

# PRATT'S GOVERNMENT CONTRACTING LAW REPORT

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# Are You a New U.S. Government Contractor? Here Are Answers to Frequently Asked Questions

*By Gail D. Zirkelbach, Peter J. Eyre, William B. O'Reilly,  
and Zachary Schroeder\**

*This article provides answers to frequently asked questions to address many of the common issues faced by federal government contractors today.*

Contracting with the federal government has always presented potentially lucrative opportunities for companies willing to comply with some of the unique requirements that the government imposes. In fact, despite widespread economic hardships resulting from the COVID-19 pandemic, federal contracting spend actually rose by nearly \$100 billion in fiscal year 2020 for a total of \$681 billion, with \$144 billion going to small businesses. This trend is expected to continue as a result of President Biden's March 11, 2021 signing of the \$1.9 trillion American Rescue Plan ("ARP"), which will increase government contracting (at the federal, state, and local levels) spend in 2021 and beyond.

Specifically, the ARP allocates more than \$100 billion in new funding to rapidly deploy new contracting solutions to procure goods and services necessary to facilitate America's recovery. As part of the Biden Administration's "National Strategy for the COVID-19 Response and Pandemic Preparedness,"<sup>1</sup> the ARP leverages the Defense Production Act ("DPA") to fill shortfalls of "all the necessary equipment and material to accelerate the manufacture, delivery, and administration of COVID-19 vaccine." This will lead to increased opportunities in everything from cloud computing to nitrile gloves and cotton swabs and will make the federal contracting space more attractive than ever for businesses looking to break into the sector.

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<sup>1</sup> <https://www.whitehouse.gov/wp-content/uploads/2021/01/National-Strategy-for-the-COVID-19-Response-and-Pandemic-Preparedness.pdf>.

In an effort to facilitate entry into what can otherwise be viewed as a daunting web of regulations and restrictions, this article provides answers to frequently asked questions (“FAQs”) to address many of the common issues faced by federal government contractors today.

### **1. WHY BECOME A GOVERNMENT CONTRACTOR?**

The U.S. government (“USG”) is the world’s largest single consumer, estimated to have spent approximately \$681 billion for products and services in fiscal year 2020, and federal government spend has increased approximately nine percent every year since 2016. Any company that provides services or supplies to the USG directly or as a subcontractor is considered a government contractor.

### **2. HOW DOES THE USG PURCHASE GOODS AND SERVICES?**

The USG enters into contracts to purchase all manner of products and services, from complex weapons systems like fighter jets and submarines to standard consumer products like printers, staplers and medical supplies. The USG typically publicizes contracting opportunities on its government-wide point of entry (“GPE”).<sup>2</sup> These opportunities may be awarded pursuant to various competitive methods such as sealed bidding or negotiations.

However, in emergency situations, the USG may also issue a contract without any competition.

### **3. HAS THE PANDEMIC EASED ENTRY FOR NEW CONTRACTORS?**

In a sense, yes. In the wake of the pandemic, the executive branch delegated authority to the Department of Health and Human Services (“HHS”) and Department of Homeland Security (“DHS”) under Title III of the DPA to respond to the spread of COVID-19 through means including restricted contract solicitations, stockpiling, and the provision of various incentives, such as loans to private businesses, purchase commitments, and contracts for the development of production capabilities.

These measures have reduced or eliminated some of the traditional barriers to entry, such as unreasonably long procurement processes and uncertain purchase commitments.

### **4. WHAT TERMS AND CONDITIONS APPLY TO USG CONTRACTS?**

USG contracts are governed generally by the Federal Acquisition Regulation (“FAR”). The FAR is the set of regulations that governs how the USG buys

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<sup>2</sup> Available at <https://beta.sam.gov/>.

goods and services. It includes the government's standard contract clauses and prescribes when those clauses must be included in contracts, based on what is being purchased (e.g., supplies or services), and the type of contract (firm fixed price, time and materials, etc. (*see* FAQ 5, below)). When purchasing "commercial items" as defined by the FAR (generally, products and services that are offered for sale to the general public), such as industrial masks, the USG is able to engage in a streamlined contracting process that is designed to reflect commercial sector contract terms and that includes a limited number of FAR clauses in the contract.

However, even "commercial item" government contracts include clauses that are not generally found in commercial sector contracts, such as a clause giving the USG the right to terminate the contract for its convenience, or requiring that the products provided to the USG meet certain domestic preference requirements (*see* FAQ 8, below), among others.

In addition, certain common commercial sector clauses contained in typical terms and conditions may not be accepted by the USG, such as automatic renewals, arbitration clauses, clauses requiring the USG to indemnify the contractor, or clauses allowing the contractor to terminate the contract.

## **5. WHAT ARE THE DIFFERENT TYPES OF GOVERNMENT CONTRACTS?**

The requirements that apply to government contracts will largely depend on the type of contract issued. The most common type of contracts are:

- *Fixed-Price Contracts.* Fixed-price types of contracts provide for a firm price, or, in appropriate cases, an adjustable price corresponding to a specific deliverable or scope of work. Fixed-price contracts providing for an adjustable price may include a ceiling price, a target price (including target cost), or both.
- *Time and Materials Contracts.* A time and materials ("T&M") contract allows the USG to buy supplies or services on the basis of direct labor hours at specified fixed hourly rates (that include wages, overhead, profit and general and administrative expenses) plus actual material or travel costs.
- *Cost-Reimbursement Contracts.* Cost-reimbursement type contracts are those in which the contractor is reimbursed for the actual, allowable costs of performing the contract, plus an agreed upon profit. These contracts establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed (except at its own risk) without the approval of the contracting officer. Cost-reimbursement contracts are generally used only when uncertain-

ties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract.

As a general matter, the contract type will determine which government contracts cost and pricing requirements will apply to the contract. Typically, “commercial item” or fixed-price contracts require the least cost or pricing requirements, followed by T&M contracts.

Cost-reimbursement contracts typically impose the most onerous cost and pricing requirements, such as the requirement for the contractor to provide certified cost or pricing data and to provide the USG extensive audit rights.

## **6. WHAT IS AN OTA?**

Certain agencies, including the Department of Defense (“DoD”), have other transaction authority (“OTA”), which allows these agencies to develop agreements that are not required to follow a standard format or include terms and conditions that are typically required when using traditional government contracting mechanisms (e.g., no FAR clauses).

Agreements entered into under the OTA authority may be tailored to meet the specific situation; for example, OTA agreements may include various funding arrangements or may be nonreimbursable, where each party bears the costs of their participation and funds are not exchanged.

In addition, the length of an OTA agreement is also negotiable, with some agreements lasting a few days and others for years. Most agencies have limitations on their OTAs, although the extent and type of limitations or requirements vary by agency. Typically, OTA agreements are used for research and development projects.

## **7. WHAT TYPES OF REPRESENTATIONS ARE GOVERNMENT CONTRACTORS REQUIRED TO MAKE?**

Government contractors are required to make certain representations and certifications related to their business ethics and corporate citizenship when bidding on contracts, including:

- Whether the company and/or any of its principals have within a three-year period been convicted for or had a civil judgment rendered against them for such things as violation of certain antitrust statutes or the commission of a number of crimes;
- Whether the company and/or any of its principals have been notified of any delinquent Federal taxes;
- Whether the company has internal confidential agreements prohibiting

employees from lawfully reporting waste, fraud, or abuse related to a government contract; and

- Whether the company has been in compliance with affirmative action requirements.

Companies can make these representations on a contract-by-contract basis, or rely on the representations and certifications made on its System for Award Management (“SAM”) registration, available at SAM.gov (*see* FAQ 16, below).

## **8. WHAT DOMESTIC PREFERENCE AND SOURCING REQUIREMENTS APPLY TO GOODS SOLD TO THE USG?**

There are a variety of domestic preference and sourcing requirements that may apply to the USG’s purchase of products. In many cases, a contract for products will include a requirement that the goods be either domestically manufactured or sourced from certain eligible countries (e.g., “designated countries” or, for DoD procurements, “qualifying countries”).

Although the specific rule that applies to each individual contract will depend on factors such as the agency issuing the contract, the type of goods being sold, and the value of the contract, as a general matter, products made entirely in countries such as China, India, Malaysia, and Vietnam are not likely to be acceptable to fulfill a government contract, unless an exemption applies or a waiver is obtained.

## **9. DOES THE USG GET OWNERSHIP OF INTELLECTUAL PROPERTY?**

As a general matter, the USG will receive certain license rights to a contractor’s intellectual property (e.g., technical data, software, patents), although the contractor typically retains ownership in the intellectual property. In government contracts for “commercial items,” as defined by FAR 2.101, the USG typically obtains only those rights in technical data pertaining to commercial items and in commercial computer software that are customarily granted to the contractor’s commercial customers, although the USG may include additional contract clauses that allow for a greater use of the technical data or computer software.

For noncommercial technical data and computer software, the contractor retains title to technical data and computer software, and the government obtains a license to use and/or disclose that technical data and computer software.

However, where the USG pays for the development of an item, component, process, or software under a government contract or subcontract there is a significant risk that the government will be entitled to broad rights to the

associated technical data and/or computer software. Government regulations regarding the rights to technical data and computer software can be complex.

An act as seemingly innocuous as accepting a contract to develop a minor modification to an existing commercial product developed by the contractor, or failing to use the appropriate restrictive legend in delivering data to the government, can have the unintended consequence of granting the USG broad rights in the associated technical data and/or computer software.

## **10. WHEN DO CONTRACTORS BECOME SUBJECT TO FEDERAL GOVERNMENT CONTRACTING REQUIREMENTS?**

A company does not become subject to government contracting requirements until it accepts and begins to perform government contracts, either as a prime contractor or subcontractor. While contractors are generally expected to be in compliance with all contract terms and conditions on day one, contracting officers, the government officials responsible for administering government contracts, have some discretion to allow contractors time to comply with certain clauses.

This discretion is not generally applicable to all clauses, particularly those dealing with information security, cost/pricing matters, and contract deliverables.

Also, in limited cases, certain requirements have specific deadlines—for example, by regulation, a contractor has 120 days to become compliant with the affirmative action obligations.

As a best practice, companies who are seeking to enter the government contracts marketplace should start preparing to be compliant with the key government contracts requirements when they start bidding on government contracts.

## **11. WHAT REQUIREMENTS COULD BE POTENTIALLY MOST PROBLEMATIC FOR NEW CONTRACTORS?**

Becoming a compliant government contractor requires numerous steps to be taken in a coordinated sequence. At a high level, companies will need an ethics and compliance program that addresses certain minimum requirements, including controls to monitor and identify fraud, waste, and abuse in connection with a government contract, as well as a gifts, gratuities, and business courtesies policy that meets the government's rules (which prohibit activities that are considered standard business practices in a non-government context), among other things.

In addition, companies should have a proposal, contract review and administration process to adequately validate compliance with product speci-

fications and requirements when responding to a solicitation and vet the terms and conditions to ensure that the company is accepting only applicable FAR clauses.

The USG is entitled to “strict compliance” with the technical requirements of the contract, including specifications and compliance with labor categories and qualifications. In that regard, it does not matter that services or supplies delivered by the contractor are equal or even superior to those described in the contract specifications. When dealing with the government, strict compliance means exactly that, and there may be serious consequences, including allegations of product substitution and fraud, for noncompliance.

## **12. WHAT ARE THE AFFIRMATIVE ACTION REQUIREMENTS AND WHAT STEPS DO COMPANIES NEED TO TAKE TO COMPLY?**

Affirmative action requirements are governed by executive order, laws, and their implementing regulations, and apply to all prime contractors and all tiers of subcontractors that enter into a contract for goods or services that is expected to be \$50,000 or more per year (\$150,000 for veterans obligations). The purpose of these laws and regulations is to prevent discrimination in employment decisions based on race, color, religion, sex, sexual orientation, gender identity, national origin, individuals with disabilities and veterans.

Government contractors, regardless of whether they serve as a prime or subcontractor, will be expected to develop and implement the processes, procedures and data collection and tracking mechanisms necessary to comply with affirmative action obligations within the first 120 days of entering into a contract for goods or services that exceed the above-referenced thresholds.

## **13. WHAT ARE THE RISKS OF BECOMING A GOVERNMENT CONTRACTOR?**

Government contractors are subject to a broad range of USG laws, regulations, and contracting requirements. The consequences of failing to comply range from criminal fines and imprisonment (most notably with respect to bribery, gift, and gratuity rules) to civil fines, contract cancellation or termination, negative past performance reviews and debarment from receiving future government contracting opportunities. The penalties and sanctions for improper activity can apply with equal force to both the company and to individual employees acting on behalf of the company.

Individual liability may arise for:

- The individual employee who signs certifications to the USG;
- Individual employees who fail to follow required procedures (e.g.,

offering items of value to government employees); or

- Senior leadership if the company is found to be acting recklessly (e.g., if a company fails to investigate reports of non-compliances with government contracting requirements thereby allowing bad acts to continue).

The civil False Claims Act (“FCA”) is the USG’s principal procurement anti-fraud mechanism. The FCA provides for treble damages plus penalties (generally up to an additional \$21,000 per claim) for the submission of false claims by either a prime contractor or subcontractor to any federal agency or entity using federal funds to pay the claims. Damages can be calculated based on the entire value of the contract even in circumstances in which the contractor has fully performed the contract.

Importantly, the FCA has a low intent threshold—it does not require actual knowledge of the fraud or falsity for liability to exist. Acting in deliberate ignorance, or in reckless disregard, of the truth or falsity of information is sufficient, and recent case law has confirmed that the government can prove recklessness by showing that the contractor lacked appropriate internal controls.

Thus, a company can be subject to potential FCA liability if it makes false submissions to the USG, such as false certifications on SAM; false certifications of compliance with product or testing specifications; and implied certifications (i.e., company fails to disclose that it violated requirements that may affect its eligibility for payment).

To monitor contractor compliance with the policies and procedures discussed above, USG agencies have an Office of the Inspector General (“OIG”) which possesses broad investigatory and audit authority. To support OIGs in their mission, USG contracts typically require contractors to provide access to certain types of books and records that may either be maintained as a requirement of the contract or generated in the ordinary course of business. OIGs regularly exercise their authority to perform both randomized compliance reviews as well as investigations into specific allegations of wrongdoing.

#### **14. DO THE SAME REQUIREMENTS APPLY TO SUBCONTRACTORS?**

Although only the prime contractor has privity with the USG, government contracts include certain FAR and other contract clauses that may be required to be flowed down to any subcontractors supporting the USG prime contract. Any agreement that is entered into in direct support of a prime contractor is generally considered a “subcontract” for these purposes, even though it may be called a purchase or sales order.

When a subcontract is for a “commercial item” (as defined by the FAR) only, there are a limited number of FAR clauses that are required to be flowed down. However, there may be other, non-required clauses that prime contractors flow down to subcontractors because they are necessary for the prime contractors to satisfy their contractual obligations. Therefore, regardless of whether a company is looking to become a prime contractor or a subcontractor to a USG prime contractor, it is important to note that certain USG prime contract terms and conditions will apply to subcontracts as well.

### **15. DO THESE RULES APPLY TO STATE AND LOCAL PROCUREMENTS?**

State and local procurements are not directly governed by the FAR or by the policies and procedures described above. However, federally funded state and local procurements are required to observe similar policies and procedures, and many state and local governments have adopted similar policies even for procurements financed without federal assistance.

Of note, the ARP, in addition to expanding federal contracting opportunities, allocates additional federal funding to state-level contracting entities. While program-level guidance regarding spending obligations has not been issued as of March 17, 2021, contractors should expect to comply with many of the federal-level requirements despite the fact that they will not be contracting directly with the federal government because the resulting contracts will be at least in part federally funded.

Specifically, it is likely that cost requirements, audit rights, and similar restrictions may apply. Contractors should also be aware of state-level small business requirements and spending goals, which may differ from those imposed by SBA regulations and the FAR.

### **16. SOUNDS GREAT—SO WHAT DO I NEED TO DO TO BECOME A GOVERNMENT CONTRACTOR?**

All companies that contract directly with the USG must first register in SAM, which is free for all users. The registration requires a company to include certain basic information about the company and make certain representations about the business (*see* FAQ 7, above). Then, companies should look for opportunities to sell their products or services to the USG (*see* FAQ 2, above), and confirm that it has the controls to comply with government contract terms and conditions on day one, should it be awarded the contract.

Doing business with the USG can be both profitable and relatively painless if the rules are clearly understood and followed.