

Protecting Your Dollars:

Procurements Under a Shrinking Federal Budget

*27th Annual
Ounce of Prevention Seminar*



Welcome

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OOPS 2011
Crowell & Moring LLP

FAR Part 15 Procurements and Bid Protests

Amy L. O'Sullivan

FAR Part 15: Contracting By Negotiation

- FAR Part 15 prescribes policies and procedures governing competitive and noncompetitive negotiated acquisitions
- FAR Part 15 sets forth:
 - Solicitation requirements
 - Source selection processes and techniques
 - Requirements regarding pre-award, award, and post-award notifications and protests

FAR Part 15: Competitive Process

- Solicitation Issued – must include:
 - Government’s requirements
 - Evaluation factors and significant subfactors
 - Information required to be in an offeror’s proposal
- Q&A’s, Amendments
- Proposals Received
- Evaluation
- Competitive Range Determination
- Discussions
- Request for BAFO/FPR
- Award

Exchanges After Receipt of Proposals

- Clarifications
 - Intended to allow offerors to clarify or resolve minor/clerical errors
- Discussions
 - Agency can reserve the right to award without discussions
 - If discussions are held, they must be meaningful – must include deficiencies, “significant” weaknesses, and “adverse” past performance information to which the offeror has not had an opportunity to respond
- Potential protest grounds

Evaluations Under FAR Part 15

- Agencies are free to perform evaluation in any manner that ensures fairness and objectivity
- However:
 - Price or cost must be evaluated
 - FAR Part 15 identifies considerations agencies must weigh in cost/price, past performance, and technical evaluations
- Evaluation will not be disturbed unless it is
 - Arbitrary or unreasonable
 - In violation of statute or regulation
 - Not in accordance with the RFP
 - Not supported by the record

Bid Protests

- Legal challenges to the federal government's conduct of procurements
- Statutorily created right to challenge procurement ground rules (Solicitation terms) and evaluation and award decisions
- Provides offerors an opportunity to ensure a fair and objective chance to compete for and win government business
- If you don't know what the procurement rules and your rights are or when to challenge issues, you may lose your ability to protest

Bid Protests: The Forums

- **Agency**
 - More often for pre-award and if heightened sensitivity to suing your customer
 - Cheapest alternative
 - Slim chance of success, but make statement of frustration/disappointment
- **GAO**
 - Recommended forum in most circumstances
 - Decisionmakers have specialized experience in procurement and protests
 - Sustain rate (protester win) in FY 2010 = 19%
- **Court of Federal Claims**
 - May be only option because of timing
 - No automatic stay and unlikely award of protest costs
 - Decisions are binding and can be appealed
 - Usually costs more than GAO protests

Two Main Types of Protests

- Pre-Award Protests
 - Challenge to the terms of the solicitation
- Post-Award Protests
 - Challenge to agency's evaluation and award decision

Pre-Award Protests

- Must file before time set for receipt of proposals
- Effect of filing:
 - Agency cannot award contract
 - Agency can override stay, which can be challenged at the Court of Federal Claims
- Common issues:
 - RFP is unduly restrictive/overstates agency needs
 - Ambiguous requirements/terms
 - Requirements unnecessarily favor one offeror

Post-Award Protests: Timing and Common Issues

- GAO and Agency: must be filed within 10 days of either receipt of either award notification or debriefing date
- Automatic Stay of Performance:
 - Must file within 10 days of award or 5 days after requested and required debriefing
 - Agency can override stay, which can be challenged at the Court of Federal Claims
- Common Issues:
 - Deviation from stated evaluation criteria
 - Relaxation of RFP requirements
 - Lack of meaningful discussions or unequal discussions
 - Arbitrary technical/price/past performance evaluations
 - Unequal treatment/bias
 - Other: Procurement Integrity Act violations, organizational conflicts of interest

Debriefings

- Opportunity to collect information that will assist offeror in determining whether to protest
- Awardees should also request
- Timing of request:
 - Pre-award: three days from receipt of notice of exclusion
 - Post-award: three days from date on which offeror received notice of contract award
- Request must be writing
- Take first date offered (this triggers protest clock)

Agency Protests

- Must be an “interested party”
 - An actual or prospective offeror whose direct economic interest would be affected by the award
- File with procuring agency
- Asking decisionmakers to reverse themselves, so don’t expect any relief
- No real process – simply file complaint and wait for decision without access to documents or opportunity for rebuttal
- Some agencies have more formalized process than others

GAO Protests: Parties and Subject Matter

- Who may file?
 - GAO jurisdiction limited to protests filed by an “interested party”
- Who may intervene?
 - Awardee may intervene in GAO protests
 - Intervenor’s role is to support the reasonableness of agency’s evaluation and award decision
 - Intervention gives awardee opportunity to protect its contract
- What to protest?
 - Generally, the violation of a procurement statute or regulation during a procurement being conducted by a federal agency can be protested
 - 2008 changes expanded jurisdiction to include protests of
 - Task and delivery orders valued in excess of \$10 million
 - TSA procurements

GAO Protests: Protective Orders

- Issued to protect proprietary, confidential, and source selection sensitive information
- Typically, only outside counsel and experts are admitted under the protective order
- Issuance of protective order curtails ability of counsel to communicate openly with client
- Violation of protective order may result in sanctions. Intentional and/or knowing violation could result in dismissal of the protest

GAO Protests: Relief

- Possible outcomes:
 - GAO issues a decision
 - Must be issued 100 days from date protest was filed
 - Decision is “recommendation”
 - GAO engages in ADR
 - Agency takes corrective action
 - Protester withdraws protest
- Protester can proceed to Court of Federal Claims for a second bite at the apple

Court of Federal Claims Protests: Filing a Protest

- Filing a timely protest
 - Unlike GAO and agency-level protests, no strict timelines
 - **But** Federal Circuit has held that patent solicitation errors must be protested before closing date for receipt of proposals
- Only “interested party” can file
- In contrast to GAO, Court protests require a pre-filing notification, filing of a complaint, submission of several documents, and a filing fee
- Protester may request injunctive relief
 - In contrast to GAO, a stay is not automatic at the Court
- What to protest?
 - Tucker Act, 28 U.S.C. § 1491(b)
 - Court has jurisdiction to render judgment on “an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement”

Court of Federal Claims Protests: Stay Overrides

- Agency can override automatic stay imposed by Competition in Contracting Act when protester files GAO protest because of:
 - “Urgent and compelling circumstances” and/or
 - When performance of the contract is in the “best interests” of the Government
- Protester should seek temporary restraining order and preliminary injunction
- GAO protest on the merits continues while Court considers challenge to override

Court of Federal Claims Protests: Schedule and Relief

- Court holds status conference “as soon as practicable” after protest is filed
- Items on the table at conference
 - Temporary restraining order or preliminary injunction
 - Protest issues
 - Protective order
 - Schedule
- Decision – no strict timeline unlike GAO
- Court may award
 - Declaratory and injunctive relief
 - Monetary relief – limited to bid preparation and proposal costs
 - Attorneys’ fees and expenses – unlikely
- Court’s decision can be appealed to the Federal Circuit within 60 days from judgment

Small Business Contracting

Amy L. O'Sullivan

What is a Small Business?

- Size status determined as of date contractor submits self-certification that it is small to the procuring agency as part of its initial offer (or other formal response to solicitation) which includes price
- If solicitation modified so initial offers are no longer responsive, contractor must recertify when submitting offer including price
- If small when receive contract, then small for entire duration (even if grow beyond size standard) – BUT several key exceptions such as merger, acquisition, novation
- Size – can vary and is tied to NAICS codes (employee or annual receipts standards)
- Offeror certifies in ORCA that it is small for the size standard in that procurement (may be small for some procurements but not others)
- SBA does not maintain a list of small businesses
- For subcontracting purposes, contractor must qualify as small as of the date that it certifies that it is small for the subcontract

Affiliation

- Size is based on employees/annual receipts of small business and its affiliates
- Affiliation when one controls or has power to control another or third party controls or has power to control both
- Numerous factors can be considered
- “Totality of the circumstances” analysis
- This is an area where SBA devotes heightened scrutiny – don’t try to walk the line!!
- “[SBA] will not close its eyes to the practical realities of business life, but will look to substance rather than form in determining the size of a concern. . . . Although no single factor alone may support a finding of power to control, consideration of all . . . factors together [may lead] to that conclusion”
- Set-aside designation does not shut out large businesses, but intense SBA scrutiny to ensure small businesses are the true beneficiaries
- Low threshold to challenge size status in SBA protest and little time for SB to respond (often incumbents will take dual approach of GAO and SBA protests)

Set-Asides and other SBA Programs

- SBA purpose is for Gov't to assist and protect the interests of small businesses by “insur[ing] that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government . . . be placed with small-business enterprises. . . .” 15 U.S.C. § 631(a) (Small Business Act of 1953)
- Set-asides create protected space for small businesses to compete
- SBA Report on the Small Business Economy for FY10:
 - SBs awarded \$96.8 billion in federal prime contracts in FY09 (which was 21.89% of all federal dollars)
 - As of July 2010, SBs had received 30% of economic stimulus money
 - SBs awarded 31.82% of federal subcontract dollars in FY09
- SBA Programs:
 - 8(a)/SDB
 - HUBZone
 - SDVOSDB
 - WOSB

Subcontracting with Small Businesses

- Annual statutory goals for agencies are:
 - SB's = 23%; SDBs = 5%; WOSBs = 5%; HUBZone = 3%; SDVOSBs = 3%
- Obligation gets pushed down to COs, and then to vendors
- Award can't be made unless SB subcontracting plan is approved, but increasingly plans or history of compliance with plans are identified as a separate evaluation criteria
- Requirements set forth in FAR 52.219-9; forms and additional guidance on <http://www.esrs.gov>
- Plan required for all contracts expected to exceed \$650K (or \$1.5M for construction of a public facility); flow-down requirements
- Goals (SB, SDB, VOSB, SDVOSB, HUBZone, WOSB)
 - Identify dollars and percentages – may count subcontracts for more than one goal
 - May rely in good faith on subcontractor's written representation of status as SB, SDB, VOSB, SDVOSB, or WOSB; verify HUBZone on CCR or with SBA
 - State whether or not spend includes indirect costs
 - Only count first tier (except lower-tier ANC's if written designation)

Questions?

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General Services Administration Schedule Contracts

Understanding the Risks

Angela Styles

Risks

- Commercial Sales Practices Format
- Price Reduction Clause
- Trade Agreements Act
- Negotiable Terms

Commercial Sales Practices Format

(3) Based on your written discounting policies (standard commercial sales practices in the event you do not have written discounting policies), are the discounts and any concessions which you offer the Government equal to or better than your best price (discount and concessions in any combination) offered to any customer acquiring the same items regardless of quantity or terms and conditions? YES ____ NO _____. (See definition of "concession" and "discount" in 552.212-70.)

(4) (a) Based on your written discounting policies (standard commercial sales practices in the event you do not have written discounting policies), provide information as requested for each SIN (or group of SINs for which the information is the same) in accordance with the instructions at Figure 515.2, which is provided in this solicitation for your convenience. The information should be provided in the chart below or in an equivalent format developed by the offeror. Rows should be added to accommodate as many customers as required.

| COLUMN 1 CUSTOMER | COLUMN 2 DISCOUNT | COLUMN 3 QUANTITY/VOLUME | COLUMN 4 FOB TERM | COLUMN 5 CONCESSIONS |
|----------------------|----------------------|-----------------------------|----------------------|-------------------------|
| | | | | |
| | | | | |
| | | | | |
| | | | | |

(b) Do any deviations from your written policies or standard commercial sales practices disclosed in the above chart ever result in better discounts (lower prices) or concessions than indicated? YES ____ NO _____. If YES, explain deviations in accordance with the instructions at Figure 515.4-2, which is provided in this solicitation for your convenience.

Price Reduction Clause

552.238-75 PRICE REDUCTIONS (MAY 2004) (ALTERNATE I - MAY 2003) 538.273(b)(2)

(a) Before award of a contract, the Contracting Officer and the Offeror will agree upon (1) the customer (or category of customers) which will be the basis of award, and (2) the Government's price or discount relationship to the identified customer (or category of customers). This relationship shall be maintained throughout the contract period. Any change in the Contractor's commercial pricing or discount arrangement applicable to the identified customer (or category of customers) which disturbs this relationship shall constitute a price reduction.

Trade Agreements Act

- Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, the Netherlands, Portugal, Spain, Sweden, UK
- Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovak Republic and Slovenia
- Canada
- Iceland
- Israel
- Japan
- Korea
- Liechtenstein
- Norway
- Singapore
- Switzerland
- Taiwan

Negotiable Terms

- Tailoring Must be Consistent with Industry Practice – FAR 12.302
- Terms Typically Tailored
 - Intellectual Property -- commercial licenses
 - Warranties
- Cannot Tailor
 - Statutory Requirements
 - Assignments, Disputes, Payment, Invoice

Questions?

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Accounting and Pricing: Fundamentals

Steve McBrady

Accounting and Pricing: Fundamentals

- Many government contracts are awarded either on a cost-reimbursement basis or at a fixed-price negotiated based on the contractor's estimated costs
- Statutes, regulations, and standard contract provisions are designed to ensure that the government is protected from contractors and from the government's own ignorance or inadvertence
- There are three related sets of pricing/estimating/accounting requirements
 - Truth in Negotiations Act (TINA)
 - FAR Part 31 cost allowability rules
 - Cost Accounting Standards (CAS)



Truth in Negotiations Act

- Enacted in 1962 and substantially enhanced in 1986
- Implementing regulations in FAR Part 15
- Primarily a disclosure requirement
- Applies to pricing actions – both original contract awards and subsequent modifications



TINA: Coverage and Exemptions

- Covers non-exempt pricing actions for \$700K or more
- Non-exempt subcontracts also covered
- Exemptions
 - Adequate price competition
 - At least 2 responsive bids
 - Award based on low price
 - Commercial items
 - Prices set by law or regulation



TINA: Substantive Requirements

- Disclose current, accurate, and complete “cost or pricing data” (CPD)
- Certify the required disclosure has been made
- CPD defined as all facts in existence as of the date of agreement on price that prudent buyers and sellers would consider significant
- Government may adjust contract price downward to reflect the impact of “defective pricing” on a no-fault basis



FAR Part 31

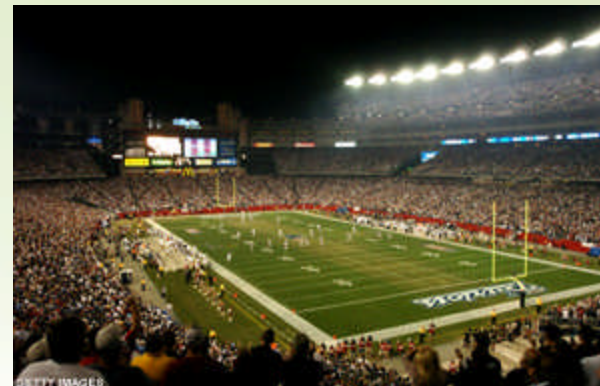
- Rules about what the government will reimburse on cost contracts and what costs it will recognize in negotiating fixed-prices
- To be recoverable, costs must be reasonable, allocable, and allowable
- Frequently different from IRS rules about deductibility of costs



Substance of FAR Rules

- Many ordinary and necessary costs are unallowable
 - Interest
 - Compensation limits
 - Charitable contributions
 - Entertainment
 - Many legal costs

Unallowable



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Cost Accounting Standards (CAS)

- CAS addresses accounting system issues, not allowability
- CAS controls measurement of cost, assignment of cost to periods, and allocation of costs to contracts
- Comparable to GAAP/FAS, but emphasis on reporting cost by contract, not for the entire enterprise

CAS Coverage

- \$7.5M trigger contract
- \$650K threshold for new contracts – changes to exempt contracts are not covered
- \$50M threshold for full coverage
- \$50M threshold for disclosure statement
- Non-exempt subcontracts are covered
- Exemptions



CAS Basics

- Disclose cost accounting practices
- Follow disclosed/established practices consistently
- Comply with specific requirements of the Standards
 - Consistency (CAS 401, 402, 406)
 - Allocation (CAS 403, 410, 418, 420)
 - Material and fixed assets (CAS 404, 409, 411, 414, 417)
 - Labor and employment costs (CAS 408, 412, 413, 415)
 - Standard costs for direct material and labor (CAS 407)
 - Insurance costs (CAS 416)
 - Unallowable costs (CAS 405)
- Adjust contract price if noncompliance or failure to follow caused Government to pay increased costs



Government Audit Rights

- Inspector General Audits
- GAO Audits
- Routine Contract Audits

Questions?

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Hot Compliance Issues

Peter J. Eyre

Hot Compliance Issues

- Compliance and Ethics program infrastructure
- Compliance and Ethics program content

Compliance Program Infrastructure

- Governing body with oversight of the program
- Assignment of internal responsibility for the program
- Internal controls
- Internal mechanisms for employees and other stakeholders to raise concerns anonymously
- Self-monitoring and auditing
- Corrective action
 - Discipline
 - External disclosures
 - Restitution
 - Root cause analysis

Infrastructure Meets Content

- Starts with a risk assessment of business
- Each principal risk area should be:
 - covered in written policies and procedures
 - the subject of employee training
 - the subject of an auditing and monitoring plan
 - associated with internal controls, including enforcement of the rules

Gifts, Gratuities & Entertainment

- Basic rule
 - Cannot offer or give anything of value to a government employee because of any official act or with intent to influence any official act
 - Anything of value includes food, alcohol, discounts, airplane tickets, lodging, samples, tradeshow entrance fees, transportation, training, tickets to theater and sporting events, flowers
- Criminal bribery and gratuities in 18 U.S.C. § 201
- FAR Gratuities clause (52.203-3)
- Office of Government Ethics regulation (5 C.F.R. § 2635)
- Federal Executive Order for Obama appointees
- State/local laws & regulations

Federal Anti-Kickback Act

- Basic rule
 - Cannot provide, attempt to provide, offer, solicit, accept, or attempt to accept a kickback
 - Kickback is defined as any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to a prime contractor, prime contractor employee, subcontractor, or subcontractor employee for the purpose of **improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract**
- Anti-Kickback Act (41 U.S.C. §§ 51 *et seq.*)
- FAR implementation (52.203-7)

Federal Anti-Kickback Act

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

Employment Discussions

- Basic rule
 - Without agency approval, current government employees cannot discuss employment with firms over which they have oversight or regulatory responsibility
- Statutory (18 U.S.C. § 208 and 41 U.S.C. § 423)
- OGE regulation (5 C.F.R. § 2635)
- FAR implementation (3.104-3)

Revolving Door Restrictions

- Restrictions on hiring
 - Some former government employees cannot be hired for one year by contractor
- Representation before a former agency employer
 - Some former government employees cannot contact their former agency on **any matter** for one to two years or longer
- Specific matters
 - Some former government employees can never communicate with the government on contracts or other matters they worked on in government

Revolving Door Restrictions

- Statutory (18 U.S.C. § 207, 41 U.S.C. § 423, Section 847 of 2008 NDAA)
- OGE regulation (5 C.F.R § 2635)
- FAR implementation (3.104-3)
- DFARS implementation (252.203-7000)

Off-Limits Information

- Rules on “off-limits” government or competitor information
 - Procurement Integrity Act
 - Statutory (41 U.S.C. § 423)
 - FAR implementation (3.104)
 - State trade secrets laws
 - GAO case law on unauthorized competitive advantage

Off-Limits Information

- Scope
 - Financial data, including indirect and direct labor rates and similar information, profit margins, and other sensitive economically valuable data not released to the public
 - “Trade secrets” or “proprietary” information (*e.g.*, software, supplier, and customer lists)
 - Cost and pricing data
 - “Inside information” – regarding competitors, the procurement, etc. – case law is much broader than the statutory restrictions

Off-Limits Information

- Source of the information is irrelevant
 - *E.g.*, consultant, competitor’s current or former employees, support contractor personnel, even government personnel
- Oral and written information covered
- Red flags
 - Conversations that “never happened”
 - Proprietary or source selection sensitive legends
 - Hiring government personnel or competitor personnel for their “inside” knowledge

Organizational Conflicts of Interest

- Three categories
 - Unequal access to information
 - Earlier contract performance
 - Hiring government or competitor personnel
 - Impaired objectivity
 - Reviewing own or related entity work, *e.g.*, source selection duties
 - Drafting government policies
 - Recommendations provided to the government that benefit the contractor, *e.g.*, “alliance agreements”
 - Biased ground rules
 - Drafting government specification or Statement of Work
- FAR 9.5

Contractor Disclosures

- ORCA – Online Representations and Certifications Application
- CCR – Central Contractor Registration
- FAPIIS – Federal Awardee Performance and Integrity Information System
- FFATA – Federal Funding Accountability and Transparency Act

Questions?

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Procurement Fraud & Mandatory Disclosure

Mana Elihu Lombardo

Government Oversight and Enforcement Tools

- Inspections, Audits and Investigations (DCMA, DCAA, GAO, OIG, DCIS, DOJ)
- False Claims Act (including *qui tam* suits)
- False Statements/Certifications
- Suspension and Debarment
- Criminal Fines, Penalties, and Imprisonment
- Congressional Investigations

Investigations

- Audits and Investigations are Inevitable
 - Congress is watching – contractors and agencies
 - Whistleblowers and their attorneys follow the money
- Many Shapes And Forms
 - Contract Clauses and Subpoenas
 - CIDs and Grand Juries
- Don't Wait for the Whistle to Blow
 - Conduct your own internal audits and compliance reviews, and re-assess your Compliance Program against industry best practices
 - Take corrective action where necessary, including careful consideration of voluntary disclosures
 - Preserve the company's options; employ the privilege while conducting internal reviews

False Claims Act

- Government's Principal Anti-Fraud Weapon
 - \$27.2 billion recovered since the 1986 Amendments (\$18.2 billion from *qui tam* suits)
- *Qui Tam* Provisions
 - 15%-30% bounties for whistleblowers
 - Government required to investigate and make an intervention decision
- Severe Sanctions
 - Treble damages
 - \$5,500 -\$11,000 penalty per false claim/statement

False Claims Act

Four Common Theories of Liability

1. **False Claim** – when a contractor **knowingly submits** a false claim to the Government or a recipient of Government funds, like another contractor, or causes another to submit a false claim.
2. **False Record or Statement** – when a contractor **knowingly makes** a false record or statement material to a false claim.
3. **Reverse False Claim** – when a contractor **knowingly makes** a false record or statement material to an obligation to pay money to the Government, or **knowingly and improperly avoids** an obligation to pay money to the Government.
4. **Conspiracy** – when a contractor **conspires to do** any of the above: (1) submit a false claim, (2) make a false statement, or (3) submit a reverse false claim.

False Claims Act

- Low intent threshold
- FCA definition of “knowingly”
 - Actual knowledge
 - Deliberate ignorance of the truth or falsity
 - Reckless disregard of the truth or falsity
- “No proof of specific intent to defraud is required”

False Claims Act

Examples of FCA Matters

- Government Accounting Rules
 - (*e.g.*, unallowable costs)
- Labor and Material Overcharging
- Truth in Negotiations Act
- False Certifications of Compliance
- Implied Certifications
- Kickbacks
- Fraudulent Inducement
- Organizational Conflicts of Interest

Other Statutes

Criminal Statutes

- 18 U.S.C. § 287 (false claims)
- 18 U.S.C. § 1001 (false statements)
- 18 U.S.C. § 1031 (Major Fraud Act)
- 18 U.S.C. § 1516 (obstruction of federal audit)
- 15 U.S.C. § 78 (FCPA)
- 22 U.S.C. § 2751, *et seq.* (AECA)
- 41 U.S.C. §§ 51-58 (kickbacks)

Mandatory Disclosure

Mandatory Disclosure Overview

- Requires contractors to **timely** disclose **credible evidence** of violations of certain criminal laws (fraud, conflict of interest, bribery, or gratuity violations found in Title 18), violations of the False Claims Act and **significant** overpayments.
- Amendments to FAR added the following:
 - New basis for suspension and debarment
 - New FAR clause for use in government contracts and subcontracts

Mandatory Disclosure

Suspension & Debarment Penalty

- Immediate effect on contractor's federal business
 - No new federal contracts **or subcontracts or options**
 - No new orders under IDIQ contracts
 - Penalty can last three years or more
- Collateral consequences on contractor's other business
 - Disclosure on state and local government procurements
 - Some commercial companies use the debarment list for non-government purchases

Mandatory Disclosure

Additional Requirements

- Written code of business ethics and conduct
- Compliance program
- Internal Control system

Mandatory Disclosure

Examples of *Potentially Reportable Events*

- Providing meals, entertainment or gifts to government officials or employees
- False statements – *e.g.*, false certifications, false reports, and incomplete OCI disclosure
- Employment discussions between a Government employee and the contractor giving rise to a conflict of interest
- Overcharges and defective parts
- Offering or accepting illegal kickbacks in connection with Government subcontracts, at any tier

Mandatory Disclosure

Examples of *Potentially Reportable Events* (cont'd)

- Unlawfully obtaining or possessing Government source selection information or contractor bid or proposal information prior to award of a contract that is related to the protected information
- Knowing failure to disclose required information, such as cost or pricing data under the Truth in Negotiations Act (TINA)
- Failure to perform tests required by the contract, or falsification of test results
- Failure to deliver products or services that conform to contract requirements

Mandatory Disclosure

Examples of *Potentially Reportable Events* (cont'd)

- Trade Agreements Act / Buy American Act violations
- Misstating employee qualification
- Invoices for payment containing overstated progress payment requests or for incurred costs; inclusion of unallowable costs in indirect cost submissions.
- Falsification or unauthorized destruction of Contractor's books and records
- Retaliation against an employee who raises an issue involving Contractor non-compliance with any governing authority

Mandatory Disclosure

When is the Disclosure Made?

- The timeliness of a disclosure is measured from the date a contractor determines that there is **credible evidence** of a violation.
- But there is no specific time limit (*e.g.*, 30 days)
- How long does the disclosure requirement apply?
 - The mandatory disclosure requirement applies to all current contracts **and** all closed contracts until three years after final payment.
- **The mandatory disclosure rule is retroactive and applies to events pre-dating 12/12/2008**

Mandatory Disclosure

The Bottom Line

- It is critical that all employees report concerns internally ... or they may go outside the company
 - Not all internal reports will lead to disclosure to the Government
 - No need to start a witch-hunt
 - Outside counsel can help make credibility determination
- Assessment of meeting disclosure requirement will factor into present responsibility and past performance

Men must turn square corners when they deal with the Government.

Justice Oliver Wendell Holmes, 1920

Questions?

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Introduction to Contract Claims & Disputes

J. Chris Haile

Contract Claims & Disputes

OVERVIEW

- Types of Claims / Disputes
- Protecting Entitlement
- Maximizing Quantum Recovery
- Claims vs. Requests for Equitable Adjustment
- Formal Disputes Procedures
- Alternative Disputes Procedures

Contract Claims & Disputes

Examples of Contractor Claims

- Stop work claims
- Termination for convenience
- Allowability / Allocability
- Formal Change Orders
- Constructive Changes
- Breach Claims

Examples of Government Claims

- Imposition of liquidated damages
- Termination for Default
- Reprocurement Costs / Corrective Work
- Defective Pricing

Contract Claims & Disputes

Formal Change Orders

- Bilateral / Unilateral
- “Changes” Clause
 - *e.g.*, FAR 52.243-1
 - *Note*: Commercial Items standard clause
- “Cardinal Change” Concept
- Questions of Authority

Contract Claims & Disputes

Constructive Changes

- Contract Terms
 - Note issue of Patent vs. latent ambiguities / the duty to inquire
- Defective Specifications / Changed Conditions
- Interference / Disruption
 - Over-inspection
 - Disruption of work
 - Failure to reasonably respond
 - GFE / GFM
- Delays
- Constructive Acceleration
 - Usually in conjunction with other changes

Contract Claims & Disputes

Protecting Entitlement

- Respond to formal and constructive changes with a Reservation of rights / claims
- Train Personnel to recognize constructive changes

Maximizing Quantum Recovery

- Direct Effects
- Indirect Effects

Contract Claims & Disputes

Requests for Equitable Adjustment vs. Claims

- Practical Considerations / Customer Relations
- Procedural Considerations
- Escalation
- Interest

Contract Claims & Disputes

Contract Disputes Act (CDA) 41 U.S.C. §§ 7101-7109 *[formerly 41 U.S.C. 601-609]*

- Comprehensive statutory scheme for disputes between contractors and the government
- Applies to most government procurement contracts
- Does NOT apply to
 - tort claims
 - pre-award disputes (Bid Protests)
 - fraud and statutory claims (e.g., FCA)

Disputes Clause – FAR 52.233-1

- Note the continue-to-work requirement

Contract Claims & Disputes

“Claim”

- A formal “claim” is required
- A claim is:
 - written demand
 - seeking as a matter of right
 - payment in a sum certain
 - adjustment of contract terms
 - other relief
- The claim must be submitted to the contracting officer
- Contractor requests the contracting officer’s “Final Decision”
- If a contractor’s demand is > \$100,000, the claim must also be certified
- Claims generally must be made within 6 years after accrual of the claim

Contract Claims & Disputes

The contracting officer's 'final decision'

- the government's decision on a contractor's claim
- the government's claim against a contractor
 - e.g., defective pricing, rights to technical data, default termination costs, etc.

Final Decisions must:

- be in writing
- describe the claim and facts
- state the decision and include rationale
- advise contractor of appeal rights
- demand any payment sought

Contract Claims & Disputes

Deadlines for final decisions on contractor claims

- If claim < \$100,000
 - decision within 60 days
- If claim > \$100,00 then within 60 days CO must either
 - issue decision, OR
 - set a firm date for the decision
 - must be a “reasonable” time

If the CO does not comply with the deadlines, then a contractor can:

- Ask the BCA or CoFC to direct its issuance
- Treat the failure as a “deemed denial”
- Wait

Contract Claims & Disputes

Effect of a Final Decision

- Binding and conclusive unless timely appealed
- 90 days to appeal to the Board of Contract Appeals
- 12 months to appeal to the Court of Federal Claims

Contract Claims & Disputes

Board of Contract Appeals

- Decision of the Board is final unless appealed to the Court of Appeals for the Federal Circuit (CAFC) within 120 days.

Court of Federal Claims

- Alternative to appeal at Board
- Must appeal CO's final decision within 12 months of issuance
- The decision of the CoFC is final unless appealed within 60 days to the Court of Appeals for the Federal Circuit (CAFC)

Contract Claims & Disputes

Court of Appeals for the Federal Circuit

- Federal Court of Appeals
- Determinations of law are reviewed de novo
- Determinations of fact are deemed conclusive unless they are not supported by substantial evidence
- Only appeal from the CAFC is to the United States Supreme Court

Contract Claims & Disputes

Alternative Dispute Procedures

- Commonly used
- Highly flexible
- Requires willing participants / principals

Questions?

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