

PCI's Executive Exchange 2023: Statutes and Regulations that Guide the Contracting Process

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Statutes

- The Armed Services Procurement Act of 1947
 - The underpinnings for all defense procurements
- The Federal Property and Administrative Services Act of 1949
 - The underpinnings for all civilian (non-defense) procurements



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The Buy American Act



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- A misleading name
- Statute creates a *preference* for domestic products
- Always start your analysis from scratch—do not go on memory

The Office of Federal Procurement Policy Act of 1974

- Led to the establishment of the Federal Acquisition Regulation (the “FAR”)
- Created the Office of Federal Procurement Policy (“OFPP”)



The Contract Disputes Act of 1978

- Lays out the process for the filing and prosecution of claims
- Prevents “forum shopping”
- Includes a “certification” requirement for all claims over \$100,000
- Covers all claims “related to” a contract, including breach claims
- Provides that contractor must follow the C.O.’s decision, even if it disagrees with it

The Competition in Contracting Act of 1984 (“CICA”)

- Designed to maximize competition in Government contracting
- Put sealed bidding and negotiated procurement on the same level
- Created Competition Advocates
- Gave GAO protest authority with “teeth”



FASA and FARA

- The Federal Acquisition Streamlining Act of 1994 and the Federal Acquisition Reform Act of 1995
- Together changed over 1,000 aspects of the Government contracting process
- Led to a rewrite of the FAR
- Introduced the concepts of “commercial item acquisition” and “past performance”
- Gave C.O.s much more discretion, making protests tougher to win
- Revised competitive negotiation procedures

The Truth in Negotiations Act (“TINA”)

- In certain situations, gives the Government an opportunity to look “under the hood” of a contractor’s pricing
- Threshold has changed over the years, but is now \$2 million
- Offerors must certify that proposed pricing is “current, complete and accurate”
- If Government wants to challenge that assertion, it initiates a defective pricing claim
- Could lead to civil or criminal liability
- Commercial item and services contracts are exempt from this statute

The Small Business Act

- Provides that small business will get a “fair proportion” of U.S. Government contracts
- Establishes the Small Business Administration
- Establishes small business size standards
- Creates small business set-asides
- Creates the Section 8(a) program



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Service Contract Act



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- Applies to all Federal service contracts over \$2,500 in value
- Establishes minimum wages and fringe benefits for covered employees
- Enforced by the Secretary of Labor
- Imposes extensive recordkeeping requirements
- Frequent source of suspension and debarment

Davis-Bacon Act of 1931

- Applies to all Federal construction contracts over \$2,000
- Provides for minimum wages and fringe benefits (locally prevailing rates) for all laborers and mechanics working on the contract—including subcontractors
- Frequent source of suspension and debarment
- Imposes extensive recordkeeping requirements



The Procurement Integrity Act

- Enacted to address the procurement scandals of the late 80s
- Imposes criminal penalties on people who improperly transmit or receive “source selection information”
- Aims to minimize improper activities resulting from the “revolving door” phenomenon



The Administrative Procedure Act (“APA”)

- Provides for an administrative process to handle disputes and rulemaking with the Federal Government
- Provides that no disputes may go to the judiciary until the aggrieved party has “exhausted” its administrative remedies
- Provides that Government decisions may not be overturned unless deemed to be “arbitrary, capricious or unreasonable,” or an abuse of discretion on the part of the decisionmaker—this is a very high standard of proof
- Provides that Government regulations undergo a “rulemaking” process, that includes public comment, before becoming finalized

The Freedom of Information Act

- Part of the APA
- Provides for the Government to turn over documents within its possession unless covered by an exemption
- Competitors use the statute all the time
- Therefore, contractors must take steps to protect their information and the most important step is to “mark” all of their important information properly [See FAR 52.215-1(e)]



Government
Document

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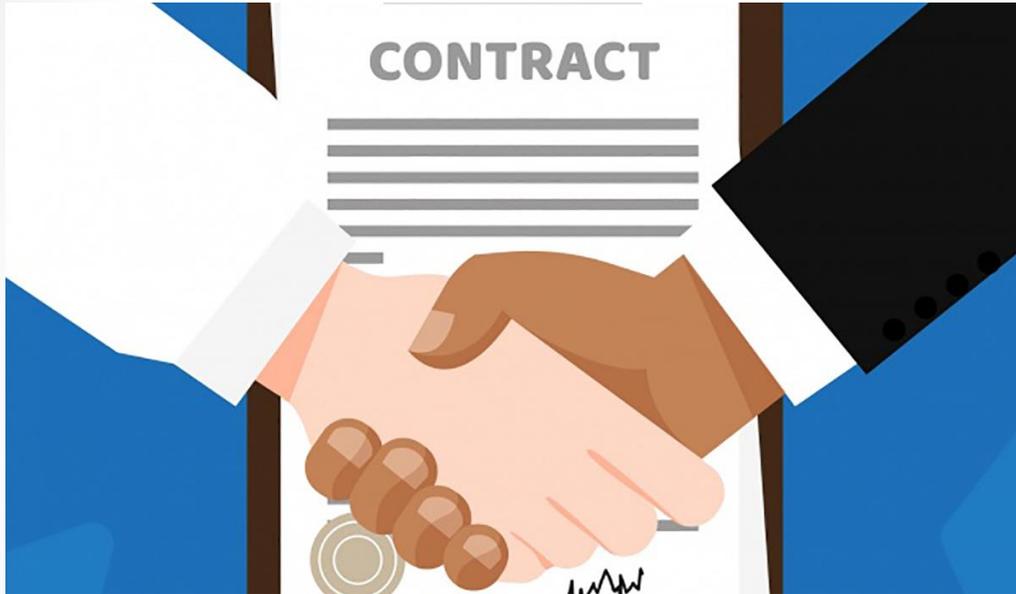
Regulations

- Regulations are issued by Federal agencies in order to implement the statutes
- They have the force and effect of law
- For Government contractors, the most important regulation is the Federal Acquisition Regulation (the “FAR”)
- In addition, each major Federal agency has a FAR supplement
- If you are in this business in any meaningful way, you have to learn to work with the regulations

Tips on Working With the Regulations

- Make sure you are using the correct version of the regulation
- Stay current on the regulations
- Always double-check the regulation before plowing ahead
- Understand how “prescription” clauses work
- Use the Table of Contents
- Check to see if there is any “case law” on the topic
- Always exhaust the regulation tree
- Don’t be afraid to ask for an explanation

Cardinal Rule



- The regulations in effect on the date of contract award generally will govern the contract regardless of its period of performance and despite the fact that the regulation might change during the course of the contract

The Christian Doctrine

- Unique to Government contracts
- Takes its name from *G.L. Christian & Associates v. United States*, 312 F.2d 418 (Ct. Cl. 1963)
- Stands for the proposition that a prescribed clause will be “read into” a contract even if the Government neglected to include it
- Does not apply to subcontracts

Questions?

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Tim Sullivan has spent 45 years in the Government contracting world. He is a co-founder of the Public Contracting Institute and has lectured and written on Government contracting topics, both nationally and internationally, since 1983. He has dealt with the full range of Government contracting issues and has successfully litigated both bid protests at the GAO and the U.S. Court of Federal Claims and contract claims before the boards of contract appeals and the U.S. Court of Federal Claims.

Tim spent his last 19 years of practice as a partner at Thompson Coburn LLP, where he chaired the Government Contracts Group. Tim is widely acclaimed for his lectures on contract negotiations.

Tim earned a bachelor of arts degree from the University of Michigan and his Juris Doctor degree from Georgetown University Law Center, where he was a member of the Georgetown Law Journal. Tim also served as a counterintelligence agent for the U.S. Army and as a contract negotiator for the Central Intelligence Agency.



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