that the government will usually not want to re-open negotiations unless the data reflect significant changes in the contract pricing. Thus, a “sweep” should be a regular practice in any business that is regularly subject to TINA.

**§ 50A:21 Review of key substantive problems—Cost accounting issues**

Another good example of the government monopsony in federal government contracts is the extensive regulation of contract costs. In a marketplace with numerous potential customers, prices are set by supply and demand, and no one customer will typically have the ability to force suppliers to exclude costs the supplier may incur for activities that the customer disfavors from the contract price. The supplier can decline such a request knowing that it can still try to obtain business from other customers (unless all customers make the request). Even the strictest teetotaler would never imagine demanding that a company exclude from the price of its products amounts spent on alcohol at corporate events. Yet that is exactly what the federal government does, explicitly prohibiting contractors from including the cost of

alcoholic beverages from billings to the government.<sup>1</sup> The following is an overview of the most significant cost accounting issues, with emphasis on the opportunities for effective inside-outside counsel partnering in each area.

Two concepts are important in the following discussion. The term allocability refers to the issue of whether or a particular cost may be allocated to a government contract, as opposed to other commercial contracts the contractor may hold. For example, while the government may encourage contractor research and development by making research and development costs allowable, it may require the contractor to separate government product research and development from commercial product research and development and permit the contractor to allocate to government contracts only government product research and development. The term allowability refers to the issue of whether the government will permit a contractor to recover a particular type of cost, even if it is properly allocated to the contract. An example of an allowability issue is the previously discussed prohibition on the reimbursement of alcoholic beverage costs.

#### **§ 50A:22 Review of key substantive problems—Cost accounting issues—Allocability**

Although the government has attempted to control the type of costs for which it will reimburse contractors since the early 20th century, it was not until 1968 that Congress began to consider the need for rules determining which costs contractors should be able to allocate to government contracts.<sup>1</sup> Following testimony from government officials as to the difficulty in comparing contract costs where contractors applied different principles to allocate costs between contracts and other cost objectives (e.g., treating the costs of supervision as a direct cost versus a component of overhead cost), Congress authorized the establishment of the Cost Accounting Standards (“CAS”) Board in 1970 as a legislative

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#### **[Section 50A:21]**

<sup>1</sup>48 C.F.R. § 31.205-51.

#### **[Section 50A:22]**

<sup>1</sup>“Future role of the Cost Accounting Standards Board”, the United States General Accounting Office, report prepared for Congress by the Cost Accounting Standards Board Review Panel (April 2, 1999) at 5–6.

independent body responsible for promulgating uniform cost allocation rules applicable initially to military contracts exceeding \$100,000 in value.<sup>2</sup> Over the next 10 years, the CAS Board promulgated 19 cost accounting standards and concluded its operations in 1980. In 1988, Congress reestablished the CAS board and extended the applicability of the cost accounting standards to civilian contracts.<sup>3</sup>

The Cost Accounting Standards currently apply to all negotiated contracts and subcontracts with a value in excess of \$650,000.<sup>4</sup> Contractors that receive (1) a single contract award of \$50 million or more not exempt from the Cost Accounting Standards or (2) \$50 million or more in net non-CAS exempt awards during its preceding cost accounting period are required to comply with all 19 cost accounting standards, so-called full CAS coverage.<sup>5</sup> Contractors that receive a contract award of less than \$50 million that is not exempt from CAS awarded to a business unit that receives less than \$50 million in net CAS-covered awards in the immediately preceding cost accounting period are subject to modified CAS coverage, such that they need only comply with three cost accounting standards governing consistency in cost accounting and the accounting for unallowable costs.<sup>6</sup> A contractor subject to full CAS coverage must file a statement with the Administrative Contracting Officer prior to the award of its first CAS-covered contract disclosing how its cost allocation practices comply with the Cost Accounting Standards.<sup>7</sup> The cost allocation issues the contractor must disclose include how it will allocate home office general and administrative expenses between its commercial and government contracts.<sup>8</sup> The government may assert a claim against a contractor whose failure to comply with the CAS or the contractor's disclosed accounting practices results in

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<sup>2</sup>“Future role of the Cost Accounting Standards Board” at 5–6.

<sup>3</sup>“Future role of the Cost Accounting Standards Board” at 5–6.

<sup>4</sup>48 C.F.R. § 9903.201-1(b)(2).

<sup>5</sup>48 C.F.R. § 9903.201-2(a).

<sup>6</sup>48 C.F.R. § 9903.201-2(b).

<sup>7</sup>48 C.F.R. § 9903.202-1.

<sup>8</sup>48 C.F.R. § 9904.410.

increased costs to the government on a CAS-covered contract.<sup>9</sup>

CAS issues typically require inside counsel to involve outside counsel at an earlier stage in the process and more extensively than is the case with other issues. CAS issues exist at an intersection of legal and financial principles and outside counsel with CAS experience will typically be conversant with both government contracts and financial accounting principles, expertise developed handling CAS issues for a large group of clients as the law firm's CAS expert. As a result, few inside counsel have the opportunity to develop the CAS expertise found in the best outside CAS counsel. Inside counsel will need to stay closely involved with the outside counsel in defending against CAS violation allegations. Inside counsel can facilitate the process of developing the client's position by assisting outside counsel in understanding the facts of the client's practices. In addition, inside counsel will want to learn as much about the CAS as possible from outside counsel so as to be able to take on a greater role in future CAS issues.

#### **§ 50A:23 Review of key substantive problems—Cost accounting issues—Allowability**

Contractors must also comply with rules specifying those costs that are not allowable — that is, will not be reimbursed by the government. The cost allowability rules generally apply in any case where a contractor is required to submit cost information to the government.<sup>1</sup> Thus, a contractor receiving a fixed-price contract awarded with adequate price competition (two or more competitors) will not without more be required to comply with cost allowability rules in preparing

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<sup>9</sup>48 C.F.R. § 9903.201-4; *see Rumsfeld v. United Technologies Corp.*, 315 F.3d 1361, 60 Fed. R. Evid. Serv. 827, 49 U.C.C. Rep. Serv. 2d 492 (Fed. Cir. 2003) (holding that contractor violated CAS by not allocating overhead to the cost of parts that were obtained from foreign participants in commercial engine collaboration program); *General Motors Corp., Detroit Diesel Allison Div. v. Aspin*, 24 F.3d 1376, 39 Cont. Cas. Fed. (CCH) P 76653 (Fed. Cir. 1994) (finding contractor violated CAS by not complying with its disclosed cost accounting practices, even if those practices did not themselves comply with CAS).

#### **[Section 50A:23]**

<sup>1</sup>48 C.F.R. § 31.103

and submitting its price for the contract.<sup>2</sup> Nonetheless, the contractor will be required to comply with the cost allowability rules, known as the cost principles, in developing a price for a change or modification to a competitively awarded fixed-price contract, as the change or modification is by definition awarded without adequate price competition.<sup>3</sup> In general, the forty-six cost principles address recurring situations in which specific costs may be at issue, in some cases making the cost entirely unallowable or allowable and in other cases making the cost allowable subject to specific limitations.<sup>4</sup> For example, the cost of bad debts,<sup>5</sup> entertainment such as tickets to shows or sporting events,<sup>6</sup> losses on other contracts,<sup>7</sup> and goodwill<sup>8</sup> are all completely unallowable. Costs for public relations and advertising,<sup>9</sup> personal services compensation,<sup>10</sup> depreciation,<sup>11</sup> idle facilities or capacity,<sup>12</sup> are allowable subject to specific limitations. The contracting officer is obligated to review costs submissions to ensure that only allowable costs are paid to the contractor.<sup>13</sup> The contracting officer is obligated to disallow any cost sought by the contractor that the contracting officer deems unallowable, providing notice to the contractor who may appeal the contracting officer's decision to the Court of Federal Claims or a board of contract appeals.<sup>14</sup>

Cost allowability issues afford inside counsel with substantial opportunity to take the lead in providing counseling to the client. Cost allowability issues generate two discrete assignments for counsel. First, inside counsel will play a role in establishing policies and procedures to ensure that unal-

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<sup>2</sup>48 C.F.R. § 31.102.

<sup>3</sup>48 C.F.R. § 31.102.

<sup>4</sup>48 C.F.R. § 31.201.

<sup>5</sup>48 C.F.R. § 31.205-3.

<sup>6</sup>48 C.F.R. § 31.205-14.

<sup>7</sup>48 C.F.R. § 31.205-23.

<sup>8</sup>48 C.F.R. § 31.205-49.

<sup>9</sup>48 C.F.R. § 31.205-1.

<sup>10</sup>48 C.F.R. § 31.205-6.

<sup>11</sup>48 C.F.R. § 31.205-11.

<sup>12</sup>48 C.F.R. § 31.205-17.

<sup>13</sup>48 C.F.R. § 42.803.

<sup>14</sup>48 C.F.R. § 42.803.

allowable costs are screened out from billings to the government. Counsel who is new to government contracts will need to work closely with outside counsel to make sure that the policies and procedures drafted for use in the business state the cost principles accurately. More seasoned inside counsel may be able to perform most of the work in preparing policies and procedures without outside counsel, but will want to have outside counsel review the policies to make sure that they are adequate. Second, inside counsel will also play a role in responding to government allegations that the business' accounting submissions fail to exclude unallowable costs. Many of the cost principles are fairly straightforward —e.g., costs of alcoholic beverages cannot be billed —so allowability issues typically are issues of fact, not disputes over the interpretation of the principles.<sup>15</sup> This will permit reasonably experienced inside counsel to perform much of the work required in responding to allowability allegations. Inside counsel will only need to consider involving outside counsel more directly in situations that appear headed to litigation, where the time demands of litigation may preclude substantial involvement by an inside counsel who has responsibility for other on-going business issues, or where the dispute turns on the interpretation of one of the more complex cost principles,<sup>16</sup> where outside counsel brings unique expertise that will assist the inside counsel in fashioning the correct response.

#### § 50A:24 Review of key substantive problems— Commercial items

By the late 80s, there was a growing sense in Congress that the strict cost accounting rules for government contracts were inhibiting competition for contracts. Congress heard testimony indicating that predominately commercial businesses were deciding that the cost of complying with government cost accounting and other rules outweighed the benefits

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<sup>15</sup>*See, e.g.*, Boeing Aerospace Operations, Inc., ASBCA 46274, ¶ 26,802 (1994), reconsidered, ASBCA 46274, 94-3 BCA ¶ 27,281 (1994).

<sup>16</sup>*See, e.g.*, ATK Thiokol, Inc. v. U.S., 598 F.3d 1329 (Fed. Cir. 2010); Brownlee v. DynCorp., 349 F.3d 1343, 1353 (Fed. Cir. 2003).

of participation in the federal marketplace.<sup>1</sup> Through the National Defense Authorization Act of 1991, Congress authorized the creation of a panel to review, among other things, the application of government contract requirements to contracts with commercial businesses.<sup>2</sup> Ultimately, the panel recommended substantial changes to procedures used for the procurement of commercial items, agreeing that the complexity and extent of government contract requirements was an impediment to attracting commercial entities to the federal government marketplace.<sup>3</sup> Congress adopted many of the panel's recommendations in the Federal Acquisition Streamlining Act of 1994.<sup>4</sup>

As result of the Federal Acquisition Streamlining Act, the Federal Acquisition Regulations were amended through the addition of (1) Standard Form 1449 for use in the procurement of commercial items and (2) a streamlined set of terms and conditions for use in the procurement of commercial items. These commercial item terms and conditions include only essential standard provisions, addressing such issues as changes, termination for convenience, and the Buy American Act.<sup>5</sup> On the other hand, commercial items are exempt from requirements such as TINA requirements regarding provision of cost and pricing data.<sup>6</sup>

It is possible to make too much of the FAR provisions on procurement of commercial items. There is no doubt that the commercial terms and conditions are substantially less burdensome for commercial businesses than the standard FAR terms. Yet, a number of the remaining commercial item terms impose requirements that are unusual in commercial contracts. For example, the commercial terms include the standard termination for convenience clause discussed below at § 50A:31, which permits the government to terminate a

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**[Section 50A:24]**

<sup>1</sup>“Future role of the Cost Accounting Standards Board”, the United States Gen. Accounting Office, report prepared for Congress by the Cost Accounting Standards Board Review Panel (April 2, 1999) at 8.

<sup>2</sup>“Future role of the Cost Accounting Standards Board” at 8.

<sup>3</sup>“Future role of the Cost Accounting Standards Board” at 8.

<sup>4</sup>P.L. 103-355, 108 Stat. 3243 (1994).

<sup>5</sup>48 C.F.R. § 52.212-3, -4.

<sup>6</sup>48 C.F.R. § 15.403-1(b)(3).

contract even though the contractor is not in breach and limit its liability for lost future profits.<sup>7</sup> The commercial terms also include the provisions implementing the Buy American Act,<sup>8</sup> which requires the use of products produced in the United States in performing most government contracts.<sup>9</sup> As a result, inside counsel should be wary of assuming that a government contract for commercial items is no different from a commercial contract between private entities.

It is a rare inside lawyer assigned to a predominantly commercial business unit who will be able to understand all of the provisions found in the government's terms for commercial item procurements without at least some assistance from an outside lawyer with government contracts expertise. A commercial business that sells products made up in part of components produced outside of the United States will need to understand the nuances of the Buy American Act and its implementing regulations to determine whether the products are covered by an exception to the Buy American Act that will permit the business to sell them to the government. An inside lawyer who represents a business that sells products to the government only occasionally may address this issue by cultivating a relationship with an outside counsel with government contracts expertise who will be available to assist on an ad hoc basis. A commercial business that expects to sell products to the government on a regular basis may want to consider having an outside government contracts counsel provide training to the inside legal staff and key non-legal personnel involved in contract administration on each of the significant provisions of the commercial item terms and conditions. This upfront training may be cost effective in allowing inside personnel to handle a greater number of issues under the commercial item terms in the long run without consulting outside counsel. The key will be weighing the cost of the training against the frequency with which inside personnel will be incurring counseling costs with outside counsel on recurring commercial item issues.

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<sup>7</sup>48 C.F.R. § 52.212-4(l).

<sup>8</sup>41 U.S.C.A. § 10a — 10d.

<sup>9</sup>48 C.F.R. § 25.102; 52.212-3(f).

**§ 50A:25 Review of key substantive problems—  
Performance issues**

One of the biggest distinctions between commercial and government contracting is the extent to which inside and outside counsel are involved in contract performance. The government monopsony has permitted the government to go much further than commercial entities in regulating contract activities by promulgating statutes and regulations to address contract performance issues. Issues such as compliance with specifications or the recording of labor hours that might be handled without the involvement of legal counsel in commercial businesses will almost certainly require the involvement of legal counsel on government contracts. The extent of counsel's involvement in contract performance issues provides many opportunities for effective partnering between inside and outside counsel.

**§ 50A:26 Review of key substantive problems—  
Performance issues—Contract changes**

Government contracts typically include a changes clause, which gives the government the unilateral right to order changes in contract specifications or schedule, method of shipment or place of delivery, subject to an obligation by the government to compensate the contractor for the change through an equitable adjustment to the contract price.<sup>1</sup> The one major exception to the Government's broad right to make changes to the contract occurs in contracts for commercial items, where the changes clause only permits changes to the contract "by written agreement of the parties."<sup>2</sup> The changes clause requires that all changes must be "within the general scope of the contract."<sup>3</sup> A change is within the scope of the contract if it "should be regarded as having been fairly and reasonably within the contemplation of the parties when the contract was entered into."<sup>4</sup>

Courts have typically permitted the government broad

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**[Section 50A:26]**

<sup>1</sup>48 C.F.R. § 52.243-1.

<sup>2</sup>48 C.F.R. § 52.212-4 (c).

<sup>3</sup>48 C.F.R. § 52.243-1.

<sup>4</sup>Freund v. U.S., 260 U.S. 60, 63, 43 S. Ct. 70, 67 L. Ed. 131 (1922).

rights under the changes clause, holding changes to be permitted under the changes clause where “the function or nature of the work as changed is generally the same as the work originally called for.”<sup>5</sup> Nonetheless, courts have occasionally held that certain changes go beyond the general scope of the contract. One example is *Information Sys. & Networks Corp.*,<sup>6</sup> where the Armed Service Board of Contract Appeals found that the government could not use the changes clause to convert a contract for a telecommunications system in the Washington DC area to one for a worldwide telecommunications system. If a change is found to exceed the general scope of the contract, it is deemed a “cardinal change” and the contractor may either decline to perform the change or perform the change under protest and with reservation of rights to seek full damages for the added work.<sup>7</sup>

Not all changes arise as a result of directions from the contracting officer explicitly identified as changes to the contract. In addition to directed changes, courts and boards of contract appeals will recognize a change in the contract compensable under the changes clause “when the contract work is actually changed but the procedures of the changes clause have not been followed.”<sup>8</sup> Such a change is known as a constructive change. An example of a constructive change is found in *Hardrives, Inc.* There, the contractor received a contract for the construction of canals and discovered, after beginning construction, that the canal specifications were based on inaccurate information and could not be used to complete the canals. The Interior Board of Contract Appeals held that the extra work performed by the contractor to remedy the specification defects constituted a constructive change to the contract, and the contractor would receive its extra costs of performance just as if the contracting officer at formally directed changes in the specifications to account for

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<sup>5</sup>John Cibinic, Ralph Nash & James Nagle, Administration of Government Contracts at 383 (4th Ed. 2006).

<sup>6</sup>ASBCA 46119, 02-2 BCA ¶ 31,952.

<sup>7</sup>*Airprep Technology, Inc. v. U.S.*, 30 Fed. Cl. 488, 39 Cont. Cas. Fed. (CCH) P 76634 (1994).

<sup>8</sup>John Cibinic, Ralph Nash & James Nagle, Administration of Government Contracts at 427 (4th Ed. 2006).

the errors.<sup>9</sup> Although formally directed changes may constitute the majority of all changes, counsel will typically have greater involvement in constructive changes. In a directed change scenario, the government has in effect admitted liability for a change by directing the contractor to perform it. The pricing of the change is the only real issue and the client may be able to handle the pricing with minimal oversight from counsel, at least where the cost impact of the change is fairly clear. By contrast, constructive changes occur where the government believes that its actions are consistent with contract requirements. It often falls to counsel to develop the analysis that demonstrates that the government's directions deviate from contract requirements. In this scenario, there is no substitute for the time that counsel spends with engineering and manufacturing staff to understand the contract requirements and the way such requirements were applied during performance. Indeed, counsel may have no greater positive impact on their client than when they can return a loss contract to a profitable position by demonstrating that the client lost money because of government constructive changes, not its own inefficiencies.

When the contracting officer changes the contract specifications, the contractor will need to prepare a request for an equitable adjustment, documenting the impact of the change on performance and the costs of performing the changes work, including any effects on the contract schedule.<sup>10</sup> A similar procedure applies to claims that contract specifications have been constructively changed, except that the contractor must first put the contracting officer on notice of its belief that a government directive or action has changed the contract requirements.<sup>11</sup> The most effective means of developing a changes claim is the establishment of a multi-functional team, including legal, contracts administration, finance, engineering and production personnel. Contracts administration personnel will need to provide the pertinent contracts background, such as identifying key communications and assisting in developing the appropriate government forms for submitting the changes claim. Finance personnel will need to provide the pricing support for the

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<sup>9</sup> IBCA 2319, 94-1 BCA ¶ 130,678.

<sup>10</sup> 48 C.F.R. § 52.243-1(c).

<sup>11</sup> 48 C.F.R. § 52.243-4(b).

claim, which may involve establishing a special accounting procedure to capture the costs of performing the change,<sup>12</sup> as opposed to the costs of base contract performance. Engineering personnel will be essential in understanding the nature of the change and its effect on the costs of performing the contract. Production personnel will be called upon to assist in explaining the effect of the change on on-going production activities.

Legal representatives will play a key role in the changes team. First, the legal team, in collaboration with contracts administration personnel, must ensure that processes are in place to promptly identify potential changes claims during performance and provide timely notice to the contracting officer. Beyond that, while the contracts administration personnel will usually have the responsibility of compiling the request for an equitable adjustment based on the team members' input, the legal representatives usually serve as the architect, defining the government actions that constitute the contract change and formulating the arguments in favor of recovery. There are several alternatives for legal staffing. At one extreme, a business may bring in outside counsel as the exclusive legal advisor to the team. At the other extreme, a business may decide to use only inside counsel in preparing the change claim. Many businesses take a middle ground, having both inside and outside counsel involved in the claim effort. Using outside counsel exclusively does have certain advantages. Outside counsel have a broad base of experience, and a business facing a major claim may decide to spare no expense and have "the experts" handle all aspects of the claim. But this approach will almost certainly result in significant costs that may not add to the quality of the claim. While there are aspects of claim development in which an expert's review is essential, many claim activities, such as development of the basic facts of the change and the provision of advice on basic legal issues, can be done effectively at a much lower cost by reasonably experienced inside counsel. Additionally, inside counsel's familiarity with his business will facilitate the identification of key personnel and documentation necessary to support the claim, thus allowing the business to reduce the cost of claim preparation further.

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<sup>12</sup>48 C.F.R. § 43.203.

Using inside counsel exclusively also has certain advantages, the biggest being cost. Inside counsel's effort is covered by existing salaries, while outside counsel will generate additional costs to the business with each hour spent on claim preparation. These costs may be mitigated by the fact that legal and consulting costs of preparing requests for equitable adjustment and negotiations with the government may be allowable costs on government contracts, while costs of prosecuting claims after a dispute has arisen are unallowable.<sup>13</sup> There are few inside counsel, however, that are as experienced in claims preparation as seasoned outside counsel. As a result, there is a risk that using inside counsel exclusively may result in the business failing to recognize all potential claims or in advancing incorrect theories in support of the claim. Even a contractor that has sufficient inside legal staff to perform all of the claim development work with inside counsel will want to involve outside counsel from the early stages of claim preparation.

The best approach to providing legal support for claims preparation is a mixed team of inside and outside counsel. Inside counsel will want to include outside counsel from the inception of the claims effort. Most significant claims efforts begin with a "kick-off" meeting in which the representatives from the various functions develop initial understandings of the potential claim scope and assign responsibilities for the claim preparation. It is normally a good practice to have outside counsel present for such meetings to validate the theories that the team will be developing and provide guidance on the types of documentation and testimony necessary to support the claims fully. Outside counsel may need to assist finance personnel with modest claims experience in establishing an appropriate change order accounting system. Thereafter, inside counsel should serve as the primary legal resource to the claims team, using outside counsel only on more difficult issues. Inside counsel will also play the lead role in the drafting of the claims, unless workload issues require reliance on outside counsel. Outside counsel will become more heavily involved as the claim preparation effort

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<sup>13</sup>See *Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541, 40 Cont. Cas. Fed. (CCH) P 76755 (Fed. Cir. 1995) (overruled on other grounds by, *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 40 Cont. Cas. Fed. (CCH) P 76803 (Fed. Cir. 1995)); 48 C.F.R. § 31.205-47(f) (1).

progresses, serving as an editor to the draft claim submission. Outside counsel may attend some of the meetings with government representatives on the claim —if for no reason other than to send a signal to the government representatives that the business is willing to litigate the matter if it cannot be settled through negotiations. This mixed team approach will hold down costs on claim preparation —at least over the exclusive use of outside counsel.

**§ 50A:27 Review of key substantive problems—  
Performance issues—Changed conditions**

In construction contracts, the government often provides bidders with information on conditions at the work site.<sup>1</sup> This information allows the bidders to gauge the degree of difficulty the project presents and accurately estimate the costs of dealing with actual site conditions. Obviously, there is always a risk that such information may prove to be inaccurate, notwithstanding the best efforts of the government in characterizing site conditions. In addition, even where the government provides no information on site conditions, bidders must make certain assumptions about site conditions likely to be encountered at the jobsite. The bidder can assume that conditions will be unexceptional and refrain from adding a cost contingency in its bid to cover costs of difficult conditions. But, this approach puts the contractor at risk of a big loss if the site conditions turn out to be more difficult than anticipated. Thus, bidders may be inclined to assume the worst and increase their bids accordingly, increasing the government's cost on speculation and creating a windfall for the contractor if the feared conditions do not materialize.

This risk is of sufficient significance that government contracts have long included a provision, entitled “differing site conditions”, that permits the contractor to recover any increased costs resulting from site conditions that differ from those reflected in bidding information (typically logs of subsurface soil borings conducted at the site) or typical for the site.<sup>2</sup>

The purpose of the changed conditions clause is thus to take

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**[Section 50A:27]**

<sup>1</sup>48 C.F.R. § 36.504.

<sup>2</sup>48 C.F.R. § 52.236-2.

at least some of the gamble on subsurface conditions out of bidding. Bidders need not weigh the cost and ease of making their own borings against the risk of encountering an adverse subsurface, and they need not consider how large a contingency should be added to the bid to cover the risk. They will have no windfalls and no disasters. The Government benefits from more accurate bidding, without inflation for risks which may not eventuate. It pays for difficult subsurface work only when it is encountered and was not indicated in the [soil boring] logs.<sup>3</sup>

The differing site conditions clause addresses two distinct situations, (1) differences between “subsurface or latent physical conditions at the site” and the conditions reflected in information provided to bidders and (2) “unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in the work of the character provided for in the contract.”<sup>4</sup>

As with changes claims, the vehicle by which a contractor is compensated for the effects of changed conditions is a request for an equitable adjustment.<sup>5</sup> The contractor will typically form a multi-functional team to prepare the claim. The partnering issues raised in this scenario are similar to those discussed above in the discussion of contract changes at § 50A:26. As in that scenario, the best practice is a mixed inside-outside counsel team, with the inside lawyer handling matters on a day-by-day basis with expert advice at key junctures from outside counsel.

#### **§ 50A:28 Review of key substantive problems— Performance issues—Product quality**

A further example of the monopsonistic nature of Government contracts is found in product inspection and acceptance. Consumers would never give much thought to the quality control or inspection practices followed by the manufacturer of goods they purchase: The consumer cares only that the product works. It is up to the manufacturer to decide on the appropriate quality control and inspection practices. For

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<sup>3</sup>Foster Const. C. A. & Williams Bros. Co. v. U. S., 193 Ct. Cl. 587, 613–614, 435 F.2d 873 (1970).

<sup>4</sup>48 C.F.R. § 52.236-2.

<sup>5</sup>48 C.F.R. § 236-2 (b).

commercial items, the government has adopted the prevailing practice in the commercial marketplace of relying on the seller's existing quality assurance system for assurances of product quality.<sup>1</sup> For all other significant procurements, however, Government contracts often contain detailed inspection and quality requirements.<sup>2</sup> Contractors will be held to compliance with testing and inspection requirements, even where they impose requirements that are stricter than trade practice.<sup>3</sup> In addition to contractually specified inspection procedures, the government can conduct unspecified tests that are "reasonable and necessary" to determine compliance with the specifications.<sup>4</sup> Finally, contractor counsel must be aware that government inspection of the work does not relieve the contractor of responsibility for latent defects that could not have been discovered through reasonable inspection.<sup>5</sup>

Inside counsel are best positioned to be the first contact whenever the client has an issue with inspection practices. Co-located with the client in many cases, inside counsel can often respond to issues more promptly than outside counsel and perhaps provide advice that allows the business to address the government's concern, thus avoiding a shut-down of production. Moreover, inspection provisions are often relatively straightforward, so that inside counsel can provide the necessary advice without consulting outside counsel and thus generating additional expense. Inside counsel may encounter inspection or quality clauses that are more complicated, perhaps clauses that incorporate various

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**[Section 50A:28]**

<sup>1</sup>48 C.F.R. § 46.102 (f).

<sup>2</sup>48 C.F.R. § 46.102 (a).

<sup>3</sup>General Time Corp., ASBCA 22306, 80-1 BCA ¶ 14,393 at 37.

<sup>4</sup>Crown Coat Front Co. v. U. S., 154 Ct. Cl. 613, 292 F.2d 290, 292 (1961).

<sup>5</sup>48 C.F.R. 52.246-2(k); see *Lee Lewis Const., Inc. v. U.S.*, 54 Fed. Cl. 88, 92-93 (2002) ("The existence of a latent defect negates the effect of a final acceptance"); *but cf.* *Perkin-Elmer Corp. v. U.S.*, 47 Fed. Cl. 672, 674-77 (2000) (finding that the "government must act within a relatively short period of time after learning of the defect" and finding that the government failed to revoke acceptance in a timely fashion after six years); *Geranco Mfg. Corp. ASBCA 12376*, 68-1 BCA ¶ 6898 (noting the "heavy burden of proof" on the government in establishing a latent defect).

Department of Defense standard provisions not readily available to inside counsel. Outside counsel will be indispensable in assisting in these more difficult cases. Ultimately, the contractor and the government may disagree on the proper interpretation of the contract quality or inspection provisions and the contracting officer may direct the contractor to proceed with the government's interpretation of the contracts, incurring increased costs thereby. In this situation, the contractor will want to assert a claim that the direction constitutes a change to the contract specifications and submit a request for an equitable adjustment. The comments above on partnering in the claim preparation process at § 50A:26 apply with equal force here.

**§ 50A:29 Review of key substantive problems—  
Performance issues—Labor charging**

Given its substantial regulation of contract costs, it should be no surprise that the government devotes significant attention to oversight of contractor labor costs. The Defense Contract Audit Agency conducts regular “floor checks” at contractor facilities for the express purpose of determining “whether the workforce is working”.<sup>1</sup> Beyond ensuring that workers are working, the DCAA floor checks also verify the accounts to which workers are charging their labor time to ensure that labor charges are recorded accurately.<sup>2</sup> As part of these floor checks, the auditors will typically interview individual employees to determine their labor charging practices.<sup>3</sup> Contractors should not treat these floor checks lightly. The Department of Defense Inspector General has advised the DCAA auditors that one of the “most common fraud indicators” is incorrect charging of labor hours.<sup>4</sup> This oversight applies to all U.S. government contracts —whether for products or services —under which the amounts paid by the government will be based on actually incurred costs. As a result, contractors should understand

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**[Section 50A:29]**

<sup>1</sup>DCAA Contract Audit Manual (CAM) ¶ I-104(b) (May 19, 2009).

<sup>2</sup>CAM ¶ 6-404 at 645.

<sup>3</sup>CAM ¶ 6-404 at 645.

<sup>4</sup>DOD-IG: Handbook on Fraud Indicators for Contract Auditors (IGDH 7600.3, APO, March 31, 1993) at II-3.

that what starts out as a routine audit of incurred labor costs could become a full-blown fraud investigation should the auditors find evidence that a significant amount of labor costs are being charged inaccurately.

Given their routine nature, DCAA floor checks do not often require the participation of legal counsel. Businesses normally anticipate being subject to occasional DCAA floor checks and have procedures in place to record the individuals contacted in the floor check and review their labor charges after a floor check to look for problems that the DCAA may have noted. Counsel may assist the operations personnel in developing such procedures, but will normally play little role in most reviews thereafter. Counsel will become involved if the floor check uncovers problems with the charges reviewed by DCAA. At that point, counsel should recognize that the business may face a criminal or civil fraud investigation of allegations that the labor charge errors resulted from intentional misconduct. For a discussion of the role of counsel in such an investigation, refer to §§ 50A:34 to 50A:35 below.

**§ 50A:30 Review of key substantive problems—  
Performance issues—IR&D/B&P costs**

One unusual feature of Government contracts is the government's willingness to reimburse contractors for costs incurred in independent research and development ("IR&D") and the preparation of bids and proposals ("B&P"). The FAR provides that costs incurred for independent research and development and bidding proposal activity are allowable as indirect costs on contracts so long as they are reasonable and allocable.<sup>1</sup> Contrast this situation with normal commercial practices, where a contractor will recover its research and development or bidding costs only to the extent that it generates sufficient profit to cover these costs. IR&D is limited to "(1) basic research, (2) applied research, (3) development, and (4) systems and other concept formulation studies".<sup>2</sup> It cannot include "the costs of effort sponsored by a

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**[Section 50A:30]**

<sup>1</sup>48 C.F.R. § 31.205-18(c); 8 C.F.R. § 9904.420.

<sup>2</sup>48 C.F.R. § 31.205-18(a).

grant or required in the performance of a contract”.<sup>3</sup> The concept is that the cost of any research and development required by the terms of a grant or contract is not an independent effort but rather a requirement the costs of which must be charged directly to that contract or grant. B&P costs are those costs “incurred in preparing, submitting, and supporting bids and proposals (whether or not solicited) on potential government or nongovernment contracts”.<sup>4</sup> Defense contract audit agency auditors will scrutinize costs charged to IR&D or B&P to ensure that contractors are not including in these accounts costs that relate to activities within the scope of a contract.<sup>5</sup>

There has been a surprisingly large amount of litigation over the application of these concepts. For example, a government agency disallowed a contractor’s costs in upgrading a rocket motor for both commercial and military customers when the only sale of the upgraded product was to a commercial customer, which refused to allow the upgrade costs to be included in its contract. Finding that the costs were not sponsored by a contract, the U.S. Court of Appeals for the Federal Circuit held that the upgrade costs qualified as allowable IR&D costs, even though they were incurred with the immediate objective of supporting a commercial sale, because the upgrades could also benefit future government customers.<sup>6</sup> Such disputes can have serious implications, as the government has asserted in at least two cases that a contractor’s decision to treat costs that are implicitly required to complete a contract as IR&D constitutes civil fraud.<sup>7</sup>

Issues concerning IR&D and B&P typically arise in the bid and proposal phase of the contracting process. Business clients involved in preparing a proposal may approach counsel with questions as to the costs that they need to include in the price being proposed for a contract. They may have on-going IR&D projects that support the technology be-

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<sup>3</sup>48 C.F.R. § 31.205-18(a).

<sup>4</sup>48 C.F.R. § 31.205-18(a).

<sup>5</sup>DCAA Contract Audit Manual (CAM) ¶ 7-1502 (May 19, 2009)4.

<sup>6</sup>ATK Thiokol, Inc. v. U.S., 598 F.3d 1329, 1335 (Fed. Cir. 2010).

<sup>7</sup>U.S. v. Newport News Shipbuilding, Inc., 276 F. Supp. 2d 539 (E.D. Va. 2003); U.S. ex rel. Mayman v. Martin Marietta Corp., 894 F. Supp. 218, 222, 40 Cont. Cas. Fed. (CCH) P 76849 (D. Md. 1995).

ing proposed for sale to the government and have questions as to whether they can continue the projects using IR&D funding or need to close out the projects as of contract award and include the costs in the contract price. They may have concerns about whether the costs of preparing the bid or proposal can be charged to B&P accounts or must be included in the charges to an existing contract that requires the submission of a follow-on proposal for the same products. Counsel may get involved in drafting proposal language to make clear whether the existing efforts will be within the scope of the proposed contract.

Inside counsel are well-advised to involve outside counsel in these efforts, at least in an advisory role. The cost principles addressing IR&D and B&P are among the more complicated and remain subject to competing interpretations.<sup>8</sup> While inside counsel may be tempted to dispense with the step of consulting with outside counsel, perhaps because of the press of a proposal deadline or a desire to avoid costs, this is a foolish choice for all but the most experienced inside counsel. Waiting to involve outside counsel until the government challenges the cost classification decision runs the risk that an incorrect cost charging decision will lead the government to allege that the charging constitutes civil or criminal fraud. Moreover, the contractor may be able to assert reliance on outside counsel's opinion that a particular IR&D or B&P charge is consistent with applicable laws and regulations as a defense to a subsequent allegation that it submitted false claims for costs that are expressly unallowable under the IR&D and B&P regulations.<sup>9</sup> Involving counsel at the bid and proposal stage will save money by allowing the business to avoid decisions that, although perhaps ultimately defensible, will generate government claims or investigations that require considerable outside counsel involvement to resolve.

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<sup>8</sup>John W. Chierichella, IR&D vs. Contract Effort, 90-2 Gov't Contract Costs, Pricing & Accounting Report 8 (Feb. 1990).

<sup>9</sup>U.S. v. Newport News Shipbuilding, Inc., 276 F. Supp. 2d 539, 547 (E.D. Va. 2003).

**§ 50A:31 Review of key substantive problems—  
Performance issues—Termination for  
convenience**

Another unique feature of government contracts is the requirement that every government contract contain a provision providing the government with the right to terminate the contract at its convenience.<sup>1</sup> The effect of such provisions is to permit the government to terminate a contract—even in the absence of any breach by the contractor—and limit its financial exposure to reimbursement for incurred costs, together with a reasonable profit on work performed.<sup>2</sup> The provision allows the government to avoid liability for consequential damages and anticipated profit on the unperformed portions of the contract, which would otherwise be recoverable for breach of contract.<sup>3</sup> The FAR termination provisions found in most large government contracts further reduce the contractor's recovery where the contract is being performed at a loss.<sup>4</sup> These provisions determine the ratio of the contract price to the estimated cost for performing the contract and then apply the ratio to the incurred costs sought by the contractor, so that the contractor only recovers those costs that should have been incurred in performing the work within budget.<sup>5</sup> For example, a contractor that projects that it would have spent \$1,000,000 performing a contract with a price of \$500,000 that has been terminated for convenience will recover 50% of its incurred costs, resulting from the multiplication of the ratio of 500,000/1,000,000 by the costs incurred through the date of termination. This loss adjustment will not be applied where the government caused the overrun in contract costs, as was the case in *Douglas Corp.*,<sup>6</sup> where the contractor incurred extra costs after the govern-

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**[Section 50A:31]**

<sup>1</sup>48 C.F.R. § 49.502.

<sup>2</sup>48 C.F.R. § 52.249-2.

<sup>3</sup>*Aerdco, Inc.*, GSBCA 3776, 77-2 BCA ¶ 12,775 at 6-7, recons. denied, 78-1 BCA ¶ 12,926; *G. L. Christian and Associates v. U. S.*, 160 Ct. Cl. 1, 21-22, 312 F.2d 418, 423 (1963).

<sup>4</sup>48 C.F.R. § 49.203.

<sup>5</sup>*G. A. Karnavas Painting Co.*, ASBCA 22281, 78-2 BCA ¶ 13,312 at 4.

<sup>6</sup>ASBCA 8566, 69-1 BCA ¶ 7578, recons. denied, 69-1 BCA ¶ 7699.

ment provided defective material for a clothing contract. The contractor is also allowed to recover the costs of settling with subcontractors, and legal and professional costs of preparing a termination settlement proposal.<sup>7</sup> After submission of the termination proposal, the parties attempt to negotiate a resolution. If unsuccessful, the government pays the amount to which it thinks the contractor is entitled, and the contractor can take an appeal seeking to recover the balance.<sup>8</sup>

Businesses facing a termination for convenience typically form a team to prepare the termination claim. The team will likely be coordinated by a member of the contracts department, with support from counsel and personnel from finance, engineering, and production. This team will function similarly to the teams assembled to prepare a request for equitable adjustment.<sup>9</sup> Outside counsel will serve largely in an advisory capacity and should be involved from the early stages of the process so that the team is focused on the appropriate legal theories from the inception of the effort. The involvement of counsel will be particularly important where the business projects a loss on the contract but believes that government actions caused some or all of the cost overruns. Counsel will need to review the government's actions and the terms of the contract to determine whether there is a basis for contending that the government is responsible for the overrun because it increased the contract requirements or otherwise impeded the business' ability to perform the contract in the manner it planned. Inside counsel are well-advised to include outside counsel in these reviews. Outside counsel will likely have had more experience in identifying claims and be able to ensure that less experienced inside personnel do not miss potential bases for shifting responsibility for the costs to the Government.

**§ 50A:32 Review of key substantive problems—  
Performance issues—Termination for  
default**

All government contracts provide the government with the right to terminate the contract for default where the contrac-

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<sup>7</sup>48 C.F.R. § 52.249-2(g)(3).

<sup>8</sup>48 C.F.R. § 52.249-2(e), (j).

<sup>9</sup>See § 50A:26.

tor fails “(i) deliver the supplies or to perform the services within the time specified in this contract or any extension; (ii) make progress, so as to endanger performance of this contract . . . ; or (iii) perform any of the other provisions” of the contract.<sup>1</sup> A default termination has serious consequences for a contractor. The government has no liability for the costs of unaccepted work, is entitled to the return of progress, partial or advance payments, can charge the contractor with the excess costs it incurs in having the contract completed by another contractor, can seek actual damages for the contractor’s failure to perform and may seek to bar the contractor from further awards.<sup>2</sup> It is therefore rare for a contractor to decline to pursue all available legal remedies in challenging a default termination, which are principally litigation against the government in either the Court of Federal Claims or a board of contract appeals.<sup>3</sup> Indeed, boards of contract appeals and the Court of Federal Claims have recognized that the default remedy is a form of forfeiture that must be strictly construed against the government.<sup>4</sup> If a contractor succeeds in proving that it was not in default, that the default was excusable, or that the termination was a pretext for a decision motivated by other objectives,<sup>5</sup> the termination for default will be converted to a termination for convenience,<sup>6</sup> in which the contractor is subject to the limitations on recovery discussed in § 50A:31.

A contractor facing a default termination will usually devote considerable resources to attempting to have it

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**[Section 50A:32]**

<sup>1</sup>48 C.F.R. § 52.249-8.

<sup>2</sup>John Cibinic, Ralph Nash & James Nagle, *Administration of Government Contracts* at 884 (4th Ed. 2006).

<sup>3</sup>E.g., *McDonnell Douglas Corp. v. U.S.*, 567 F.3d 1340 (Fed. Cir. 2009), certiorari granted in part, 131 S. Ct. 62 (2010) and certiorari granted in part, 131 S. Ct. 62 (2010), (Petition for certiorari filed 4/23/2010).

<sup>4</sup>*See Kisco Co., Inc. v. U. S.*, 221 Ct. Cl. 806, 820, 610 F.2d 742, 26 Cont. Cas. Fed. (CCH) P 83432 (1979); *King v. U.S.*, 37 Ct. Cl. 428, 436, 1900 WL 1521 (1902); *Fairfield Scientific Corp.*, ASBCA No. 21151, 78-1 BCA ¶ 13,082 (1978), accord, *Tri-State Tool Co.*, ASBCA No. 16300, 73-1 BCA ¶ 9886 (1973).

<sup>5</sup>*Schlesinger v. U. S.*, 182 Ct. Cl. 571, 583–84, 390 F.2d 702 (1968).

<sup>6</sup>48 C.F.R. § 49.401(b).

converted into a termination for convenience. The contractor will assemble a cross-functional team of personnel from the finance, contracts, legal, engineering and production departments. Often, the inside counsel will be asked to lead the team, in part to cover the team's work product with the attorney-client and attorney-work product privileges.<sup>7</sup> While inside counsel may consider handling the termination claim without outside counsel, such an approach should be avoided. The consequences of a default termination are too serious to risk missing a potential ground for appeal by excluding outside counsel with extensive experience in terminations from the default termination team. Inside counsel will be able to perform much of the day-to-day work in developing the claim, assuming no workload issues. But the opportunity to have the advice of experienced counsel from the inception of the effort is invaluable. Moreover, there is a high likelihood that the contractor will seek to challenge the default termination in court if it cannot persuade the government in negotiations to convert the termination into one for the convenience of the government. If litigation ensues, outside counsel that has been involved in the development of the case from its inception will be able to proceed more efficiently in filing and prosecuting the litigation.

**§ 50A:33 Review of key substantive problems—  
Dispute Resolution**

Sections 50A:18 through 50A:32 reflect the diversity of issues that can arise in the award and performance of government contracts. If the contractor and the government are unable to resolve these issues amicably, the next step in attempting to resolve the dispute is a decision by the contracting officer under his authority to “to decide or resolve all claims arising under or relating to a contract”.<sup>1</sup> This authority is based on the Contract Disputes Act of 1978, which provides that “[a]ll claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims

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<sup>7</sup>See Chapter 33, “Attorney-Client Privilege and Attorney Work Product Protection” (§§ 33:1 et seq.).

[Section 50A:33]

<sup>1</sup>48 C.F.R. § 33.210; 33.211.

by the government against a contractor relating to a contract shall be the subject of the decision by the contracting officer”.<sup>2</sup> The government generally tries “to resolve all contractual issues and controversy by mutual agreement at the contracting officer’s level”.<sup>3</sup> Where disputes cannot be resolved through informal discussions with the contracting officer, federal agencies are encouraged to use alternative dispute resolution procedures, including “conciliation, facilitation, mediation, fact-finding, mini-trials, arbitration, and use of ombuds”.<sup>4</sup>

A contractor triggers the requirement for contracting officer review of a claim by submitting the claim in writing and, for claims exceeding \$100,000, certifying that “the claim is made in good faith; that the supporting data are accurate and complete to the best of [its] knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable; and that [party signing the certification on behalf of the contractor is] duly authorized to certify the claim on behalf of the Contractor.”<sup>5</sup> The certification requirement is important because the certification triggers the running of interest on the claim under the Contract Disputes Act.<sup>6</sup> The contracting officer must issue a final decision “on any submitted claim of \$100,000 or less within 60 days from his receipt of a written request from the contractor that a decision be rendered within that period”.<sup>7</sup> For claims exceeding \$100,000, the contracting officer is obligated within 60 days of the receipt of a certified claim to either issue a decision or inform the contractor of the time within which a decision will be issued.<sup>8</sup> If the contracting officer fails to issue a decision within the extended time period or otherwise fails to issue a decision within a reasonable period, the contractor may treat

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<sup>2</sup>41 U.S.C.A. § 605(a).

<sup>3</sup>48 C.F.R. § 33.204.

<sup>4</sup>5 U.S.C.A. § 571(3); *see generally* Chapter 57, “Alternative Dispute Resolution” (§§ 57:1 et seq.).

<sup>5</sup>48 C.F.R. § 52.233-1(d)(2)(iii).

<sup>6</sup>48 C.F.R. § 33.208.

<sup>7</sup>41 U.S.C.A. § 605(c)(1).

<sup>8</sup>41 U.S.C.A. § 605(c)(2).

the inaction as a “deemed denied” decision and appeal.<sup>9</sup> Once a contracting officer has issued a decision, it becomes final and binding on the contractor unless appealed to the U.S. Court of Federal claims within 12 months or agency board of contract appeals within 90 days.<sup>10</sup>

Section 50A:26, “Contract Changes”, discusses the best practices in assembling and managing a team charged with developing a claim against the government, particularly the respective roles of inside and outside counsel. This discussion applies with equal force here.

### § 50A:34 Review of key substantive problems—Civil fraud investigations/False Claims Act

A significant feature of U.S. government contracts is the possibility that the contractor may incur criminal and/or civil fraud liability for negligent or intentional failures to comply with contract provisions. Developed in 1863 during the Civil War in response to widespread fraud in defense contracts, the False Claims Act provides for liability for any person who “knowingly” presents a false claim for payment or approval directly or indirectly to the US government.<sup>1</sup> The penalty for each false submission is a civil penalty of not less than \$5,500 and not more than \$11,000, plus 3 times the amount of damages that the Government sustains as a result of the false claim (2 times if the contractor informs the Government of the fraud within thirty days of discovering it, assuming that the Government has not commenced a proceeding concerning the alleged fraud and the contractor is unaware of any Government investigation of the fraud).<sup>2</sup> Significantly, the requirement that a claim be “knowingly” false does not require a specific intent to defraud.<sup>3</sup> The government need only prove that the contractor “actually

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<sup>9</sup>41 U.S.C.A. § 605(c)(5).

<sup>10</sup>41 U. S. C. §§ 605(b); 606; 609.

#### [Section 50A:34]

<sup>1</sup>31 U.S.C.A. § 3729(a)(1)(A); *U.S. v. Neifert-White Co.*, 390 U.S. 228, 232, 88 S. Ct. 959, 19 L. Ed. 2d 1061 (1968).

<sup>2</sup>John Cibinic & Ralph Nash, *Formation of Government Contracts* at 166 (3rd Ed. 1998); 31 U.S.C.A. § 3729; 28 C.F.R. § 85.3.

<sup>3</sup>John Cibinic & Ralph Nash, *Formation of Government Contracts* at 168 (3rd Ed. 1998).

knew it had omitted material information from its [submissions] or that it recklessly disregarded or deliberately ignored that possibility”.<sup>4</sup> In addition, as recent decisions illustrate, false statements in a proposal can result in FCA liability and forfeiture of earned contract payments, even if the contractor satisfactorily performed the contract obligations.<sup>5</sup> The significance of the government’s efforts to identify and pursue civil fraud should not be underestimated. In its most recent semiannual report to Congress, the Department of Defense Inspector General reported that, during the six-month period from October 1, 2009, through March 31, 2010, it returned \$1.9 billion to the U. S. Treasury, made up of civil judgments of \$1.8 billion and civil settlements of \$111 million.<sup>6</sup> While these figures include more than False Claims Act recoveries, they nonetheless provide some measure of the seriousness with which the government pursues fraud investigations.

An interesting feature of the False Claims Act is its authorization of a civil action (referred to as “qui tam”) “brought in the name of the United States” by private plaintiffs (referred to as “relators”) to pursue False Claims Act actions.<sup>7</sup> Such private plaintiffs, if successful, will receive at least 15% but not more than 25% of any recovery, “depending upon the extent to which the person substantially contributed to the prosecution of the action”.<sup>8</sup> The penalties under the Act are subject to periodic adjustment to account for inflation.<sup>9</sup>

The specter of potential civil fraud liability must be factored into client counseling. The heightened scrutiny of government contracts for evidence of fraud means that counsel needs to understand that any false information

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<sup>4</sup>U.S. v. TDC Management Corp., Inc., 24 F.3d 292, 298, 39 Cont. Cas. Fed. (CCH) P 76670 (D.C. Cir. 1994).

<sup>5</sup>See U.S. ex rel. Longhi v. U.S., 575 F.3d 458 (5th Cir. 2009), cert. denied, 130 S. Ct. 2092, 176 L. Ed. 2d 722 (2010); U.S. v. Science Applications Intern. Corp., 653 F. Supp. 2d 87 (D.D.C. 2009), aff’d, 2010 WL 4909467 (D.C. Cir. 2010).

<sup>6</sup>Department of Defense Inspector General, semiannual report to the Congress, for the period October 1, 2009 through March 31, 2010 at 2.

<sup>7</sup>31 U.S.C.A. § 3730(b).

<sup>8</sup>31 U.S.C.A. § 3730(d).

<sup>9</sup>See 28 C.F.R. § 85.3.

provided to the government —for example, executing routine payment certifications that the contractor is in compliance with environmental laws when it has known environmental issues<sup>10</sup> —can give rise to a civil fraud investigation or qui tam action. Even if they do not result in actual liability, such proceedings will generate significant legal fees and distraction for the contractor's employees who must assist in the defense of the matter, perhaps while being concerned that they may have personal criminal exposure in the matter. This understanding must of necessity drive counsel to give conservative advice to clients considering their options in contract performance.

The risks involved in civil fraud proceedings should lead most contractors to retain counsel experienced in fraud investigations shortly after uncovering evidence of fraud internally or receiving notice from government agencies of an investigation. The prevalence of fraud investigations has led several of the largest government contractors to hire counsel with fraud investigative experience onto their inside legal staff. Outside of these few contractors, most inside counsel will not have sufficient experience in fraud investigations to handle an investigation without assistance from outside counsel. The early use of outside counsel will have two advantages. First, outside counsel will assist inside counsel in evaluating the seriousness of the risks posed by an investigation and in ensuring that the client is focusing its defense on the issues likely to be of most interest to government investigators. Second, outside counsel will be able to augment the inside staff so that emerging fraud concerns can be addressed quickly. A contractor is likely to encounter allegations of potential fraud regularly but will be able to determine with a relatively limited investigation that many of the allegations are unlikely to pose significant risks to the business. Nonetheless, the contractor will occasionally receive allegations that appear on their face to involve significant risks. In such cases, inside counsel will want to proceed expeditiously with an investigation in order to advise management on the risks the business faces but may be unable to drop all other assignments and focus exclusively on the investigation. In this case, a firm with experience in

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<sup>10</sup>*E.g.*, U.S. ex rel. Holder v. Special Devices, Inc., 296 F. Supp. 2d 1167 (C.D. Cal. 2003)

fraud investigations will be able to assign sufficient number of lawyers to the investigation to ensure that the contractor stays ahead of the government investigators, if possible, in understanding the contractor's risks. Outside counsel can also advise the contractor on the particularly difficult and potentially perilous issues that arise when a qui tam relator is a current employee of the company.

The client will want to put counsel in charge of the investigation in order to maximize the client's ability to protect the results of the investigation under the attorney-client and attorney work product privileges.<sup>11</sup> While outside counsel may perform much of the day-to-day investigative work, inside counsel will need to remain closely involved in order to supplement outside counsel's knowledge of the client's business practices and coordinate the responses of other business functions to counsel requests so that the internal investigation proceeds expeditiously. Moreover, effective inside counsel will have the confidence of inside business leaders, who will look to inside counsel to validate the opinions offered by outside counsel, particularly if outside counsel is raising significant concerns about situations that the client previously viewed as unexceptional. If the client has sufficient inside legal staff, it may be able to reduce fees to outside counsel by assigning inside counsel to work as "second chair" to outside counsel, having inside counsel prepare drafts of interview memoranda after participating in internal interviews or assist outside counsel with factual research.

#### **§ 50A:35 Review of key substantive problems— Criminal investigations**

In addition to its civil fraud remedies, the government also has significant criminal statutes to use in punishing those who seek to obtain government payments corruptly. The basic criminal fraud statute provides that anyone who makes a claim for payment to an agency of the United States, knowing that the claim is "false, fictitious or fraudulent", will be imprisoned for not more than five years and subject

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<sup>11</sup>See Chapter 33, "Attorney-Client Privilege and Attorney Work Product" (§§ 33:1 et seq.).

to a fine.<sup>1</sup> The government can establish criminal intent by showing that the person submitted a claim with “knowledge that the claim is false or fictitious” and need not prove a specific intent to defraud the government.<sup>2</sup> Significantly, the criminal False Claims Act applies to claims submitted directly *or indirectly* to the government. For example, submitting a claim to a state for housing units never constructed constitutes a claim against the federal government where the state would be using federal funds for payment.<sup>3</sup>

The government’s criminal remedies extend beyond false claims. The False Statements Act provides for a fine and imprisonment for not more than five years for any person that makes “false, fictitious or fraudulent statements or representations” concerning “any matter within the jurisdiction of any department or agency of the United States”.<sup>4</sup> The False Statements Act is broader than the criminal False Claims Act in that it covers “false statements that might support fraudulent claims against the Government, or that might pervert or corrupt the authorized functions of those agencies to whom the statements were made”.<sup>5</sup> The Act covers oral as well as written and unsworn as well as sworn statements.<sup>6</sup> It also covers the omission of information from forms that explicitly call for it.<sup>7</sup> The Act applies to matters “within the jurisdiction of any department or agency of the United States” so that a prosecutor need only show that a statement was made in connection with a federal program, not that the alleged false statement was made directly to the

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**[Section 50A:35]**

<sup>1</sup>18 U. S. C. § 287.

<sup>2</sup>U.S. v. Barker, 942 F.2d 585, 588–589 (9th Cir. 1991), opinion amended and superseded on denial of reh’g, 967 F.2d 1275 (9th Cir. 1991).

<sup>3</sup>U.S. v. Beasley, 550 F.2d 261 (5th Cir. 1977).

<sup>4</sup>18 U. S. C. § 1001.

<sup>5</sup>U.S. v. Bedore, 455 F.2d 1109, 1111 (9th Cir. 1972).

<sup>6</sup>U.S. v. Poindexter, 951 F.2d 369, 388, 34 Fed. R. Evid. Serv. 33 (D.C. Cir. 1991).

<sup>7</sup>U.S. v. Irwin, 654 F.2d 671, 676 (10th Cir. 1981) (abrogated on other grounds by, U.S. v. Daily, 921 F.2d 994 (10th Cir. 1990)).

government.<sup>8</sup> Indeed, an individual can be convicted of making a false statement even where he does not know that the federal government is involved in the transaction.<sup>9</sup>

Another criminal statute applicable to government contracts is the Anti-kickback Act.<sup>10</sup> The Act makes it illegal to provide something of value (a “kickback”) to a prime or subcontractor or their employees “for the purpose of improperly obtaining or rewarding favorable treatment in connection with” a government prime or subcontract or to include the amount of such a kickback in the price of the prime contract or underlying subcontract.<sup>11</sup> Those found guilty of violating the Act are subject to imprisonment of up to ten years and a fine.<sup>12</sup> The Act also provides for civil penalties of two times the value of the kickback plus \$11,000 per kickback paid.<sup>13</sup>

The government has enjoyed considerable success in pursuing criminal charges on government programs. In the Department of Defense alone, the government obtained 159 indictments and 122 convictions during the six-month period from October 1, 2009 through March 31, 2010.<sup>14</sup>

### § 50A:36 Review of key substantive problems—Ethics and compliance program

At least since November 1, 1991, when the United States Sentencing Commission adopted the organizational sentencing guidelines (“the Guidelines”), sophisticated contractors have understood the importance of having a well-developed

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<sup>8</sup>Ebeling v. U.S., 248 F.2d 429, 434 (8th Cir. 1957).

<sup>9</sup>U.S. v. Wright, 988 F.2d 1036, 1038, 23 Env'tl. L. Rep. 20970 (10th Cir. 1993).

<sup>10</sup>41 U.S.C.A. § 54.

<sup>11</sup>41 U.S.C.A. § 53.

<sup>12</sup>41 U.S.C.A. § 54.

<sup>13</sup>41 U.S.C.A. § 55; 28 C.F.R. § 85.3.

<sup>14</sup>Department of Defense Inspector General, semiannual report to the Congress, for the period October 1, 2009 through March 31, 2010 at 2.

ethics and compliance program.<sup>1</sup> The Guidelines provide that a court can reduce the potential sentence for a contractor that is found or pleads guilty to criminal violations if the court determines that the contractor's violation occurred even though it adopted an effective ethics and compliance program.<sup>2</sup> Given this potential benefit from having an effective ethics and compliance program, many contractors established such programs. Generally, an effective compliance program must include:

- Established standards and procedures to prevent and detect criminal conduct;
- Oversight of the program by the contractor's board of directors or other governing authority;
- Assignment of responsibility for the program to a "high-level" representative of the contractor;
- Due diligence to avoid including in senior management individuals who have engaged in illegal activities;
- Effective training and communication concerning the program;
- Comprehensive monitoring and auditing to detect criminal conduct and evaluate the effectiveness of the program;
- A mechanism by which the contractor's employees and agents may report potential criminal conduct with anonymity or confidentiality without fear of retaliation;
- Discipline for those that have engaged in criminal conduct, and;
- Appropriate corrective action once criminal conduct has been detected.<sup>3</sup>

While a contractor's adoption of an ethics and compliance program is voluntary under the Guidelines, recent changes to the FAR have made such programs mandatory for government contractors under contracts with a value exceeding \$5

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**[Section 50A:36]**

<sup>1</sup>Federal Sentencing Guideline Manual, Sentencing of Organizations, § 8B2.1 United States Sentencing Commission (2007); *see generally* Chapter 47, "Compliance", (§§ 47:1 et seq.).

<sup>2</sup>Federal Sentencing Guideline Manual, Sentencing of Organizations, at § 8C2.5.

<sup>3</sup>Federal Sentencing Guideline Manual, Sentencing of Organizations, at § 8B2.1.

million and a performance period of at least 120 days.<sup>4</sup> The elements of the ethics and compliance program required by the FAR are similar to those of the Guidelines, except that the FAR additionally requires contractors covered by the ethics and compliance program provisions to disclose violations of federal criminal law or the civil False Claims Act on a covered contract in writing to the Department of Defense Inspector General and the contracting officer.<sup>5</sup>

The effort involved in developing an effective ethics and compliance program should not be underestimated.<sup>6</sup> The contractor will need to, among other things, prepare a code of conduct and related policies, develop and conduct training for the entire employee population, investigate allegations of improprieties, and implement a “hotline” or other reporting mechanism. The legal function will be one of the most critical participants in this effort given the overwhelming influence of laws and regulations on the content and operation of the program.

Many major contractors have several in-house counsel assigned exclusively to the operation of the ethics and compliance program. Such contractors will typically only involve outside counsel when they are first developing the program, seeking outside counsel’s advice on the topics to address in policies and training or assistance in drafting policies covering the more difficult topics. After the program has been developed, large contractors will normally use inside personnel, either counsel or non-legal professionals with strong compliance roles, such as finance or contract administration, as trainers and advisors to the employee population. Many businesses use outside counsel at the inception of a program to “train the trainers”, providing in-depth instruction to personnel who then take over training activities after they have gained a solid grasp of the training materials. Smaller contractors may need to use outside counsel to supplement their compliance staff, providing training or being on-call to assist inside staff on the handling of issues they face in operating the program.

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<sup>4</sup>Federal Contractors Code of Business Ethics and Conduct, FAR Case 2006-007, 48 C.F.R. Parts 2, 3 and 52, Effective December 24, 2007; 48 C.F.R. §§ 3.1003; 3.1004(a); 52.203-13.

<sup>5</sup>48 C.F.R. § 52.203-13(b)(3)(i).

<sup>6</sup>See Chapter 47, “Compliance” (§§ 47:1 et seq.).

**§ 50A:37 Review of key substantive problems—  
General services administration multiple  
award schedule contracts**

Participation in the General Services Administration (“GSA”) multiple award schedule program requires input and guidance from inside counsel and often from outside counsel as well. The multiple award schedule program (also known as the Federal Supply Schedule program) allows government agencies and other authorized users to purchase commercial goods and services in a streamlined process. The goods and services for sale through the Schedule program range from IT products and services, office furniture, hardware products, business consulting services, safety and disaster recovery equipment, to energy audits. The GSA awards multiple contracts for each type of product or service offered on the Schedule program. Schedule contracts are treated as commercial item contracts, and have fewer government clauses incorporated into them than other types of contracts. Nevertheless, Schedule contracts do have a number of unique requirements that are not present in normal commercial contracts and with which compliance can be difficult. Thus, it is incumbent upon companies that become involved in the Schedule program to enlist the support of counsel throughout the contract formation process and during performance.

One unique requirement of the Schedule program is the obligation for prospective contractors to disclose their commercial pricing practices, including pricelists, standard discounts, and non-standard discounts. The failure to provide current, accurate, and complete sales data could result in a government finding of defective pricing and/or fraud. A second unique requirement is for Schedule contractors to keep track of sales made through the Schedule program, report that information to GSA on a quarterly basis, and pay a fee, known as the Industrial Funding Fee (“IFF”), to GSA on a quarterly basis. The IFF amount represents a percentage of the sales value of the sales made to government customers and is typically built into the price of the items listed on the contractor’s Schedule pricelist. GSA uses the IFF to fund its administration of the Schedule program and so pays close attention to contractors’ quarterly reporting of sales information and payment of the IFF.

A third unique requirement of a Schedule contract is the

**Price Reduction Clause.** This clause requires the contractor to maintain the negotiated pricing relationship between government customers and a certain set of commercial customers, known as the “Basis of Award” (“BOA”) customer, for the life of the contract. In other words, if a company and GSA negotiate that government purchases from the Schedule contract will receive a 4% better discount than the pricing given to the BOA customer, then any time the company improves its commercial pricing to any customer that falls within the BOA customer category, it must ensure that the prices of items sold to the government through the Schedule contract are likewise improved to maintain the 4% pricing relationship. The composition of the BOA customer can make compliance with the Price Reduction Clause difficult, particularly if the BOA customer is very broad, such as “all commercial end users.” With a broad BOA customer base, the contractor may have difficulty monitoring pricing for all of the customers in the base, and thus find that it faces a price reduction claim because of a decrease in the average price charged to the BOA customers that it did not recognize until the government audits the pricing given to the BOA customer base.

Fundamentally, it is this interrelationship between the Schedule contractor’s performance of its GSA contract and its commercial business — often performed by two different business units — that makes compliance with Schedule contract requirements so difficult. Counsel needs to understand how the company prices and sells its products or services to both government customers and commercial customers and should have a good understanding of the pricing disclosure, IFF, and Price Reduction Clause requirements. Because the items sold through the Schedule program are commercial in nature, many companies that apply for and are awarded Schedule contracts operate largely, if not exclusively, in the commercial marketplace and do not have experience performing government contracts. Because the failure to comply with the requirements of a Schedule contract routinely results in significant monetary penalties and even fraud allegations, it is incumbent on companies without knowledgeable in-house counsel to seek guidance from outside counsel who is experienced with the GSA Schedule program to minimize the risk of noncompliance with the contractual requirements.

**§ 50A:38 Review of key substantive problems—  
Mergers and acquisitions**

The opportunities for partnering in mergers and acquisitions are addressed extensively in Chapter 41, “Mergers and Acquisitions” (§§ 41:1 et seq.). This section is limited to unique government contract issues in mergers and acquisitions. Inside counsel regularly involved in government contracts counseling will likely not also have primary responsibility for mergers and acquisitions. Larger contractors will typically have inside counsel with mergers and acquisitions expertise who have the responsibility for managing transactions. Smaller contractors will not have inside staff to serve this function but will likely turn to outside counsel to manage transactions, given the multitude of complex issues likely to arise there. Nonetheless, inside counsel with government contracts expertise will likely be asked to assist in acquisitions of properties with significant government contracts business. Involvement typically occurs at two stages. During the due diligence phase, inside counsel may be asked to review contracts, policies and procedures, or government audits and investigations to assist in assessing the quality of the potential acquisition. Due diligence can be very time intensive, as the volume of documents to be reviewed may be great and the review may need to be done remotely at the potential acquisition’s offices, unless the target sets up a “virtual” data room to allow the review to be done on-line. While inside counsel may initially hope to perform due diligence internally, work volume and tight schedule may force inside counsel to consider involving outside counsel to assist in the review.

During the acquisition agreement drafting phase, inside government contracts counsel will normally be asked to draft language for the transaction agreement to address government contracts issues. This assignment can be challenging for even the most experienced inside government contracts counsel because it also requires some experience in mergers and acquisitions. Counsel will need to understand the way transaction agreements are structured and the conventions for addressing various issues. Counsel new to mergers and acquisitions will likely need to consult with outside government contracts counsel with prior mergers and acquisitions experience to understand the way in which government contracts issues are typically addressed in transactions. The

portion of the typical transaction agreement that will contain the most significant language relevant to government contracts is the representation and warranties section, in which the seller represents the way in which it has conducted its government contracts business. For example, the buyer will typically ask the seller to represent that it either has no open government investigations or has disclosed all such investigations to the buyer in a schedule to the transaction agreement. Inside counsel with no experience in mergers and acquisitions will want to involve outside counsel with both government contracts and mergers and acquisitions experience in the drafting of the representations and warranties on government contracts. Included in § 50A:46 of this chapter is a model set of representations and warranties concerning government contracts that inside counsel can use as a guide to the scope of desirable representations and warranties. Once inside counsel has worked with outside counsel on several transactions, he can use the model forms, as enhanced through use on multiple deals, to assist in the drafting of government contract portions of transaction agreements without using outside counsel extensively.

**§ 50A:39 Review of key substantive problems—  
Subcontracts**

Inside counsel may also become involved in government contracts through contact with subcontractors used to perform portions of a U.S. government prime contract. After a business secures a prime contract, it will need to enter into subcontracts for portions of the project that it does not have the internal capability to perform. Contacts with prospective subcontractors typically begin well before the award of the prime contract. The business will need information from the subcontractor on cost and technical approach to include in the prime contract proposal for consideration by the government. Arrangements between a prime contractor and its subcontractors are a hybrid of government and commercial contracts. On one hand, the FAR requires prime contractors to include certain clauses in subcontracts — so-called “flow down” clauses — so that a significant portion of a government subcontract will contain FAR clauses and appear similar to a government prime contract. On the other hand, the FAR leaves many subcontract aspects unregulated, leaving the prime contractor and subcontractor to negotiate

the terms as two private parties engaged in a commercial transaction.

The first task for inside counsel in drafting a subcontract is to determine which FAR clauses must be included in the subcontract. Fortunately, several organizations, including the American Bar Association Section of Public Contract Law,<sup>1</sup> have prepared publications that provide a complete listing of the mandatory flow down clauses. Included in § 50A:47 is a model set of special provisions for U.S. government subcontracts that captures all of the mandatory flow down clauses. Inside counsel should also determine the FAR clauses that, although not mandatory flow down clauses, should be included to protect the prime contractor. For example, the FAR does not mandate that the disputes clause be flowed down to subcontractors. Yet, it is essential that the prime contractor include a disputes clause in all subcontracts to make sure that its ability to pursue its rights under the prime contract disputes clause is not impaired by an inconsistent subcontract disputes clause.

For example, a prime contractor is in an untenable position if it must proceed with contract claims through the standard FAR changes clause before a board of contract appeals or the Court of Federal Claims while defending against related subcontractor claims in a state court or federal district court. The contractor may find itself arguing that it should receive an equitable adjustment for changes allegedly made to the prime contract that increased costs to the contractor's subcontractors while simultaneously defending against a subcontractor state court lawsuit seeking compensation for the changes by arguing that the contract requirements were not changed. The government could use the positions taken against the subcontractor to undermine the prime contract claims. The solution is a provision that requires the subcontractor to agree to stay its claim proceeding and cooperate

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**[Section 50A:39]**

<sup>1</sup>Strategic Alliance, Teaming and Subcontracting Committee, Section of Public Contract Law, the American Bar Association "Guide to Fixed Price Supply Subcontract Terms and Conditions" (4th Ed. 2005) is an excellent resource for determining mandatory flow down clauses for subcontracts under U.S. government contracts. The same ABA committee has published a "Guide to Service Subcontract Terms and Conditions" (March 2008).

with the prime contractor in related claims against the government until the prime contract claims are resolved. An example of such language is “[t]o the extent that the issue in dispute between Buyer and Seller is related to an issue in dispute between Buyer and its customer, Seller agrees to a stay in arbitration proceedings until Buyer’s dispute with its customer is finally resolved, either through settlement or judgment.” Another approach is an agreement under which the prime contractor agrees to sponsor the subcontractor’s claims for government changes and, if necessary, pursue those claims before the Court of Federal Claims or board of contract appeals in the name of the prime contractor. The optimal partnering approach for subcontract issues is for inside counsel to develop standard subcontract terms that outside counsel review occasionally to ensure they incorporate the most recent changes, if any, to the FAR and related agency FAR supplements.

A contractor may find the work to be performed by certain subcontractors so critical to the success of its proposal effort that it will want to secure a commitment of participation by the subcontractor in the proposal effort well in advance of having to submit a proposal to the government. It may be that the potential prime contractor and its intended subcontractor will need to engage in joint development of certain aspects of the ultimate product before submitting a proposal. In such cases, the prime and sub may enter into a teaming agreement through which they formalize their relationship, addressing such issues as responsibility for the costs of joint efforts, confidentiality of information the parties exchange and the duration and the work scope of the teammates in the event their proposal is successful. Parties contemplating a teaming agreement will want to enter into a confidentiality agreement before they begin substantive discussions to avoid the risk that the other party may use information they disclose on other procurements if the parties are unsuccessful in reaching a teaming agreement. Included in § 50A:44 of this chapter is a model confidentiality agreement for use in teaming discussions. It requires confidential treatment for information the parties disclose to each other and provides procedures for handling the information if the teaming agreement is terminated or otherwise does not result in a contract award to the team. If the parties agree to form a team, they will need to prepare a teaming agreement.

Included in section § 50A:45 of this chapter is a model teaming agreement that addresses the relevant issues.

Another technique for ensuring the teammates are committed to the joint proposal effort and do not use shared technical information to the benefit of another competitor is through an exclusivity provision preventing the teammates from teaming with another firm. The Department of Defense has expressed wariness about the potential anti-competitive effects of such exclusive teaming agreements,<sup>2</sup> so care must be taken to evaluate the competitive efforts of such provisions, potentially with the assistance of outside anti-trust counsel.<sup>3</sup> Finally, a number of courts have held that teaming agreements are not enforceable contracts but rather “agreements to agree,” creating an obligation to negotiate in good faith if a contract is awarded, but not an unconditional agreement to contract.<sup>4</sup> Contractor counsel need to counsel company executives regarding the limitations on the rights and liabilities created by a teaming agreement.

Inside counsel with little experience in teaming agreements will want to involve outside counsel in drafting the teaming agreement. Inside counsel may wish to produce a first draft based on the model agreement and have the draft reviewed by outside counsel. This will reduce the amount of time for which outside counsel will need to charge in the review. After inside counsel acquires experience through the negotiation of several teaming agreements, he should be able to draft and negotiate teaming agreements without use of outside counsel, except in the event of unique or complex issues.

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<sup>2</sup>Memorandum for Secretaries of the Military Departments from Under Secretary of Defense Jacques Gansler Re: Anti-Competitive Teaming, Jan. 5, 1999.

<sup>3</sup>See generally Chapter 79, “Antitrust and Competition” (§§ 79:1 et seq.).

<sup>4</sup>Cable & Computer Technology Inc. v. Lockheed Sanders, Inc., 214 F.3d 1030, 2000-2 Trade Cas. (CCH) ¶ 72991 (9th Cir. 2000); ATACS Corp. v. Trans World Communications, Inc., 155 F.3d 659 (3d Cir. 1998); Trianco, LLC v. International Business Machines Corp., 583 F. Supp. 2d 649, 656, 662, 664-67 (E.D. Pa. 2008), aff’d, 347 Fed. Appx. 808 (3d Cir. 2009), citing Teachers Ins. and Annuity Ass’n of America v. Tribune Co., 670 F. Supp. 491, 498 (S.D. N.Y. 1987); but see ABT Associates, Inc. v. JHPIEGO Corp., 9 Fed. Appx. 172 (4th Cir. 2001); and W.J. Schafer Associates, Inc. v. Cordant, Inc., 254 Va. 514, 493 S.E.2d 512, 33 U.C.C. Rep. Serv. 2d 1073 (1997).

**§ 50A:40 Review of key substantive problems—  
Contracting with state governments**

A consideration of the many issues that may arise in contracts with state governments is beyond the scope of this chapter. Each state has adopted varying levels of regulation of state government contracts so that it is impossible to generalize effectively on the specific issues that counsel will need to address in contracts with a particular state. Nonetheless, it is possible to make certain generalizations about partnership opportunities on state government contracts. State governments enjoy some of similar monopsonistic advantages of the federal government and have in many cases established standard terms and conditions that are similar to the FAR.<sup>1</sup> As a result, many of the partnering techniques discussed in the preceding sections will apply with equal force at the state level, with the exception that outside counsel will need to have expertise in the state regulations. Inside counsel to organizations that regularly sell to a particular state government will eventually acquire expertise in that state's procurement rules and be able to perform an ever-increasing amount of the work involved in basic contract formation and administration. Inside counsel that does not deal on a regular basis with a particular state will probably always need to rely heavily on outside counsel in reviewing proposed contracts or handling interpretative issues that arise during contract performance.

**§ 50A:41 Review of key substantive problems—  
Contracting with foreign governments**

As with state government contracts, the diversity of issues arising in contracts with foreign governments precludes a detailed review of specific issues likely to arise in such contracts. The difficulty of dealing with requirements that differ between jurisdictions is compounded by the likelihood that counsel will encounter a foreign legal system that may

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**[Section 50A:40]**

<sup>1</sup>Summary of Statutory and Policy Requirements for State Contracts — May, 2001, California Department of General Services (DGS) Procurement Division, (<http://www.pd.dgs.ca.gov/Publications/spsummary.htm>); see generally §§ 50A:2, 50A:15 and 50A:16.

differ substantially from the U.S. legal system.<sup>1</sup> In this situation, it is critical that inside counsel identify in-country outside counsel early on in the procurement cycle who has experience with the host country's procurement practices. The enormous volume of government contract activity in the U.S. has generated demand for experienced outside counsel sufficient to make specialization in government contracts viable as a sole focus of a lawyer's practice. By contrast, smaller countries, particularly those with small militaries, may not have sufficient government contract volume to entice outside counsel to limit their practice to government contracts. In these situations, inside counsel may have to rely on an outside commercial counsel that has only sporadic involvement with his country's government contract awards. Inside counsel will need to consult with a variety of sources—peers at other U.S. contractors, U.S. outside counsel or in-country teaming partners—to identify appropriate outside counsel. Obviously, the opportunities for partnering with a lawyer trained in a foreign legal system will be far less than in the U.S. between two lawyers trained in the same legal system.

#### § 50A:42 Practice checklist

##### A. Alternate Government Contractor Models and Their Implications for Inside Counsel Staffing

1. Several major government contractors, primarily in the defense industry, engage almost exclusively in government contracting, either with the U.S. government or foreign governments. Such business will recruit a significant number of lawyers from major government procurement agencies or government contract law firms. These lawyers will be able to perform most of the day-to-day counseling their businesses require, partnering with outside counsel only on the more unusual or complex matters. (*See* § 50A:4).
2. Other major government contractors have a combination of commercial and government businesses.

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#### [Section 50A:41]

<sup>1</sup>*See generally* Chapter 22, "Counsel for International Legal Work" (§§ 22:1 et seq.).

While they hire a significant number of lawyers without government contracts expertise to serve their commercial businesses, they will also hire lawyers who specialize in government contracts for their government businesses. These lawyers will also be able to perform most of the day-to-day counseling for their government contract businesses, but may have to use outside government contracts counsel more extensively than lawyers in businesses that deal exclusively with government customers because they may also support commercial businesses and have workload issues that require greater use of outside counsel. (*See* § 50A:5).

3. Some businesses that make most of their sales to commercial customers may nonetheless occasionally sell directly to the federal government. Inside counsel will likely have limited expertise in government contracts and need to involve outside counsel in many government contracts assignments. (*See* § 50A:6).

#### **B. Factors that May Influence the Choice of Outside Counsel**

1. Outside government contracts counsel tend to be concentrated in Washington, D.C. and, secondarily, in a limited number of cities near major government procurement centers. A large local firm on which a business has relied for the bulk of its past outside counsel requirements may not have lawyers with expertise in government contracts. (*See* § 50A:7).
2. Given the extent of government regulation of the government contracting process and the regularity with which legal issues arise throughout the government contracts process, inside counsel should cultivate a relationship with a law firm that has a significant government contracts practice. This will increase inside counsel's ability to provide prompt responses to client inquiries and provide a resource for addressing minor issues on which inside counsel would like a second opinion. (*See* § 50A:7).
3. There is a variety of U.S. government agencies involved in government contracts performance.

Each agency that awards significant numbers of government contracts will have a contracting function that will award and administer government contracts. Federal agencies also require audit support. The Defense Contract Audit Agency satisfies the Department of Defense and NASA's audit needs, while at other agencies the Inspector General or other parts of the agency audit government contracts. Finally, the extensive application of civil and criminal fraud statutes to government contracts has resulted in the establishment of several agencies, such as service investigative agencies and inspectors general, that work with the Department of Justice and Federal Bureau of Investigation to investigate and prosecute procurement fraud cases. Knowledge of the agency with which inside counsel must deal will assist counsel in identifying outside counsel with expertise specific to the agency at issue. (See § 50A:8 to 50A:11).

4. There are a number of opportunities to employ alternative fee arrangements in retaining outside government contracts counsel. Certain tasks, such as reviewing policies or procedures or providing training, can be done on a fixed price basis because of their defined scope. A law firm may agree to a volume discount in exchange for a commitment to send all or most of the client's government contract work to the firm. Reduced fee or holdback arrangements for litigation in which the outside firm may have the opportunity to earn a success fee or share of the recovery are good ways to align the interests of the contractor and the outside firm. (See § 50A:12).
5. Inside counsel can involve non-legal staff in partnering activities given the cross-functional nature of most government contract disputes. A successful resolution to a problem may require the involvement of personnel from the finance, contract administration, engineering and/or production departments. Inside counsel will want to choose counsel who can work effectively with non-lawyers. (See § 50A:13).
6. The federal government has a monopsony over

government contract awards and has used its monopsony to impose standard terms and conditions on government contracts. Federal statutes provide basic guidance on procurement policy and specific direction on certain key topics. Federal regulations, principally the Federal Acquisition Regulation, provide detailed provisions addressing the key areas of contract award and performance. Outside counsel must have considerable experience in working with applicable laws and regulations to provide effective government contracts counseling. (See § 50A:14 to 50A:16).

**C. Key Substantive Issues to Consider in Partnering Between Inside and Outside Counsel**

1. The heavily regulated bid and proposal phase of government procurement requires substantial participation from counsel. Inside counsel new to government contracts will want to involve outside counsel to avoid missing issues that may affect the client's success in winning the procurement. Experienced inside counsel will be able to handle most bid and proposal issues, but will want to have outside counsel "on call" to provide guidance on new or complex requirements. In particular, inside counsel will need to involve outside counsel if the bid or proposal award is protested before the Government Accountability Office or in court because of likely restrictions on the ability of inside counsel to access competitive data in the protest. (See § 50A:18 to 50A:19).
2. Inside counsel will want to involve outside counsel as advisors in rebutting claims of defective pricing, both to ensure the assertion of all potential defenses and to position outside counsel to undertake litigation of a defective pricing claim if efforts to resolve the claim with the contracting officer are unsuccessful. (See § 50A:20).
3. Inside counsel will frequently be involved in cost accounting issues, as to both the allocability and allowability of incurred costs. Such issues straddle the boundary of law and finance and require special expertise that only the most experienced inside government contracts counsel will possess. Unless

unusually skilled in government cost accounting, inside counsel will generally benefit from involving outside counsel with government accounting expertise at the early stages of any cost accounting dispute. Early consultation with outside counsel will ensure that complex cost issues are addressed comprehensively in the event that the dispute results in litigation. (See § 50A:21 to 50A:23).

4. Inside counsel with largely commercial businesses will play a significant role in client counseling in procurements that use the commercial item terms and conditions in FAR Part 12. Nonetheless, the commercial item terms and conditions still contain numerous clauses with which inside counsel to commercial businesses will be unfamiliar, and inside counsel will want to consult with outside counsel on these clauses until inside counsel has handled a sufficient number of commercial item procurements to feel comfortable handling all of the commercial item clauses. (See § 50A:24).
5. Many government contracts disputes will result in the submission of a claim to the contracting officer and possibly litigation before boards of contract appeals or the Court of Federal Claims. Examples of typical claims are contract changes, changed conditions, and terminations for default or convenience. A claim typically involves detailed contributions from multiple functions (finance, contract administration, engineering and production) in addition to counsel. Even experienced inside counsel will want to involve outside counsel at the planning stages of claim preparation to make sure all appropriate theories of recovery are identified and all necessary factual issues that must be researched are identified. Experienced inside counsel will likely be able to manage the claim preparation activity without extensive involvement of outside counsel, unless the claim is litigated, in which case outside counsel is likely to take the lead role. (See §§ 50A:26 to 50A:27, 50A:31 to 50A:33).
6. Government contractors face serious exposure to civil or criminal fraud investigations for providing inaccurate information to the government or seek-

ing payment for claims that prove to be unfounded. The potential risks of such investigations justify involving outside counsel at the earliest stages of an investigation so that inside counsel can be confident that the seriousness of the matters being investigated and all available defenses are understood. Unless armed with substantial experience in fraud investigations, inside counsel who tries to manage such an investigation without consulting outside counsel may understate the risks of the investigation to senior management who will look to inside counsel to provide a prompt assessment of the risks posed by the investigation. (See § 50A:34 to 50A:35).

7. All contractors will want to have a well-developed ethics and compliance program to demonstrate their commitment to integrity and satisfy regulatory requirements for such programs. Inside counsel will need to draft policies and procedures and conduct training on ethics and compliance issues. Outside counsel can draft such procedures and training scripts for inexperienced inside counsel, while providing merely editorial assistance to more senior counsel. Outside counsel can assist by “training the trainers”, providing the first training sessions to inside counsel and contracts administration, finance or compliance personnel who then take over the provision of training. (See § 50A:36).
8. Inside counsel may be asked to support mergers and acquisitions of targets involved in government contracts by performing due diligence and drafting representations and warranties concerning government contracts. Counsel with little experience in these activities will want to involve outside counsel in these activities until counsel acquires sufficient experience to perform these tasks with minimal involvement from outside counsel. (See § 50A:38).
9. Inside counsel face a mix of government and commercial contract issues in dealing with subcontracts under government prime contracts. A key issue is ensuring that any subcontract terms are consistent with the provisions of the prime contract. Inside counsel will want to prepare standard subcontract

terms and conditions for use in government subcontracts, which outside counsel should review for completeness and accuracy unless inside counsel has substantial experience with the drafting of subcontracts. Inside counsel may also become involved in drafting teaming agreements in cases where a prime and sub contractors wish to formalize their relationship regarding a specific opportunity. (See § 50A:39).

### § 50A:43 Forms

Many of the forms used in government contracts are standard forms or provisions set forth in the Federal Acquisition Regulations (“FAR”). Below are models for certain agreements that address issues not directly addressed in the FAR.

### § 50A:44 Form government contract proprietary information exchange agreement

This agreement should be used to address the treatment of information exchanged between parties exploring collaboration on government contracts. (See § 50A:39).

#### Proprietary Information Exchange Agreement

This Agreement is entered into by and between \_\_\_\_\_, a corporation organized and existing under the laws of \_\_\_\_\_, by and through its \_\_\_\_\_ subsidiary, having offices \_\_\_\_\_ (hereinafter referred to as “\_\_\_\_\_”) and \_\_\_\_\_, a corporation organized and existing under the laws of \_\_\_\_\_, having offices at \_\_\_\_\_ (hereinafter referred to as “\_\_\_\_\_” or “the Receiving Party”).

**Subject of information for both parties:** Discussions in the areas of \_\_\_\_\_:

#### PURPOSE OF EXCHANGE:

**To allow exploration of potentially broad areas of business collaboration between the organizations — expected to culminate in a Memorandum of Understanding (“MOU”) and/or a Teaming Agreement**

The parties hereto desire to exchange information concerning the subject described above, and considered by them to be proprietary, for the above-stated purpose. The party furnishing the proprietary information will be referred to as

the “Disclosing Party” and the party receiving the proprietary information will be referred to as the “Receiving Party”. In order to provide for the protection of such proprietary information from unauthorized use and disclosure, the parties hereby agree that the disclosure of such information between them shall be subject to the following terms and conditions:

1. Only that information disclosed in written form and identified by a marking thereon as proprietary, or oral information that is identified as proprietary at the time of disclosure and confirmed in writing within ten (10) days of its disclosure, shall be considered proprietary and subject to this Agreement.
2. The exclusive points of contact with respect to the delivery and control of proprietary information disclosed hereunder are designated by the parties as follows:

For \_\_\_\_\_: \_\_\_\_\_  
 For \_\_\_\_\_: \_\_\_\_\_

Either party may change its points of contact by written notice to the other.

3. Information identified and disclosed as provided in this Agreement shall be held by the Receiving Party in confidence for a period of **five (5) years** from the date of receipt.

During such period, such information shall be used only for the purpose stated above and shall not be disclosed to any third party. Neither party shall be liable for disclosure pursuant to judicial action or government regulation or requirement, provided that the originating party is given prompt notice of such government or judicial action and is afforded an opportunity to respond prior to disclosure by the Receiving Party.

4. The parties shall have no obligation under this Agreement to hold information in confidence which, although identified and disclosed as stated herein, has been or is:
  - (a) developed by the Receiving Party independently and without benefit of information disclosed hereunder by the Disclosing Party;
  - (b) lawfully obtained by the Receiving Party from a third party without restriction;
  - (c) publicly available without breach of this Agreement;

(d) disclosed without restriction by the Disclosing Party to a third party, including the United States Government; or

(e) known to the Receiving Party prior to its receipt from the Disclosing Party as established through appropriate documentation.

5. Each party shall use not less than the degree of care used to prevent disclosure of its own proprietary information to prevent disclosure of information received in accordance with this Agreement. In no event, however, shall less than a reasonable standard of care be used.
6. All information received and identified in accordance with this Agreement shall remain the property of the Disclosing Party and shall be returned upon request. Nothing contained herein shall be construed as a right or license, express or implied, under any patent copyright, or application therefore, of either party by or to the other party.
7. Any U. S. Government classified information disclosed by one party to the other shall be handled in accordance with the Department of Defense Industrial Security Manual for Safeguarding Classified Information (DoD 5220.22-M) or the National Industrial Security Program Operating Manual (NISPOM), their supplements, and other applicable U. S. Government security regulations.
8. The Receiving Party represents and warrants that no technical data delivered to it by the Disclosing Party shall be exported from the United States without first complying with all requirements of the International Traffic in Arms Regulations and the Export Administration Act, including the requirement for obtaining any export license, if applicable. The Receiving Party shall first obtain the written consent of the Disclosing Party prior to submitting any request for authority to export any such technical data.
9. The terms and conditions herein constitute the entire agreement and understanding of the parties and shall supersede all communications, negotiations, arrangements and agreements, either oral or written, with respect to the subject matter hereof. No amendments to or modifications of this Agreement shall be effective unless reduced to writing and executed by the parties hereto. The failure of either party to enforce any term hereof shall not be deemed a waiver of any rights contained herein.

- 10. The effective date of this Agreement shall be the date of the last signature below. This Agreement shall **expire two (2) years** from the effective date hereof unless extended in writing by the parties hereto. The obligations of the parties contained in paragraph 3 above shall continue in effect notwithstanding the expiration of this Agreement.
- 11. This Agreement shall be governed and interpreted in accordance with the laws of the State of \_\_\_\_\_ except its rules in regard to choice of laws.

**DISCLOSING PARTY**

BY: \_\_\_\_\_

TYPED NAME: \_\_\_\_\_

TITLE: \_\_\_\_\_

DATE: \_\_\_\_\_

**RECEIVING PARTY**

BY: \_\_\_\_\_

TYPED NAME: \_\_\_\_\_

TITLE: \_\_\_\_\_

DATE: \_\_\_\_\_

**§ 50A:45 Form teaming agreement**

The following agreement is used to formalize an arrangement whereby two businesses agree to work collaboratively in pursuing a government program. (See § 50A:39).

**TEAMING AGREEMENT**

THIS AGREEMENT is made this \_\_\_\_ day of \_\_\_\_\_ by and between \_\_\_\_\_, with offices located in \_\_\_\_\_ (hereinafter "**TEAM FOLLOWER**"), and \_\_\_\_\_, with offices located in \_\_\_\_\_ (hereinafter "**TEAM LEADER**"), **TEAM FOLLOWER** and **TEAM LEADER** individually and collectively referred to herein as "Party" or "Parties."

**WITNESSETH**

**WHEREAS, TEAM FOLLOWER** possesses certain expertise and experience in the design and manufacture of \_\_\_\_\_; and

**WHEREAS, TEAM LEADER** possesses certain expertise and experience in the design and manufacture of \_\_\_\_\_; and

**WHEREAS, TEAM FOLLOWER** and **TEAM LEADER** desire to use their respective products and expertise in a cooperative effort to design, build and thereafter install \_\_\_\_\_; and

**WHEREAS, TEAM FOLLOWER and TEAM LEADER** desire to set forth the terms and conditions which will govern such cooperative effort.

**NOW, THEREFORE,** the Parties hereto, intending to be bound hereunder, agree as follows:

**ARTICLE 1. — RELATIONSHIP OF THE PARTIES**

- 1.1. The Parties shall act as independent contractors and neither Party shall act as agent for or partner or joint venturer of the other Party for any purpose whatsoever, and the employees of one Party shall not be deemed the employees of the other Party.
- 1.2. Each Party shall furnish to the other Party such cooperation and assistance as may reasonably be required hereunder including product development, assembly of major components, and testing of the System.

**ARTICLE 2. — WORK SCOPE AND DIVISION OF RESPONSIBILITIES**

- 2.1. The Parties agree to work together to gain industry support for the System as appropriate.
- 2.2. **TEAM LEADER** will act as the lead Party in marketing efforts and will be the point of order entry for prime contracts with the U.S. Government and its agencies.
- 2.3. **TEAM FOLLOWER and TEAM LEADER** agree that except for the reasons set forth below, the cooperative arrangement described herein shall be exclusive.

If **TEAM LEADER** reasonably determines that a customer's specifications for performance cannot reasonably be met by **TEAM FOLLOWER** for a System or Systems and/or if **TEAM FOLLOWER** cannot deliver within the time required or specified, the exclusivity restrictions contained in this paragraph may be deemed waived with respect to such performance and **TEAM LEADER** may contract in any manner with a third party for the supply and delivery of a System, provided that **TEAM FOLLOWER** is permitted ninety (90) days from written notification from **TEAM LEADER** to correct the situation deemed by **TEAM LEADER** to provide grounds for the waiver of exclusivity.

If **TEAM FOLLOWER** reasonably determines that a customer's specifications for performance cannot reasonably be met by **TEAM LEADER** for a System or Systems and/or if **TEAM LEADER** cannot deliver within the time required or specified, the exclusivity restrictions contained in this paragraph may be deemed waived with respect to such performance and **TEAM FOLLOWER** may contract in any manner with a third party for the supply and delivery of a System, provided that **TEAM LEADER** is permitted ninety (90) days from written notification from **TEAM FOLLOWER** to correct the situation deemed by **TEAM FOLLOWER** to provide grounds for the waiver of exclusivity.

2.4. Except as otherwise provided herein, any and all costs, expenses, or liability to either **TEAM LEADER** or **TEAM FOLLOWER** caused by or arising out of this Agreement, its implementation, amendment or extension, shall be borne by each Party separately and individually and neither Party shall be liable or obligated to the other for any such costs, expenses or liability.

### **ARTICLE 3. — ACTIVITIES AND PERFORMANCE**

3.1. Each Party shall exert its best efforts to prepare proposals that will lead to customer selection of the System. Each Party shall bear its own expenses in connection with purchase order requirements and in conjunction with this Agreement.

3.2. Neither Party shall be responsible for, nor deemed to be in default, on account of delays in the performance of any act to be performed by them under this Agreement due to any of the following causes, Acts of God or acts of war, fire, floods, explosions, serious accidents or other natural phenomena, epidemics or quarantine restrictions, any act of a government, failure of transportation, strikes or labor troubles causing cessation, slowdown or interruption of work, nor shall either Party be in default due to any other cause to the extent such cause is beyond its reasonable control; provided, however, nothing shall be deemed to relieve either Party from the obligation to continue performance with reasonable dispatch whenever the causes for delay or default are removed.

**ARTICLE 4. — PROPRIETARY AND CONFIDENTIAL INFORMATION**

- 4.1. The Parties anticipate that under this Agreement it may be necessary for either to transfer to the other information of a proprietary or confidential nature (hereinafter “Information”). All documentation transmitted to the receiving Party shall be marked with a legend or other appropriate marking to indicate its proprietary and confidential status. All oral information deemed proprietary or confidential transmitted to the receiving Party shall be identified as proprietary at the time of disclosure and confirmed in writing within ten (10) days of its disclosure. All Information disclosed hereunder shall be used solely by the recipient for the purpose of mutual discussions and planning for the cooperative arrangement set forth herein.
- 4.2. Disclosures of such Information shall be restricted to those employees of the Parties who are directly participating in the discussions and planning for the cooperative arrangement identified herein and who have been advised to keep such Information confidential.
- 4.3. Neither Party shall make any reproduction, disclosure, or use of such Information except as follows:
  - (a) Such Information furnished by **TEAM FOLLOWER** may be used by **TEAM LEADER** only in performance of its obligations under this Agreement and for the term of this Agreement;
  - (b) Such Information furnished by **TEAM LEADER** may be used by **TEAM FOLLOWER** only in performing its obligations under this Agreement and for the term of this Agreement.
- 4.4. Except as set forth in 4.3 above, the receiving Party shall maintain the Information in confidence and not disclose such Information or transmit any documents or copies containing such Information to any third party, without the written consent of the Furnishing Party. The Information shall be used solely for the purpose of providing a System to a bona fide customer or prospective customer.
- 4.5. The Receiving Party shall maintain appropriate internal policies and procedures to protect the confidential nature of the Information, in the same man-

ner as the Receiving Party's Information is protected. Access to the Information shall be limited to those employees having a need for such access for the above purpose. The Receiving Party will assure that its employees who visit another Party's facilities shall, upon request by the other Party, sign an Information Agreement consistent with this Agreement. In no event, however, shall less than a reasonable standard of care be used.

- 4.6. Notwithstanding item 4.4 above, in the event the work scope to be performed involves a Party's parent, subsidiaries, affiliates, or other associated companies, Information provided by the Parties may be disclosed to employees of said parent, subsidiaries, affiliates, or other associated companies on the same proprietary basis as contained in this agreement provided written nondisclosure agreements exist between said employees and their employer which obligates the employee to protect the Information furnished under this Agreement.
- 4.7. All documents and Information furnished will remain the property of the Furnishing Party. The Receiving Party will not make a greater number of copies than necessary for its above-mentioned purpose. The Receiving Party shall return to the Furnishing Party or certify their destruction, all such documents and copies thereof upon request by the Furnishing Party.
- 4.8. Notwithstanding the preceding, a Receiving Party may disclose Information furnished hereunder to a government authority to the extent required by law; provided, however, that before the Receiving Party undertakes to so disclose such Information, the Receiving Party agrees to i) give the Furnishing Party advance written notice of such undertaking, ii) make reasonable efforts to secure confidential treatment of such Information by the governmental authority involved, and iii) permit the Furnishing Party to participate in discussions with such governmental authority with regard to such confidential treatment. In the event that efforts to secure confidential treatment are unsuccessful, the Furnishing Party shall have the right, subject to the agreement of the relevant government agency, to revise such Information

to make it non-proprietary or to minimize the loss of its proprietary value.

- 4.9. Each Party agrees that in making this Information available to the other Party, the disclosing Party shall have no obligation to the Receiving Party (1) as to the accuracy, completeness, or usefulness of the information; or (2) that the use of such information does not infringe privately owned rights of third parties.
- 4.10. The limitations on reproduction, disclosure, or use of such Information shall not apply to, and neither Party shall be liable for reproduction, disclosure or use of Information with respect to which any of the following conditions exist:
- (a) If prior to the receipt thereof under this Agreement it has been developed independently by the Party receiving it, or was lawfully known to the Party receiving it, or has been lawfully received from other sources, provided such other source did not receive it due to a breach of this Agreement or a confidential relationship, in all cases, as established by appropriate documentation;
  - (b) If, subsequent to the receipt thereof under this Agreement: (i) it is published by the Party furnishing it or is disclosed by the Party furnishing it to others, without restriction, or (ii) it has been lawfully obtained by the Party receiving it from other sources, provided such other source did not receive it due to a breach of this Agreement or a confidential relationship, or (iii) if such Information otherwise comes from the public knowledge or becomes generally known to the public, or (iv) it is developed independently by the Party receiving it without making use of data disclosed by the other Party;
  - (c) If any part of the Information has been or hereafter shall be disclosed in a patent issued to the Party furnishing the Information hereunder, then, after the issuance of such patent, the limitations on such Information as disclosed in the patent shall be only that afforded by the patent laws of the country in which such patent issues.
- 4.11. The disclosing Party retains all rights, title and interest in and to the Information disclosed hereunder, and the receiving Party agrees to return such

Information upon the reasonable written request of the disclosing Party or to certify as to the destruction of such Information. Neither the execution and delivery of this Agreement, nor the furnishing of any Information by either Party shall be construed as granting to the other Party, either expressly or by implication, any license under any patent, copyright, trade secret, trademark or other proprietary right now or hereafter owned or controlled by the disclosing Party.

#### **ARTICLE 5. — RIGHTS IN INVENTIONS**

- 5.1. The Parties agree that all property rights in inventions developed entirely by employees of one Party during the term of this Agreement that are or may be patentable shall belong exclusively to the Party whose employees were responsible for the invention (i.e., all inventions directed to the \_\_\_\_\_ shall belong exclusively to **TEAM FOLLOWER** and all inventions directed to the \_\_\_\_\_ shall belong exclusively to **TEAM LEADER**).
- 5.2. The Parties agree that **TEAM FOLLOWER** will provide the majority of the design, engineering and manufacturing effort necessary to \_\_\_\_\_ based on the various parameters associated with the System and \_\_\_\_\_. Therefore, all property rights (including all intellectual property rights) in inventions relating to \_\_\_\_\_ shall belong exclusively to **TEAM FOLLOWER**, even in the event that an employee of **TEAM LEADER** contributes as a joint inventor to a \_\_\_\_\_ invention. **TEAM LEADER** agrees to take whatever steps are necessary to assist **TEAM FOLLOWER** in securing and maintaining patent(s) based on \_\_\_\_\_ inventions at no cost to **TEAM FOLLOWER**, both during the term of this Agreement and after this Agreement expires or is terminated.
- 5.3. The Parties agree that **TEAM LEADER** will provide the majority of the design, engineering and manufacturing effort necessary to design and assemble the \_\_\_\_\_ based on the various parameters associated with the System and \_\_\_\_\_. Therefore, all property rights (including all intellectual property rights) in inventions relating to \_\_\_\_\_ shall belong exclu-

sively to **TEAM LEADER**, even in the event that an employee of **TEAM FOLLOWER** contributes as a joint inventor to a \_\_\_\_\_ invention. **TEAM FOLLOWER** agrees to take whatever steps are necessary to assist **TEAM LEADER** in securing and maintaining patent(s) and any other form of intellectual property right based on \_\_\_\_\_ inventions at no cost to **TEAM LEADER**, both during the term of this Agreement and after this Agreement expires or is terminated.

#### **ARTICLE 6. — TERM**

This Agreement will remain in full force and effect for a period of three (3) years from the effective date of this Agreement. This Agreement will renew automatically for one year thereafter and can thereafter be extended upon the mutual consent of both Parties.

Each Party may terminate this Agreement for convenience at any time upon 180 days written notice to the other Party. In the event of such termination:

- (a) If a bid or proposal for work in accordance with this Agreement has been submitted to a customer prior to notice of termination or if work covered by this Agreement has been awarded to the Parties but not completed prior to notice of termination, the Parties shall cooperate to complete any such work in accordance with the terms of this Agreement.
- (b) The Parties shall: (1) except as provided above, discontinue any further activities contemplated by Articles 1, 2, and 3 of this Agreement, and (2) return to disclosing Party any Proprietary Information furnished hereunder. However, each Party may retain those materials necessary to permit such Party to complete and fulfill its obligations in accordance with Paragraph (a) of this Article.

Any contract(s) involving the Parties for the provision of a System shall be governed exclusively by the terms and conditions contained in such contract(s) and in the event of a conflict between the terms of the contract and this Agreement, the terms and conditions set forth in the contract shall take precedence.

The provisions of this Article and Article 4, "Proprietary

and Confidential Information”, and Article 5, “Rights in Inventions”, shall survive the termination or expiration of this Agreement.

#### **ARTICLE 7. — LIABILITIES**

- 7.1. Neither Party shall have any liability to the other for any special, incidental, indirect or consequential damages, including but not limited to cost of capital, or loss of profits or revenue, arising out of or in any manner related to its performance or non-performance of its obligations hereunder, whether such liability is based on contract, tort (including negligence and strict liability) or otherwise.
- 7.2. In the event that a Party breaches this Agreement, such defaulting Party shall be notified in writing by the other Party of such breach. If the defaulting Party fails to cure such breach within a reasonable period of time following receipt of such written notification, the other Party may, at its sole discretion, deem this Agreement terminated for cause and such Party shall have such rights and remedies provided by law, subject to Section 7.1.

#### **ARTICLE 8. — REPRESENTATION**

Each Party represents to the other that it is a corporation duly organized and validly existing in the state or commonwealth indicated in this Agreement. Further, each Party represents that it has full corporate power and authority to enter into this Agreement and to do all things necessary for the performance of the contracts contemplated herein.

#### **ARTICLE 9. — NOTICES**

Any notice, demand or request required or permitted by this Agreement shall be in writing and shall be deemed to have been sufficiently given (i) when personally delivered or faxed or (ii) delivered by Federal Express, or similar courier service, and deemed received within five (5) days of such notice being delivered to the courier service. Such notices shall be addressed as follows:

**TEAM LEADER:**

**TEAM FOLLOWER:**

Either Party may, by notice given as aforesaid, change its address for these notification purposes.

**ARTICLE 10. — PUBLICITY AND NEWS RELEASES**

Any news release, public announcement, advertisement or publicity proposed to be released by either Party concerning the teaming arrangement set forth herein and identifying the other Party in connection with this Agreement or resulting contracts or subcontracts shall be subject to the approval of the other Party prior to release (except as otherwise provided by law), which approval shall not be unreasonably withheld.

**ARTICLE 11. — GOVERNING LAW**

This Agreement will be construed and interpreted in accordance with the laws of the \_\_\_\_\_, excluding its choice of law provisions.

**ARTICLE 12. — ENTIRE AGREEMENT**

This Agreement constitutes the entire understanding and agreement between the Parties with respect to the subject matter hereof and supersedes all prior representations and agreements, verbal or written. This Agreement shall not be amended or modified, nor shall any waiver of any right hereunder be effective unless set forth in a document executed by duly authorized representatives of both Parties. The waiver of any breach of any term, covenant, or condition herein contained shall not be deemed to be a waiver of such term, covenant, or condition for any subsequent breach of the same.

**ARTICLE 13. — ASSIGNMENT**

This Agreement may not be assigned or otherwise transferred by either Party, in whole or in part, without the express written consent of the other Party, which consent will not be unreasonably withheld. The foregoing shall not apply in the event either Party shall change its corporate name or merge with another corporation.

**ARTICLE 14. — DISPUTE RESOLUTION**

All disputes or claims connected with, arising out of or relating to the subject matter of this Agreement shall initially be subject to mediation as described herein, including but not limited to sums due under the Agreement, the interpretation, performance or nonperformance of this Agreement, any claim for damages, a breach or default or validity of the Agreement or its parts, whether such controversies or claims

are in law or equity or include claims based upon contract, statute, tort, fraud, or otherwise.

If a claim or dispute arises, a Party shall provide the other Party written notice thereof, asking for mediation in accordance herewith. Within twenty (20) days after receipt of said notice, the notified Party shall submit to the other Party a written response. The notice and response shall include a statement of the Party's position and a summary of the evidence and arguments supporting its position. The parties shall be represented in the negotiations by at acceptable time and place within thirty (30) days of the date of the notified Party's response and thereafter as often as they reasonably deem necessary to exchange relevant information and to attempt to resolve the dispute.

If the controversy has not been resolved within sixty (60) days after the first meeting, or if the Party receiving said notice will not meet within such thirty (30) days (the failure of which shall not be deemed a breach of this Agreement), either Party may initiate mediation of the controversy or claim in accordance with the American Arbitration Association ("AAA") Commercial Mediation Rules, as may be amended by the AAA and both Parties shall participate therein in good faith. Mediation shall take place in \_\_\_\_\_:

If both Parties elect to forego mediation as provided for herein or if the controversy has not been resolved pursuant to the aforesaid mediation procedures within sixty (60) days of the initiation of such procedures (the failure of which shall not be deemed a breach of this Agreement), the Parties shall then submit the claim exclusively to arbitration in accordance with the rules of the AAA. Arbitration shall take place in \_\_\_\_\_, before a panel of three (3) arbitrators, unless the Parties otherwise agree in writing. The arbitrators shall not have the discretion to compel depositions or unlimited document production. The decision of the arbitrators shall be consistent with the terms and conditions of this Agreement, including, but not limited to the provisions of Section 7.1. The decision of the arbitrators shall be final.

**IN WITNESS WHEREOF**, the Parties hereto have caused this Agreement to be executed by their respective duly authorized representatives effective the day and year first written above.

**TEAM LEADER****TEAM FOLLOWER**

Signature

Signature

Name

Name

Title

Title

**§ 50A:46 Standard government contracts representations and warranties—Mergers and acquisitions**

The following are representations and warranties that can be used in merger and acquisition agreements to address government contract risks. Capitalized terms not defined in the following section must be defined elsewhere in the acquisition agreement in accordance with the typical definition of such terms in such agreements. (See § 50A:38).

Section — Government Contracts.

(a) *Definitions*. For purposes of this Agreement, the following terms have the following definitions:

“Government Contract” shall mean, with respect to any party, any prime contract, subcontract, teaming agreement or arrangement, joint venture, basic ordering agreement, pricing agreement, letter contract, purchase order, delivery order, change order, Government Bid or other arrangement of any kind between or involving such party or any of its subsidiaries and (i) the U.S. Government (acting on its own behalf or on behalf of another country or international organization), (ii) any prime contractor of the U.S. Government or (iii) any subcontractor with respect to any Contract of a type described in clauses (i) or (ii) above.

“Government Bid” shall mean any quotation, bid or proposal submitted to the U.S. Government or any proposed prime contractor or higher-tier subcontractor of the U.S. Government.

“U.S. Government” shall mean the federal government of the United States of America and any of its branches and instrumentalities, including its departments, agencies, bureaus, commissions, boards, courts, corporations, offices, and other entities, and divisions thereof.

(b) *Government Contract Compliance.* Except as set forth on Schedule 2.19(b), with respect to each Government Contract to which Target is or was a party (each, a “Target Government Contract”) and each pending Government Bid submitted by Target (each, a “Target Bid”), (i) Target has complied with all requirements of all Laws, standards or agreements pertaining to such Target Government Contract or Target Bid, including, without limitation, the Cost Accounting Standards, the Truth in Negotiations Act and the False Claims Act; (ii) all representations and certifications executed, acknowledged or set forth in or pertaining to such Target Government Contract or Target Bid were complete and correct as of their effective date and Target has complied with all such representations and certifications; (iii) neither any Governmental Entity nor any prime contractor, subcontractor or other Person has notified Target, either in writing or, to the Knowledge of Target, orally, that Target has breached or violated any Law, certification, representation, clause, provision or requirement pertaining to such Target Government Contract or Target Bid; (iv) no termination for convenience, termination for default, cure notice or show cause notice is currently in effect or has been issued within the past three (3) years pertaining to any such Target Government Contract or Target Bid; (v) other than pursuant to Government Contract requirements for withholding of fees under cost plus fixed fee contracts and labor withholdings under time and materials/labor hour contracts, no money due to Target pertaining to such Target Government Contract or Target Bid has been withheld or set off nor has any claim been made to withhold or set off money, and Target is entitled to all progress payments received with respect thereto; (vi) Target has complied with all of the provisions of such Target Government Contract or Target Bid (including the clauses in General Services Administration multiple award schedule contracts relating to Price Reductions and Commercial Sales Practices); (vii) to the Knowledge of Target, no material cost incurred by Target pertaining to such Target Government Contract or Target Bid has been formally questioned or challenged, is the subject of any investigation or has been disallowed by the U.S. Government; (viii) Target is not a guarantor or otherwise liable

for any liability or obligation (including indebtedness) of any other Person other than Target; (ix) there have not been any requests by any Governmental Entity for a contract price adjustment based on a claimed disallowance by any Governmental Entity or at the direction of any Governmental Entity or written notice of defective pricing; (x) there have not been any claims or equitable adjustments by Target against the U.S. Government or any third party in excess of \$50,000; and (xi) there have not been any written notices challenging, questioning or disallowing any costs.

(c) *Government Investigations.* Except as set forth on Schedule 2.19(c), (i) Target and, to the Knowledge of Target, any of its directors, officers or employees are not under, and at any time during the last five (5) years have not been under, administrative, civil or criminal investigation, indictment or writ of information by any Governmental Entity or any audit or investigation by any Governmental Entity, with respect to any alleged irregularity, misstatement, omission or noncompliance arising under or relating to any Government Contract or Laws applicable to Government Contracts; and (ii) during the last five (5) years, Target has not conducted or initiated any internal investigation or made a voluntary disclosure to any Governmental Entity, with respect to any alleged irregularity, misstatement, omission or noncompliance arising under or relating to any Government Contract or any Law applicable to Government Contracts (including ITAR and ODTC). Except as set forth on Schedule 2.19(c), there exists no irregularity, misstatement, omission or noncompliance arising under or relating to any Government Contract or any Law applicable to Government Contracts that has led or could lead to any of the consequences set forth in clause (i) or (ii) of the immediately preceding sentence or any other damage, penalty assessment, recoupment of payment or disallowance of cost.

(d) *Absence of Claims.* Except as set forth on Schedule 2.19(d), with respect to Target, there exist (i) no outstanding claims against Target, either by any Governmental Entity or by any prime contractor, subcontractor, vendor or other third party, arising under or relating to any Government Contract; and (ii) no disputes between Target and any Governmental Entity under the Contract Disputes

Act or any other federal statute or between Target and any prime contractor, subcontractor or vendor arising under or relating to any Government Contract Target has no interest in any pending or potential claim against any Governmental Entity or any prime contractor, subcontractor or vendor arising under or relating to any Government Contract. Schedule 2.19(d) lists each Target Government Contract which, to the Knowledge of Target, is currently under audit (other than routine audits conducted in the ordinary course of business) by the U.S. Government or any other person that is a party to such Government Contract.

(e) *Eligibility; Systems Compliance.* Except as set forth on Schedule 2.19(e), neither Target nor any of its management has ever been (i) debarred or suspended from participation in the award of Contracts with the United States Department of Defense or any other Governmental Entity (excluding for this purpose ineligibility to bid on certain contracts due to generally applicable bidding requirements) or (ii) subject to any debarment or suspension inquiry. To the Knowledge of Target, there exist no facts or circumstances that would warrant the institution of suspension or debarment proceedings or the finding of nonresponsibility or ineligibility on the part of Target with respect to any prior, current or future Government Contract. No payment or other benefit has been made or conferred by Target or by any Person on behalf of Target in connection with any Government Contract in violation of applicable Laws (including procurement Laws or the U.S. Foreign Corrupt Practices Act). Except as set forth on Schedule 2.19(e), Target's cost accounting, materials management and procurement systems, and the associated entries reflected in the Financial Statements, with respect to the Target Government Contracts and the Target Bids are in compliance in all material respects with all applicable Laws.

(f) *Test and Inspection Results.* Except as set forth on Schedule 2.19(f), all test and inspection results or other reports provided by Target to any Governmental Entity pursuant to any Government Contract or to any other Person pursuant to a Government Contract or as a part of the delivery to the U.S. Government or to any other Person pursuant to a Government Contract for any article, spare

part, apparatus or any intangible (including software and databases) that were designed, developed, engineered or manufactured by Target or any of its' subcontractors, were complete and correct as of the date so provided. Except as set forth on Schedule 2.19(f), Target has provided all test and inspection results to the U.S. Government or to any other Person pursuant to the Target Government Contracts as required by applicable Law and the terms of the applicable Target Government Contract.

(g) *Government Furnished Equipment.* Schedule 2.19(g) hereto, identifies by description or inventory number and contract all equipment and fixtures loaned, bailed or otherwise furnished to or held by Target (or by subcontractors on behalf of Target) by or on behalf of the United States Government as of the date stated therein (said equipment and fixtures are herein referred to as the "GFE"). Target has certified to the U.S. Government in a timely manner that all GFE is in good working order, reasonable wear and tear excepted, and otherwise meets the requirements of the applicable contract. There are no outstanding loss, damage or destruction reports that have been or should have been submitted to any Governmental Entity in respect of any GFE.

(h) *Closed Years; Forward Rates.* Target has reached agreement with the responsible U.S. Government contracting officers and applicable agencies approving and closing all overhead and other costs charged to Target Government Contracts for the years prior to and through December 31, 200\_\_, and those years are closed. Target has submitted to the responsible U.S. Government contracting officers and applicable agencies as to all forward pricing indirect rates to be bid, billed and charged under Target Government Contracts for the years ended December 200\_\_, 200\_\_ and 200\_\_, which such indirect rates have been disclosed to Buyer. In addition, Target has submitted to the responsible U.S. Government contracting officers and applicable agencies incurred cost submissions for the years ended December 200\_\_ and 200\_\_, which such indirect rates have been disclosed to Buyer.

(i) Schedule 2.19(i) hereto, identifies (a) all Target Intellectual Property that was developed, in whole or in part, with full- or partial-funding from a Governmental Entity, including, without limitation, to the United States Govern-

ment, or any agency thereof or in efforts with other entities receiving full- or partial-funding from a Governmental Entity or any agency thereof, and (b) all rights that such Governmental Entity has with respect to the Target Intellectual Property.

**§ 50A:47 Standard government contract special subcontract terms and conditions**

The following special provisions are used to supplement general subcontract terms and conditions in cases where a subcontract procures items that will be used on a U.S. government prime contract. (*See* § 50A:39).

**ADDITIONAL GOVERNMENT PROVISIONS.** If the face of this order indicates that it is placed under a Government prime or higher-tier subcontract or Purchase Order or does not indicate that it is placed under a commercial contract, the following provisions are applicable to this order to the extent provided herein. As used therein, “FAR” shall mean the Federal Acquisition Regulation, “DFARS” shall mean the Department of Defense Supplement to the Federal Acquisition Regulation, “NASA” shall mean the National Aeronautics and Space Administration, “NASAFARS” shall mean the NASA Supplement to the Federal Acquisition Regulations, “DOE” shall mean the Department of Energy, “DEAR” shall mean the DOE Supplement to the Federal Acquisition Regulations, “DOT” shall mean the Department of Transportation, “TAR” shall mean the DOT Supplement to the Federal Acquisition Regulations. Government contract clauses incorporated by reference are those in effect on the date the latest Government prime contract under which this order is issued; however, if Buyer does not enter into a contract with its customer until after the date of this order, such clauses are those in effect on the date of this order and Seller agrees to comply with any revised versions of the Government contract clauses cited that are set forth in Buyer’s contract with its customer. The Government clauses are the FAR and DFARS clauses cited unless the Government contract number on the face of this order indicates that this order is placed under a NASA, DOE or DOT prime or higher-tier subcontract, in which event the FAR and NASAFARS, DEAR or TAR clauses indicated below, respectively, are applicable. In all such clauses, unless otherwise

specified, “this contract” shall mean this order, “Contractor” shall mean Seller, “Contracting Officer” shall mean Buyer, “Government” shall include Buyer to the extent necessary to enable Buyer to administer this order and to perform its obligations under its Government prime contract or higher-tier subcontract, and “subcontract(s)” and “subcontractor(s)” shall mean Seller’s lower-tier subcontract(s) and subcontractor(s), respectively.

**A. COMMERCIAL ITEM/SERVICES PROCUREMENTS.** If the items and/or services being procured under this order meet the definition of commercial item found in FAR 2.101, then only the following FAR clauses will apply to this order:

<u>CLAUSE TITLE</u>	<u>FAR REF- ERENCE</u>	<u>APPLICABILITY</u>
Equal Opportunity	52.222-26	All
Equal Opportunity for Veterans	52.222-35	If value of this order is \$10,000 or more
Affirmative Action for Workers with Disabilities	52.222-36	If value of this order is \$10,000 or more. Paragraph (b) (2) is revised to delete “and provided by or through the Contracting Officer” and insert “and provided upon request by the Contracting Officer through the Buyer’s Purchasing Representative”.
Buy American Act — Supplies	52.225-1	All orders where the items being procured will be delivered as end items to the U.S. Government

<u>CLAUSE TITLE</u>	<u>FAR REF- ERENCE</u>	<u>APPLICABILITY</u>
Trade Agreements	52.225-5	All orders where the items being procured will be delivered as end items to the U.S. Government
Protest After Award	52.233-3	All; Substitute "Buyer" for "Contracting Officer" and "Government" and "Seller" for "Contractor"
Subcontracts for Commercial Items and Commercial Components	52.244-6	All
Preference for Privately Owned U.S.-Flag Commercial Vessels	52.247-64	All

**B. GOVERNMENT CONTRACT CLAUSES.**

1. The following FAR Provisions are incorporated herein by reference as applicable unless otherwise stated on the face of this purchase order:

Covenant Against Contingent Fees	52.203-5	All
Restrictions on Subcontractor Sales to the Government	52.203-6	If value of this order is \$100,000 or more, subject to Article 2 of the General Provisions of this order.

Anti-Kickback Procedures	52.203-7	If value of this order is \$100,000 or more, except that paragraph (c) (2) is amended by adding the following sentence: "Unless otherwise prohibited by law, Seller shall notify Buyer's Purchasing Representative whenever such a report has been made." and by revising paragraph (c) (4) by deleting "The Contracting Officer may" and inserting "To the extent that the Contracting Officer has effected an offset at the prime contract level or has directed the Buyer to withhold any sum from the Seller, Buyer may".
Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions	52.203-11	If value of this order is \$100,000 or more
Limitation on Payments to Influence Certain Federal Transactions	52.203-12	If value of this order is \$100,000 or more
Security Requirements	52. 204-2	If this order involves access to classified information

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Protecting the Government's Interest When Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment	52.209-6	If value of this order is \$25,000 or more
Material Requirements	52.211-5	All
Defense Priority and Allocation Requirements	52.211-15	If this order is placed under a DoD prime or subcontract.
Audit and Records—Negotiation	52.215-2	If one of the following are present: (1) That are cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable type or any combination of these; (2) For which cost or pricing data are required; or (3) That require the seller to furnish reports as discussed in paragraph (e) of this clause.
Integrity of Unit Prices	52.215-14	Not applicable to commercial items.
Pension Adjustments and Asset Reversions	Alternate 1 52.215-15	Only applicable if cost and pricing data are required or for which any pre-award or post-award cost determinations will be subject to FAR Part 31.

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Waiver of Facilities Capital Cost of Money	52.215-17	All
Reversion or Adjustment of Plans for Post Retirement Benefits (PRB) Other Than Pensions Notification of Ownership Changes	52.215-18 52.215-19	Only applicable if cost and pricing data are required or for which any pre-award or post- award cost determinations will be subject to FAR Part 31 All
Utilization of Small Business Concerns	52.219-8	All
Small Business Subcontracting Plan	52.219-9	If value of this order is \$500,000 or more and order is placed with a Large Business as defined in FAR Part 19
Contract Work Hours and Safety Standards — Overtime Compensation	52.222-4	All
Walsh-Healey Public Contracts Act	52.222-20	If value of this order is \$10,000 or more
Prohibition of Segregated Facilities	52.222-21	If value of this order is \$10,000 or more
Equal Opportunity	52.222-26	All
Affirmative Action for Disabled Veterans and Veterans of the Vietnam Era	52.222-35	If value of this order is \$10,000 or more
Affirmative Action for Workers with Disabilities	52.222-36	If value of this order is \$10,000 or more
Employment Reports Veterans	52.222-37	If value of this order is \$10,000 or more

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Hazardous Material Identification and Material Safety Data	52.223-3 & ALTERNATE I	All
Notice of Radioactive Materials	52.223-7	All
Toxic Chemical Release Reporting	52.223-14	All
Privacy Act	52.224-2	If this order involves the design, development, or operation of a system of records on individuals.
Buy American Act — Supplies	52.225-1	All orders where the items being procured will be delivered as end items to the U.S. Government
Buy American Act — Free Trade Agreements — Israeli Trade Act	52.225-3	All
Trade Agreements	52.225-5	All
Duty Free Entry	52.225-8	If value of this order is \$100,000 or more
Restrictions on Certain foreign Purchases	52.225-13	All
Utilization of Indian Organizations and Indian-Owned Economic Enterprises	52.226-1	Only applicable if a subcontracting plan has been submitted under FAR 52.219-9, but other than paragraph g thereof.

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Authorization and Consent	52.227-1	If this clause is included in the prime or lower tier contract under which this order is a subcontract.
Notice and Assistance Regarding Patent and Copyright Infringement	52.227-2	If value of this order is \$100,000 or more
Refund of Royalties	52.227-9	If amount of royalties reported by Seller during negotiations exceeds \$250.
Filing of Patent Applications -Classified Subject Matter	52.227-10	All
Rights in Data-General	52.227-14	If this order is placed under a Government contract or subcontract other than DoD contracts and subcontracts.
Additional Data Requirements	52.227-16	If this order is placed under a Government contract or subcontract other than DoD, NASA or DOE contracts and subcontracts.
Commercial Computer Software License	52.227-19	If this order is placed under a Government-Restricted Rights contract or subcontract other than DoD contracts and subcontracts.

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Workers' Compensation Insurance (Defense Base Act)	52.228-3	If this order is to be performed outside the United States
Workers' Compensation and War-Hazard Insurance Overseas	52.228-4	If this order is to be performed outside the United States
Insurance-Work on a Government Installation	52.228-5	If this order involves work on a Government installation.
Federal, State, and Local Taxes	52.229-3	All
Interest	52.232-17	All
Protest After Award	52.233-3	All
Restrictions on Severance Payments to Foreign Nationals	52.237-8	If this order is to be performed outside the United States
Stop-Work Order	52.242-15	All
Government Delay of Work	52.242-17	All
Changes — Fixed Price	52.243-1	All
Change Order Accounting	52.243-6	All
Notification of Changes	52.243-7	If value of this order is \$1,000,000 or more
Subcontracts for Commercial Items and Commercial Components	52.244-6	All
Government Property (Fixed-Price Contracts)	52.245-2	All
Inspection of Supplies — Fixed Price	52.246-2	All
Responsibility for Supplies	52.246-16	All
Preference for U.S.-Flag Air Carriers	52.247-63	All

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Preference For Privately Owned U.S.-Flag Commercial Vessels	52.247-64 & 1	All ALTERNATE
Value Engineering	52.248-1	If value of this order is \$100,000 or more
Termination for Convenience	52.249-2	All
Default (Fixed-Price Supply and Service)	52.249-8	All

2. In addition, the following DFARs clauses are incorporated herein by reference as applicable if the face of this order indicates it is placed under a prime or lower tier contract with a component of the Department of Defense, or indicates that it is placed under a U. S. Government prime or lower tier contract and does not identify the Government agency which issued the prime contract:

Prohibition on Persons Convicted of Fraud or Other Defense-Contract-Related Felonies	252.203-7001	If value of this order is \$100,000 or more
Disclosure of Information	252.204-7000	All
Control of Government Personnel Work Product	252.204-7003	All
Acquisition Streamlining	252.211-7000	All
Item Identification and Valuation	252.211-7003	All
Pricing Adjustments	252.215-7000	All
Small Business Subcontracting Plan (DoD contracts)	252-219-7003	If value of this order is \$500,000 or more and order is placed with a Large Business as defined in FAR Part 19
Safety Precautions for Ammunition and Explosives	252.223-7002	If the subcontract involves ammunition or explosives

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Prohibition on Storage and Disposal of Toxic and Hazardous Materials	252.223-7006	All
Buy American Act and Balance of Payments Program	252.225-7001	In lieu of FAR 52.225-1. if clause would otherwise apply
Qualifying Country Sources as Subcontractors	252.225-7002	All
Reporting of Contract Performance Outside the United States and Canada	252.225-7004	Applicable only if the Order exceeds \$500,000 and is not for commercial items, construction, ores, natural gas, utilities, petroleum products and crudes, timber (logs) or subsistence.
Quarterly Reporting of Actual Performance Outside the United States	252.225-7006	All
Restriction on Acquisition of Certain Articles Containing Specialty Metals	252.225-7009	All
Commercial Derivative Military Article—Specialty Metals Compliance Certificate	252.225-7010	All
Preference for Certain Domestic Commodities	252.225-7012	All

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Duty-Free Entry	252.225-7013	All subcontracts for qualifying country components or nonqualifying country components for which Seller estimates that duty will exceed \$200 per unit
Preference for Domestic Hand Or Measuring Tools	252.225-7015	If hand or measuring tools will be delivered under this order
Trade Agreements	252.225-7021	All
Trade Agreements Certificate — Inclusion of Iraqi End Products	252.225-7022	If products contain Polyacrylonitrile Carbon Fibers
Requirement for Products or Services from Iraq or Afghanistan	252.225-7024	If products contain Night Vision Intensifier Tubes and Devices
Restriction on Acquisition of Forgings	252.225-7025	All
Acquisition Restricted to Products or Services from Iraq or Afghanistan.	252.225-7026	If value of this order is \$500,000 or more and Buyer advises Seller that this is a first tier subcontract
Exclusionary Policies and Practices of Foreign Governments	252.225-7028	All
Buy American Act — Free Trade Agreements — Balance of Payments Program	252.225-7036	All

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Utilization of Indian Organizations, Indian-Owned Enterprises, and Native Hawaiian Small Business Concerns	252.226-7001	If the Order exceeds \$500,000
Rights in Technical Data-Noncommercial Items	252.227-7013	If this order includes delivery of technical data for a noncommercial item, component or process
Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation	252.227-7014	If this order includes delivery of noncommercial software and related data
Technical Data-Commercial Items	252.227-7015	If this order includes delivery of technical data for a commercial item, component, or process
Rights in Bid or Proposal Information	252.227-7016	All
Identification and Assertion of Use, Release, or Disclosure Restrictions	252.227-7017	If this order includes delivery of technical data or software
Validation of Asserted Restrictions-Computer Software	252.227-7019	If this order includes delivery of software
Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends	252.227-7025	If this order includes delivery of technical data or software
Deferred Delivery of Technical Data or Computer Software	252.227-7026	If this order includes delivery of technical data or software

## GOVERNMENT CONTRACTS

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Deferred Ordering of Technical Data or Computer Software	252.227-7027	If this order includes delivery of technical data or software
Technical Data or Computer Software Previously Delivered to the Government	252.227-7028	If this order includes delivery of technical data or software
Technical Data — Withholding of Payment	252.227-7030	If this order includes delivery of technical data or software
Validation of Restrictive Markings on Technical Data	252.227-7037	If this order includes delivery of technical data
Accident Reporting and Investigation Involving Aircraft, Missiles, and Space Launch Vehicles	252.228-7005	All
Supplemental Cost Principles	252.231-7000	All
Frequency Authorization	252.235-7003	If radio frequency authorization required
Material Management and Accounting System	252.242-7004	If Seller meets the requirements of this clause
Pricing of Contract Modifications	252.243-7001	All
Requests of Equitable Adjustment	252.243-7002	All
Subcontracts for Commercial Items and Commercial Components	252.244-7000	All
Warranty of Data	252.246-7001	All
Transportation of Supplies by Sea	252.247-7023	If value of this order is \$100,000 or more
Notification of Transportation of Supplies by Sea	252.247-7024	If value of this order is \$100,000 or more

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SUCCESSFUL PARTNERING

Notification of Anticipated Contract Termination or Reduction	252.249-7002	All
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3. In addition, if this order is placed under a prime or lower tier contract with NASA, the following NASAFARs clauses are incorporated herein by reference as applicable unless otherwise provided on the face of this order:

Use of Rural Area Small Businesses	1852.219-74	All
Safety and Health	1852.223-70	If value of this order is \$1,000,000 or more or this order involves the use of hazardous materials or operations.
Frequency Authorization	1852.223-71	All
Rights in Data-General	1852.227-14	If this order includes delivery of technical data or software.
Commercial Computer Software-Restricted Rights	1852.227-19	If this order includes delivery of technical data or software.
Engineering Change Proposals	1852.243-70	All
Geographic Participation in the Aerospace Program	1852.244-70	If value of this order is \$100,000 or more
Financial Reporting of NASA Property in the Custody of Contractors	1852.245-73	All

4. In addition, if this order is placed under a prime or lower tier contract with DOE, the following DEAR clauses are incorporated herein by reference as applicable unless otherwise provided on the face of this order:

Security Requirements	952.204-2	All
Classification/Declassification	952.204-70	All

Sensitive Foreign Nations Controls	952.204-71	All
Printing	952.208-70	All
Organizational Conflicts of Interest	952.209-72	If value of this order is \$100,000 or more and involves performance of advisory and assistance services per FAR 37.201.
Priorities and allocations for energy programs (solicitations)	952.211-70 ALTERNATE I	If this order is in support of an authorized DOE atomic energy program.
Priorities and Allocations for Energy Programs (Contracts)	952.211-71	If this order is in support of a program to maximize the domestic energy reserves.
Government Property (Fixed Price Contracts)	952.245-2	All

5. In addition, if this order is placed under a prime or lower tier contract with DOT, the following TAR clauses are incorporated herein by reference as applicable unless otherwise provided on the face of this order:

Accident and Fire Reporting 1252.223-71 All

**C. SPECIAL LABOR PROVISIONS.** The following clauses are incorporated herein by reference to the extent they are included in Buyer's prime or higher-tier subcontract under which this order is placed:

1. Service Contract Act of 1965, as Amended, FAR 52.222-41. As used therein, "Contractor" shall mean Seller except in the term "Government Prime Contractor".

2. Contract Work Hours and Safety Standards Act — Overtime compensation — FAR 52.222-4. As used therein, "Contractor" shall mean Seller except in the term "Prime

Contractor. “Buyer reserves the right to withhold out of monies payable to Seller an amount equal to that withheld by the Contracting Officer under the Buyer’s prime or higher-tier subcontract pursuant to the “Withholding of Funds” clause for any liabilities, acts or omissions of Seller or its subcontractor(s).

**D. COST OR PRICING DATA.** If the Seller is required to furnish a Certificate of Current Cost or Pricing Data substantially in conformance with the form prescribed in FAR Subsection 15.406-2 in connection with the pricing of this order or any change thereto or modification thereof, the following FAR clauses are incorporated herein by reference: Price Reduction for Defective Cost or Pricing Data, FAR 52.215-10; Price Reduction for Defective Cost or Pricing Data—Modifications, FAR 52.215-11; Subcontractor Cost or Pricing Data, FAR 52.215-12; Subcontractor Cost or Pricing Data—Modifications, FAR 52.215-13.

In addition, upon request by Buyer’s personnel, Seller agrees to disclose complete, accurate and current cost or pricing data to Buyer in support and prior to the conclusion of Buyer’s negotiations with the U.S. Government if this order is issued under a U.S. Government prime contract and the Truth In Negotiations Act requires disclosure of Seller’s cost or pricing data prior to the agreement on the order without regard to the date on which Seller and Buyer enter into this order.

Seller agrees to furnish and require its lower-tier subcontractors to furnish cost or pricing data as defined in Table 15-2 of FAR 15.408, or other form prescribed by Buyer, and a Certificate of Current Cost or Pricing Data substantially in conformance with the form set forth in FAR Subsection 15.406-2 in connection with the pricing of any change to or modification of this order if required by Buyer. Seller agrees to indemnify and hold Buyer harmless from and against any loss or damage Buyer may incur which arises out of or results from any failure of Seller or Seller’s actual or prospective subcontractors or vendors, at whatever level, to comply with any of the foregoing provisions.

**E. COST ACCOUNTING STANDARDS.** Unless the face of this order indicates it is exempt from Cost Accounting Standards provisions, the following provisions apply:

1. Seller shall comply with the provisions of FAR clause

52.230-2 “Cost Accounting Standards,” (excluding subparagraph (b) thereof), hereby incorporated herein by reference or, if the face of this order so indicates, FAR clause 52.230-3, “Disclosure and Consistency of Cost Accounting Practices,” (excluding subparagraph (b) thereof), hereby incorporated herein by reference; provided, however, that, in lieu of submission of a Disclosure Statement to Buyer as may be required by either of said clauses, Seller may, as appropriate, submit a Certificate of Previously Submitted Disclosure Statement or a Certificate of Submittal of Disclosure Statement Containing Privileged Information as contained in Buyer’s form approved for that purpose.

2. Seller shall comply with the provisions of FAR clause 52.230-6 “Administration of Cost Accounting Standards”, hereby incorporated herein by reference.

3. As used herein and in the clauses incorporated herein by reference, the Cost Accounting Standards applicable shall be those in effect on the date of this order or the date of final agreement on price as shown on Seller’s “Certificate of Current Cost or Pricing Data”, if applicable.

4. In the event the Government Contracting Officer of the prime contract under which this order is issued determines that the Government incurred any increased costs under the prime contract because Seller or a lower-tier subcontractor failed to comply with an applicable Cost Accounting Standard, rule or regulation of the Cost Accounting Standards Board or any other provision of this Cost Accounting Standards clause, and, as a result, the prime contract price or the price of this order is reduced pursuant to the Cost Accounting Standards clause in the prime contract, or, where the prime contract is on other than a firm fixed price basis, if the price of this order is disallowed in whole or in part, then the price of this order shall be appropriately reduced and this order shall be modified in writing as may be necessary to reflect such reduction.

5. Seller agrees to indemnify and save Buyer harmless from and against any loss, damage, liability or expenses caused by any failure of Seller or Seller’s lower-tier subcontractors or vendors to comply with any of the foregoing provisions.

**F. PATENT CLAUSES.** If this order contemplates or has as one of its purposes experimental developmental,

research, design, or engineering work, the following clauses set forth in the indicated Subsections of the FAR and the NASAFARS are, to the extent that such clauses are included in Buyer's prime or lower tier subcontract under which this order is placed, incorporated herein by reference: Patent Rights — Ownership by the Government, FAR 52.227-13; Patent Rights—Ownership by the Contractor, FAR 52.227-11; New Technology, NASAFARS 1852.227-70; Patent Rights — Retention by the Contractor (Short Form), NASAFARS 1852.227-11; Designation of New Technology Representative and Patent Representative, NASAFARS 1852.227-72.

**G. CLEAN AIR AND WATER.** Seller shall comply with the provisions of the Clean Air Act if value of this order is \$100,000 or more, or is of indefinite quantity and expected to be \$100,000 or more, or if Seller's facility to be used in connection with this order has been the subject of a conviction under the Clean Air Act (42 U.S.C.A. § 7413 (c)(1)) or the Federal Water Pollution Control Act (33 U.S.C.A. 1319 (c)) and is listed by the EPA, or this order is not otherwise exempt. Seller agrees to indemnify and hold Buyer harmless to the full extent of any loss, damage or expense (including reasonable attorneys' fees), or liability resulting from any failure of the Seller or his lower tier subcontractors to comply therewith.

**H. CERTIFICATION OF CLAIMS.** Seller shall provide a certification of any claim or request for adjustment submitted by it that forms the basis of a claim or request for adjustment submitted to the Government or Buyer's customer by the Buyer. Seller's certification shall be in the form and signed by the appropriate official of the Seller as set forth in the "Disputes" clause, FAR 52.233-1, as directed by the Buyer. Seller shall provide such certification upon request by the Buyer for any such claim or request for adjustment regardless of the value thereof. Seller shall indemnify and hold harmless the Buyer for any liability or reduction in Buyer's claim or request for adjustment to its customer resulting from any false or fraudulent statement or certification submitted by Seller in connection with this order.

**I. PROCUREMENT CERTIFICATIONS**

1. By acceptance and performance of this order, Seller shall submit the certification required in paragraph (b) of FAR 52.203-11, "Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions", for all procurements valued at \$100,000 or more.

2. By acceptance and performance of this order, Seller certifies that, except as previously disclosed in writing to Buyer's Purchasing Representative executing this order, neither Seller or its principals is presently debarred, suspended, or under consideration for debarment by the Federal Government (reference FAR 52.209-5).

3. If any of the above certifications shall cease to be correct and accurate at any time during performance of this order, Seller shall immediately notify the Buyer's Purchasing Representative having cognizance over this order. Seller agrees that any failure to accurately certify, or any adverse change in such certification shall be grounds for terminating this order for Seller's default. Seller agrees to indemnify and hold harmless Buyer for any losses, damages, fines or penalties imposed as the result of any of the above certifications being false.

**J. APPLICABILITY OF FEDERAL PROCUREMENT LAW.** This order shall be governed by and construed in accordance with the laws of U.S. Government contracts as set forth by statute and applicable regulations, and by decisions by appropriate courts and Boards of Contract Appeals. To the extent that the laws referred to in the foregoing sentence is not determinative of an issue arising out of the provisions of this order, recourse shall be the law of the state wherein Buyer's place of business issuing this order is located.

