



PUBLIC
CONTRACTING
INSTITUTE

GovCon Express

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Agenda

- Introduction
- Compliance Programs & Internal Controls
- Proposals & Award
- Protest
- Performance
- Claims
- Audits & Investigations
- Terminations

Introduction

- Class Objectives
- Who is a Government Contractor
- Rules of the Road
- FAR Cheat Sheet

Who is a Government Contractor?

- Prime contractors
 - Traditional primes
 - Resellers
 - Joint Ventures
 - Contractor Team Arrangement (CTA) Partners
- Subcontractors
 - Traditional subcontractors
 - Teaming partners
 - Suppliers/vendors

What Are Some Of The Differences?

- Contractor Disclosure Obligations
- Government *Termination For Convenience* Rights
- Government Audit Rights
- Decidedly Non-Commercial Contract Clauses
- Stiff Penalties for Non-Compliance
- Bid Protests & Disputes
- Conflicts of Interest
- Limitations on Giving Gifts

Rules of the Road

- Statutes
 - False Claims Act (31 U.S.C. § § 3729 *et seq.*)
 - Anti-Kickback Act (41 U.S.C. § § 8701 *et seq.*)
- Code of Federal Regulations (CFR)
- Federal Acquisition Regulation (FAR)
- FAR Supplements (e.g., Defense Federal Acquisition Regulation Supplement (DFARS))
- Agency Regulations
- Dollar Thresholds
 - Micro-Purchase Threshold (\$10,000)
 - Simplified Acquisition Threshold (\$250,000)

FAR Cheat Sheet

- Part 2 – Definitions
- Part 3 – Improper Business Practices
- Part 6 – Competition Requirements
- Subpart 8.4 – GSA Schedules
- Part 9 – Responsibility Matters
- Part 12 – Commercial Items
- Part 13 – Simplified Acquisition Procedures
- Part 14 – Sealed Bidding
- Part 15 – Negotiated Procurements
- Part 16 – Contract Types
- Part 19 – Small Business Programs
- Part 25 – Foreign Acquisition
- Part 31 – Cost Principles
- Part 33 – Protests, Disputes, and Appeals
- Part 49 – Terminations
- Part 52 – Solicitation Provisions and Contract Clauses

Compliance Programs & Internal Controls

- Overview
- False Claims Act
- Contractor Code of Business Ethics and Conduct
- Mandatory Disclosure Rule
- Suspension/Debarment Process
- Gifts
- Procurement Integrity
- Organizational Conflicts of Interest

Government Contract Compliance

- Government contractors operate in a heavily regulated environment
 - Prime contractors AND subcontractors
- Heightened diligence around compliance is critical
- Key to compliance is knowledge of the rules
- Noncompliance can result in severe consequences
 - For the Company AND the employee

Civil False Claims Act

- Civil War era anti-fraud statute
- Currently Government's primary civil fraud statute
- FCA provides that any person who knowingly submits, or causes to submit, false claims to the government is liable for 3x damages plus a penalty
- "*Qui Tam*" provisions permit suits to be brought by a "Relator" on behalf of Government
- Relators can be part of the alleged fraud
- Significant damages/penalties

FCA Elements

- A claim
- That is false
- That is submitted to
 - the United States government; or
 - a contractor, grantee, or other recipient, and the money/property is spent/used on the government's behalf or to advance a government program or interest, and the government provided the money/property or will reimburse the contractor/grantee/recipient for the money/property demanded
- That is made “knowingly”
 - Intentionally
 - With deliberate indifference
 - Recklessly

FCA Damages

- Treble damages
 - \$1M actual damages costs you \$3M in damages
- Up to \$27,018 in penalties per FCA violation (as of Jan. 23, 2023)
 - \$1 overcharge on 100 invoices costs
 - \$300 in damages
 - \$2,701,800 in penalties
- Plus Plaintiff's attorneys fees in some cases
- Plus your own attorneys fees
- Plus collateral damages

FCA Statistics – Fiscal Year 2022

- DOJ recovered more than \$2.2 billion in FCA settlements and judgments
- 652 suits filed by whistleblowers
- Leading sources of FCA settlements:
 - Health care fraud
 - COVID-related fraud
 - Civil-Cyber Fraud Initiative

Contractor Code of Business Ethics and Conduct

FAR 52.203-13(b) Code of business ethics and conduct.

(1) Within 30 days after contract award, unless the Contracting Officer establishes a longer time period, the Contractor shall -

- (i) Have a written code of business ethics and conduct;
- (ii) Make a copy of the code available to each employee engaged in performance of the contract.

(2) The Contractor shall -

- (i) Exercise due diligence to prevent and detect criminal conduct; and
- (ii) Otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

FAR 52.203-13(c) Code of Business Ethics and Conduct

(1) An ongoing business ethics awareness and compliance program.

(2) An internal control system. . . .

(A) Assignment of responsibility at a sufficiently high level and adequate resources to ensure effectiveness of the business ethics awareness and compliance program and internal control system.

(B) Reasonable efforts not to include an [unethical] individual as a principal,

(C) Periodic reviews of company business practices, procedures, policies, and internal controls

(D) An internal reporting mechanism, such as a hotline

(E) Disciplinary action for improper conduct or for failing to take reasonable steps to prevent or detect improper conduct.

(F) [Compliance with the Mandatory Disclosure Rule].

(G) Full cooperation with any Government agencies responsible for audits, investigations, or corrective actions.

Mandatory Disclosure Rule(s)

- **Suspension/Debarment Disclosure Rule (FAR part 9)**
 - Company must timely disclose “to the government” when a principal has “credible evidence” of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations, civil FCA violations; and significant overpayments
- **FAR Disclosure Clause (FAR 52.203-13(b))**
 - Once incorporated, Company must timely disclose “to the OIG” when it has “credible evidence” of certain crimes and FCA violations (but not overpayments)
 - Requirement applicable only to contracts of \$6 million or more and 120 days or longer
- **Internal Control System (ICS) Disclosure Rule (FAR 52.203-13(c))**
 - Once clause incorporated, Company must implement an ICS to facilitate the timely disclosure to the OIG of credible evidence of certain crimes and FCA violations (but not overpayments)
 - Requirement applicable only to contracts of \$6 million or more and 120 days or longer

FAR Part 9 – Suspension & Debarment

FAR 9.406-2(b)(1)(vi) – Causes for Debarment

Knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or subcontract thereunder, credible evidence of...

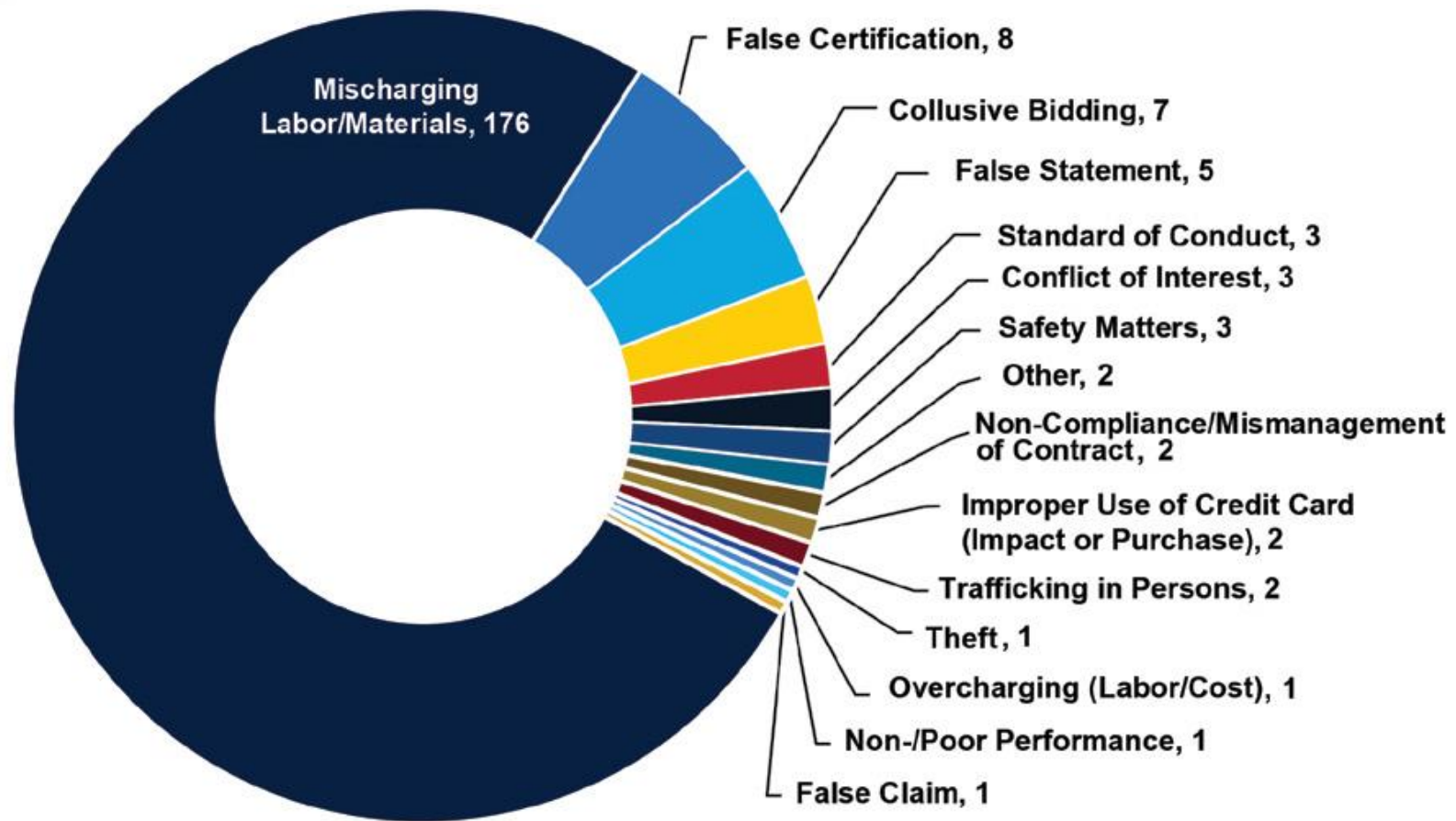
Three Reportable Categories

- Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;
- Violation of the civil False Claims Act (31 U.S.C. 3729-3733); or
- Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in FAR 32.001.

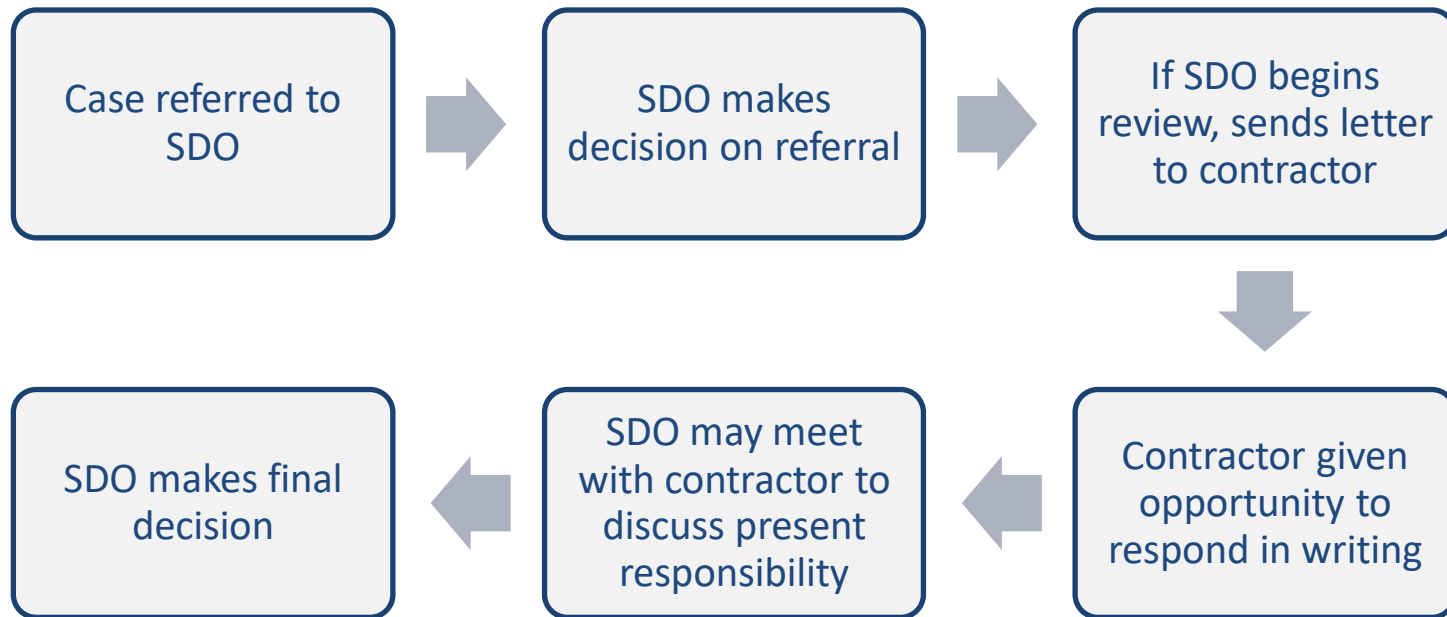
Mandatory Disclosure Rule(s) – Consequences

- Breach of Contract
- Past Performance ratings
- Suspension/Debarment
 - Federal
 - Primes
 - State & Local
- False Claims Act
- Loss of business
- Personal risk
 - Discipline/termination
 - Personal suspension/debarment

DOD IG Disclosures (4/20 – 9/20)



Suspension/Debarment Process



- Suspension – typically 1 year pending investigation; based upon adequate evidence, including an indictment
- Debarment – typically 3 years (range of 1 to 5 years); based upon a preponderance of the evidence, including a conviction

Suspension/Debarment Mitigating Factors

FAR 9.406-1(a) – whether the contractor...

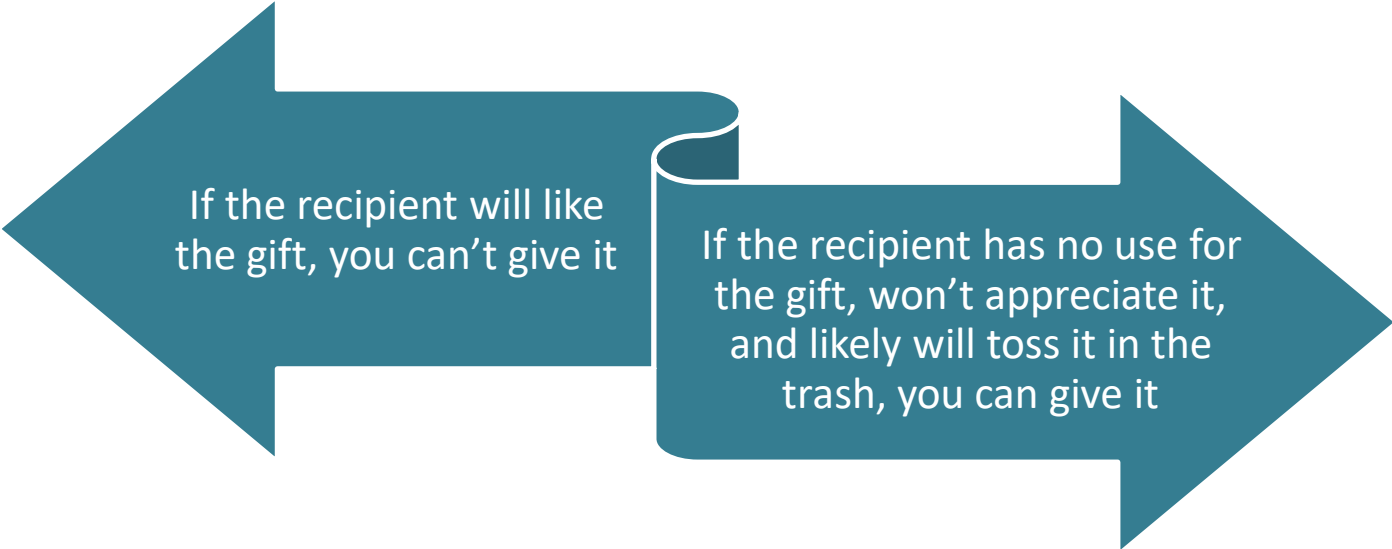
1. had effective standards of conduct and internal control systems in place.
2. brought the activity to the attention of the Government in a timely manner.
3. fully investigated . . . and, if so, made the result of the investigation available to the debarring official.
4. cooperated fully with the Government.
5. paid or has agreed to pay all criminal, civil, and administrative liability.
6. took appropriate disciplinary action against the responsible individuals.
7. implemented or agreed to implement remedial measures.
8. instituted new or revised reviews/controls and ethics training.
9. eliminated the circumstances that led to the cause for debarment.
10. management recognizes and understands the seriousness of the misconduct . . . and has implemented programs to prevent recurrence.

Gifts & Gratuities Rules

FAR 3.101-2 – Solicitation and Acceptance of Gratuities by Government Personnel.

As a rule, no Government employee may solicit or accept, directly or indirectly, any gratuity, gift, favor, entertainment, loan, or anything of monetary value from anyone who (a) has or is seeking to obtain Government business with the employee's agency, (b) conducts activities that are regulated by the employee's agency, or (c) has interests that may be substantially affected by the performance or nonperformance of the employee's official duties. Certain limited exceptions are authorized in agency regulations.

Giving Gifts



If the recipient will like the gift, you can't give it

If the recipient has no use for the gift, won't appreciate it, and likely will toss it in the trash, you can give it

Gifts Include

■ Any gratuity

- Favor
- Discount
- Entertainment
- Hospitality
- Loan

■ Forbearance

- Item of monetary value
- Services
- Training
- Transportation
- Local travel
- Lodgings and meals

Potential Exceptions

- Gifts of \$20 or less per occasion, with \$50 aggregate per donor per year
- Gift based on personal relationship, motivated by other than employee's position
- Certain widely available discounts and similar benefits
- Certain awards and honorary degrees
- Gifts based on outside business or employment relationships of a spouse
- Special rules for Presidential Appointees and Congressional offices

Procurement Integrity

- FAR 3.104-3(b) *Prohibition on obtaining procurement information (41 U.S.C. 2102)*. A person must not, other than as provided by law, knowingly obtain contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates.
- FAR 3.104-3(d) *Prohibition on former official's acceptance of compensation from a contractor (41 U.S.C. 2104)*. (1) A former official of a Federal agency may not accept compensation from a contractor that has been awarded a competitive or sole source contract, as an employee, officer, director, or consultant of the contractor within a period of 1 year...
- Regulations provide significant penalties for Procurement Integrity Act violations

Organizational Conflicts of Interest (OCIs)

Unequal Access to Information

- Vendor competing for a contract possesses (1) non-public information obtained from the Government without authorization; OR (2) source selection information relevant to the contract, not available to all bidders, that would assist that vendor in obtaining the contract

Biased Ground Rules

- Vendor competing for a contract prepares: (1) the specification/SOW to be used in a subsequent competitive bid procurement; OR (2) any document which directly or indirectly influences the way proposals will be evaluated

Impaired Objectivity

- Vendor is bidding on a contract that: (1) would require the vendor to evaluate its own products or services; (2) includes any task that would require the vendor to evaluate its competitors' products or services; (3) includes situations where impartial advice may adversely impact the vendor

Why Understanding OCIs is Important

- May need to mitigate the OCI through firewalls
- There is a renewed IG focus
- Could preclude you from competing for or keeping a contract
- Failure to mitigate
 - Increases risks during protests
 - Creates False Claims Act liability risk
 - Could lead to suspension and debarment

Proposal & Award

- Going to Market
- Acquisition Process
- Contracts
 - Award Types
 - Cost Reimbursement Contracts
 - Small Business Contracting/Subcontracting
 - Subcontracts
 - Teaming Agreements
 - GSA CTAs
- Proposal Accuracy
- Representations and Certifications
- Country of Origin Requirements
- Staffing Regulations
- Timing Rules

Going to Market

- Direct Contracts
- Master Agreements
 - GSA Schedules Program
 - Other Multiple Award Contract Vehicles
- Subcontracts
- Teaming Agreements
- Joint Ventures

Acquisition Process

- Contractor Registration
 - DUNS/CAGE
 - SAM.gov
 - SBA.gov (guidelines for small businesses when registering in SAM)
- Contractor Market Research
 - FBO.gov (now part of SAM.gov)
- Agency Market Research
 - Requests for Information (RFI)
- Solicitation
 - Request for Proposals (RFP)
 - Request for Quotations (RFQ)
- Award
- Protest
- Performance
- Claims and Disputes

Competition

- Sealed Bidding (FAR Part 14)
- Negotiated Procurements (FAR Part 15)
- IDIQs (FAR Subpart 16.5)
- GSA Schedules (FAR Subpart 8.4)
- Sole Source/Limited Source (with Justification and Approval) (FAR Subpart 6.3)
- Simplified Acquisition Procedures (FAR Part 13)
- Commercial Items (FAR Part 12)

Award Types

- Fixed Price (FAR Subpart 16.2)
 - Firm-Fixed-Price (FAR 16.202)
 - Fixed Price with Economic Price Adjustment (FAR 16.203)
 - Firm-Fixed-Price, Level-of-Effort (FAR 16.207)
- Cost Reimbursement Contracts (FAR Subpart 16.3)
- Indefinite-Delivery, Indefinite-Quantity (FAR 16.504)
- Time-and-Materials (FAR 16.601)
- Labor Hour (FAR 16.602)
- Other Transaction Authority Agreements (OTAs) (10 U.S.C. § 2371b)

Cost Reimbursement Contracts

- Cost reimbursement contracts are subject to enhanced government scrutiny
 - Government bears the risk of performance as compared to fixed price
- Cost Principles (FAR Part 31) and Cost Accounting Standards (CAS) (FAR Part 30)
- Cost is **allowable** if:
 - (1) It is reasonable
 - (2) It is allocable
 - (3) It complies with the CAS, if applicable, GAAP and practices appropriate to the circumstances
 - (4) It complies with the terms of the contract
 - (5) It complies with the Cost Principles

Cost Principles

- Covers 46 selected items of cost (48 CFR 31.205)

FAR 31.205-1 – Public Relations and Advertising Costs

FAR 31.205-2 – [RESERVED]

FAR 31.205-3 – Bad Debts

FAR 31.205-4 – Bonding Costs

FAR 31.205-5 – [RESERVED]

FAR 31.205-6 – Compensation for Personal Services

FAR 31.205-7 – Contingencies

FAR 31.205-8 – Contributions or Donations

FAR 31.205-9 – [RESERVED]

FAR 31.205-10 – Cost of Money

FAR 31.205-11 – Depreciation

FAR 31.205-12 – Economic Planning Costs

FAR 31.205-13 – Employee Morale, Health, Welfare, Food Service, and Dormitory Costs and Credits

FAR 31.205-14 – Entertainment Costs

FAR 31.205-15 – Fines, Penalties, and Mischarging Costs

FAR 31.205-16 – Gains and Losses on Disposition or Impairment of Depreciable Property or Other Capital Assets

FAR 31.205-17 – Idle Facilities and Idle Capacity Costs

FAR 31.205-18 – Independent Research and Development and Bid and Proposal Costs

FAR 31.205-19 – Insurance and Indemnification

FAR 31.205-20 – Interest and Other Financial Costs

FAR 31.205-21 – Labor Relations Costs

FAR 31.205-22 – Lobbying and Political Activity Costs

FAR 31.205-23 – Losses on Other Contracts

FAR 31.205-24 – [RESERVED]

FAR 31.205-25 – Manufacturing and Production Engineering Costs

Cost Principles cont'd

- FAR 31.205-26 – Material Costs
- FAR 31.205-27 – Organization Costs
- FAR 31.205-28 – Other Business Expenses
- FAR 31.205-29 – Plant Protection Costs
- FAR 31.205-30 – Patent Costs
- FAR 31.205-31 – Plant Reconversion Costs
- FAR 31.205-32 – Precontract Costs
- FAR 31.205-33 – Professional and Consultant Services Costs
- FAR 31.205-34 – Recruitment Costs
- FAR 31.205-35 – Relocation Costs
- FAR 31.205-36 – Rental Costs
- FAR 31.205-37 – Royalties and Other Costs for Use of Patents
- FAR 31.205-38 – Selling Costs
- FAR 31.205-39 – Service and Warranty Costs
- FAR 31.205-40 – Special Tooling and Special Test Equipment Costs
- FAR 31.205-41 – Taxes
- FAR 31.205-42 – Termination Costs
- FAR 31.205-43 – Trade, Business, Technical, and Professional Activity Costs
- FAR 31.205-44 – Training and Education Costs
- FAR 31.205-45 – [RESERVED]
- FAR 31.205-46 – Travel Costs
- FAR 31.205-47 – Costs Related to Legal and Other Proceedings
- FAR 31.205-48 – Research and Development Costs
- FAR 31.205-49 – Goodwill
- FAR 31.205-50 – [RESERVED]
- FAR 31.205-51 – Costs of Alcoholic Beverages
- FAR 31.205-52 – Asset Valuations Resulting from Business Combinations

Cost Accounting Standards

- **Currently 19 standards (48 CFR 9904)**

CAS 401 – Consistency in Estimating, Accumulating and Reporting Costs

CAS 402 – Consistency in Allocating Costs Incurred for the Same Purpose

CAS 403 – Allocation of Home Office Expenses to Segments

CAS 404 – Capitalization of Tangible Assets

CAS 405 – Accounting for Unallowable Costs

CAS 406 – Cost Accounting Period

CAS 407 – Use of Standard Costs for Direct Material and Direct Labor

CAS 408 – Accounting for Costs of Compensated Personal Absence

CAS 409 – Depreciation of Tangible Capital Assets

CAS 410 – Allocation of Business Unit General and Administrative Expenses to Final Cost Objectives

CAS 411 – Accounting for Acquisition Costs of Material

CAS 412 – Composition and Measurement of Pension Cost

CAS 413 – Adjustment and Allocation of Pension Cost

CAS 414 – Cost of Money as an Element of the Cost of Facilities Capital

CAS 415 – Cost of Deferred Compensation

CAS 416 – Accounting for Insurance Costs

CAS 417 – Cost of Money as an Element of the Cost of Capital Assets under Construction

CAS 418 – Allocation of Direct and Indirect Costs

CAS 419 – [RESERVED]

CAS 420 – Accounting for Independent Research and Development Costs and Bid and Proposal Costs

Cost Accounting Standards

- Full CAS coverage:
 - \$50 million contract(s) threshold
- Modified CAS coverage:
 - Requires compliance with 4 standards
 - For covered contract(s) under \$50 million
- Exemptions (48 CFR 9903.201-1); E.g.,
 - Negotiated contracts under TINA threshold (\$2 million)
 - Contracts with small businesses
 - Commercial Items contracts
 - Contracts under \$7.5 million where no other covered contracts at \$7.5 million or more

Other Transaction Agreements (OTAs)

- Typically used to engage industry and academia for a broad range of research and prototyping activities
- Agencies limited by statutory authority
- Generally not subject to federal laws and regulations for procurement contracts
 - No FAR or DFARS
 - No Competition in Contracting Act (CICA)

Small Business Contracting

- Government's goal is to spend 23% of contracting dollars on small businesses
- Several categories of small businesses for federal contracting – sub goals for each
 - Small Business
 - Small Disadvantages Businesses (SDB)
 - Woman-Owned Small Business (WOSB)
 - Veteran-Owned Small Business (VOSB)
 - Service-Disabled Veteran-Owned Small Business (SDVOSB)
 - HUBZone Small Business

Small Business Contracting

- All contracts under SAT (\$250k) must be set aside for small businesses
- FAR 19.502-2(b) “Rule of Two” – above the SAT, contracts must be set aside for small businesses if two qualified small businesses are expected to submit a proposal

Small Business Qualifications

- SBA publishes size standards – usually stated in number of employees or average annual receipts – and company must be below the applicable threshold to qualify
- Size standards organized by NAICS code

NAICS codes	NAICS U.S. industry title	Size standards in millions of dollars	Size standards in number of employees
483111	Deep Sea Freight Transportation		500
483112	Deep Sea Passenger Transportation		1,500
483113	Coastal and Great Lakes Freight Transportation		750
483114	Coastal and Great Lakes Passenger Transportation		500
483211	Inland Water Freight Transportation		750
483212	Inland Water Passenger Transportation		500
484110	General Freight Trucking, Local	\$30.0	
484121	General Freight Trucking, Long-Distance, Truckload	\$30.0	
484122	General Freight Trucking, Long-Distance, Less Than Truckload	\$30.0	
484210	Used Household and Office Goods Moving	\$30.0	
484220	Specialized Freight (except Used Goods) Trucking, Local	\$30.0	
484230	Specialized Freight (except Used Goods) Trucking, Long-Distance	\$30.0	
485111	Mixed Mode Transit Systems	\$16.5	
485112	Commuter Rail Systems	\$16.5	
485113	Bus and Other Motor Vehicle Transit Systems	\$16.5	
485119	Other Urban Transit Systems	\$16.5	
485210	Interurban and Rural Bus Transportation	\$16.5	

SBA Affiliation Rules

- Affiliation rules establish the circumstances where the SBA will view two companies as one for purposes of determining size
- Generally, affiliation exists when one business controls or has the power to control another (or when a third party controls or has the power to control both businesses)
 - Ownership
 - Management
 - Personal Relationship
 - Performance

Small Business Subcontracting

- **Small Business Prime**

- 13 C.F.R. § 125.6 – Limitation on Subcontracting Rule
 - Applicability: SB set asides above \$250k and other set-asides of ANY value
 - Rule: SB cannot pay more than 50% of the amount paid by the Government to non-similarly situated firms

- **Large Business Prime**

- FAR 52.219-8: must offer small businesses “maximum practicable opportunity” to compete
- FAR 52.219-9: must submit a small business subcontracting plan annually and make good faith efforts to meet goals

What is a Subcontract?

- FAR 44.101
 - “Subcontract” means any contract as defined in Subpart 2.1 entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.
 - “Subcontractor” means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.
- FAR 3.502-1
 - “Subcontract” means a contract or contractual action entered into by a prime contractor or subcontractor for the purpose of obtaining supplies, materials, equipment, or services of any kind under a prime contract.
 - “Subcontractor” (1) means any person, other than the prime contractor, who offers to furnish or furnishes any supplies, materials, equipment, or services of any kind under a prime contract or a subcontract entered into in connection with such prime contract; and (2) includes any person who offers to furnish or furnishes general supplies to the prime contractor or a higher tier subcontractor.
- FAR 15.401
 - “Subcontract” (except as used in 15.407-2) also includes a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or a subcontractor
- FAR 52.219-9
 - “Subcontract” means any agreement (other than one involving an employer-employee relationship) entered into by a Federal Government prime Contractor or subcontractor calling for supplies or services required for performance of the contract or subcontract.

Why Do We Care?

- Privity, risk, flow-downs . . .
- Required Clauses
 - FAR 52.212-5(e)
 - FAR 52.244-6
- Necessary Clauses
 - COO clauses
 - PRC/CSPF clauses

Teaming Agreements

- FAR 9.601: 'Contractor team arrangement' means an arrangement in which –
 - (a) Two or more companies form a partnership or joint venture to act as a potential prime contractor; or
 - (b) A potential prime contractor agrees with one or more other companies to have them act as its subcontractors under a specified Government contract or acquisition program.

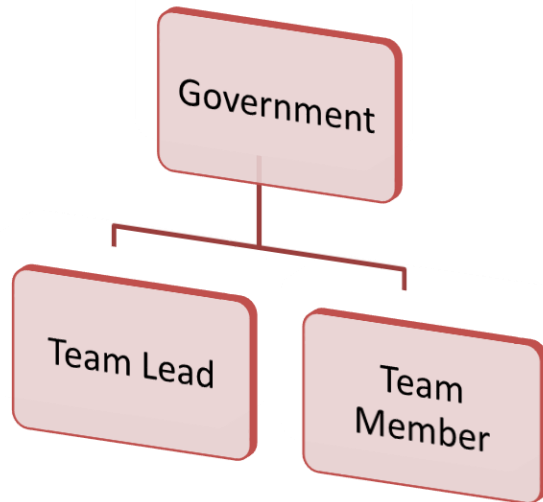
- Key Agreement Issues
 - Exclusivity
 - Non-Disclosure
 - Intellectual Property
 - Disputes
 - Termination

GSA Contractor Teaming Agreements (CTAs)

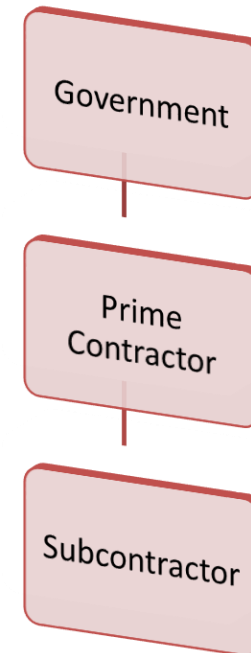
- Contractor-to-contractor agreements
- Each Team Member receives a contract award and has privity of contract with the Government
- Agreement identifies a Team Lead
 - One face to customer
 - Allows for one company to invoice
- Key compliance considerations
 - All members must be MAS contractors
 - Each member must sell at its own Schedule price
 - Each member must pay its own IFF

CTAs vs. Subcontracts

CTA



Prime/Sub



GSA-Suggested CTA Elements

- Identify participants, responsibilities, schedules, items
- Define key terms
- Identify scope, performance period, termination provisions
- Identify fees, etc.
- Identify administration functions and process
- Establish license and other proprietary rights
- Establish representations and warranties
- Identify confidentiality provisions
- Identify indemnification provisions
- Identify governing law
- Establish how disputes will be resolved

Proposal Accuracy



U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Decision

Matter of: Sev1Tech, Inc.

File: B-416811; B-416811.2

Date: December 18, 2018

Stephen P. Ramaley, Esq., C. Peter Dungan, Esq., and Jason Stockbridge P.C., for the protester.
Barbara A. Duncombe, Esq., Suzanne Sumner, Esq., Erin R. E. Dobyms, Esq., for Solutions Through Innovative Technology
Allen Lotz, Esq., Department of Homeland Security, for the agency
Paula J. Haurilesko, Esq., and Laura Eyester, Esq., Office of the
GAO, participated in the preparation of the decision.

DIGEST

Protest that the awardee misrepresented the availability of information in its submission of resumes is sustained, where the awardee's protest had already negotiated contingent offers of employment where the record shows that the awardee did not obtain prior consent from the agency in its resumes in its proposal.

DECISION

Sev1Tech, Inc., of Woodbridge, Virginia, protests the issuance of a task order to Solutions Through Innovative Technologies, Inc. (STI-TEC), of Fairborn, Ohio, under request for proposal (RFP) No. 70Z03818RS0000001, issued by the Department of Homeland Security, U.S. Coast Guard, for professional services.

We sustain the protest.

BACKGROUND

The Coast Guard issued the RFP on March 6, 2018, pursuant to Federal Acquisition Regulation (FAR) subpart 16.5, to vendors holding indefinite-delivery, indefinite-quantity (IDIQ) contracts under the General Services Administration's One Acquisition Solution

“[W]e will consider an allegation that an offeror’s proposal contains a misrepresentation concerning personnel that materially influences an agency’s evaluation... A misrepresentation is material where an agency has relied upon the misrepresentation and that misrepresentation likely had a significant impact on the evaluation.”

Certifications & Representations

- In every solicitation, contractors are required to submit a number of certifications and representations
- Two forms
 - Affirmative certification by checking a box or providing information
 - Passive certification (by submitting this proposal, you certify...)

252.247-7022 REPRESENTATION OF EXTENT OF TRANSPORTATION BY SEA (AUG 1992) DFARS

(a) The Offeror shall indicate by checking the appropriate blank in paragraph (b) of this provision whether transportation of supplies by sea is anticipated under the resultant contract. The term "supplies" is defined in the Transportation of Supplies by Sea clause of this solicitation.

(b) *Representation.* The Offeror represents that it-

_____ Does anticipate that supplies will be transported by sea in the performance of any contract or subcontract resulting from this solicitation.

_____ Does not anticipate that supplies will be transported by sea in the performance of any contract or subcontract resulting from this solicitation.

- Even commercial item solicitations can be very complicated to complete...

Certifications & Representations

DFARS 252.203-7005 REPRESENTATION RELATING TO COMPENSATION OF FORMER DOD OFFICIALS (NOV 2011)

DFARS 252.204-7008 Compliance with Safeguarding CDI

DFARS 252.204-7016 Covered Defense Telecommunications Equipment or Services – Representation

DFARS 252.204-7017 Prohibition on the Acquisition of Covered Defense Telecommunications Equipment or Services - Representation

DFARS 252.211-7003 Item Unique Identification and Valuation

DFARS 252.215-7010 Requirements for Certified Cost or Pricing Data and Data Other than Certified Cost or Pricing Data

DFARS 252.219-7003 Small Business Subcontracting Plan

DFARS 252.225-7000 BUY AMERICAN STATUTE - BALANCE OF PAYMENTS PROGRAM CERTIFICATE (NOV 2014)

DFARS 252.225-7000 BUY AMERICAN STATUTE - BALANCE OF PAYMENTS PROGRAM CERTIFICATE (NOV 2014) ALT I (NOV 2014)

DFARS 252.225-7001 BUY AMERICAN AND BALANCE OF PAYMENTS PROGRAM –BASIC (MAR 2022)

DFARS 252.225-7001 BUY AMERICAN AND BALANCE OF PAYMENTS PROGRAM—ALT I (MAR 2022)

DFARS 252.225-7010 Commercial Derivative Military Article – Specialty Metals Compliance Certificate

DFARS 252.225-7018 Photovoltaic Devices – Certificate (JAN 2022)

DFARS 252.225-7020 TRADE AGREEMENTS CERTIFICATE—BASIC (NOV 2014)

DFARS 252.225-7021 TRADE AGREEMENTS--BASIC (MAR 2022)

DFARS 252.225-7035 Buy American – Free Trade Agreements – Balance of Payments Program Certificate

DFARS 252.247-7022 Representation of Extent of Transportation by Sea

DLAD L02 Electronic Order Transmission

DLAD L26 EVALUATION OF QUANTITY SENSITIVE AND INDEFINITE DELIVERY CONTRACTS (AUG 2017)

FAR 52.203-18 PROHIBITION ON CONTRACTING WITH ENTITIES THAT REQUIRE CERTAIN INTERNAL CONFIDENTIALITY AGREEMENTS OR STATEMENTS-REPRESENTATION (JAN 2017)

FAR 52.204-17 OWNERSHIP OR CONTROL OF OFFEROR

FAR 52.204-20 PREDECESSOR OF OFFEROR (AUG 2022)

FAR 52.204-22 ALTERNATE LINE ITEM PROPOSAL (JAN 2017)

FAR 52.207-4 Economic Purchase Quantity

FAR 52.209-11– Representation by Corporations Regarding Delinquent Tax Liability or a Felony Conviction under any Federal Law

FAR 52.209-7 Information Regarding Responsibility Matters

FAR 52.212-1 INSTRUCTIONS TO OFFERORS - COMMERCIAL ITEMS (NOV 2021)

FAR 52.212-3 - Reqs and Certs

FAR 52.214-34 SUBMISSION OF OFFERS IN THE ENGLISH LANGUAGE (APR 1991)

FAR 52.214-35 SUBMISSION OF OFFERS IN U.S. CURRENCY (APR 1991)

FAR 52.216-31 Time and Materials/Labor-Hour Proposal Requirements

FAR 52.222-41, Service Contract Labor Standards (AUG 2018) (41 U.S.C. chapter 67)

FAR 52.222-48 Exemption From Application Of The Service Contract Labor Standards to Contracts for Maintenance, Calibration, Or Repair Of Certain Equipment -- Certification (May 2014)

FAR 52.223-18, Encouraging Contractor Policies to Ban Text Messaging While Driving (JUN 2020) (E.O. 13513)

FAR 52.225-18 Place of Manufacture

FAR 52.225-25 PROHIBITION ON CONTRACTING WITH ENTITIES ENGAGING IN SANCTIONED ACTIVITIES RELATING TO IRAN – REPRESENTATION AND CERTIFICATION (JUN 2020)

FAR 52.247-60 Guaranteed Shipping Characteristics

NDAA Section 889

■ Part A

- Prohibits contractors from *selling* to the Government equipment and services that use covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system
- FAR rule took effect August 13, 2019

■ Part B

- Prohibits agencies from working with contractors that *use* covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, *even if that use is unrelated to the contractor's federal business*
 - FAR rule effective August 13, 2020
- ## ■ Limited exceptions and waivers

NDAA Section 889

- “Covered telecommunications equipment or services” – certain equipment or services incorporating telecommunications technology produced by:
 - Huawei Technologies Company
 - ZTE Corporation
 - Hytera Communications Corporation
 - Hangzhou Hikvision Digital Technology Company
 - Dahua Technology Company
 - Any subsidiary or affiliate thereof

- Representation requirements (FAR 52.204-24)

Country of Origin Requirements

	Buy American Act	Trade Agreements Act	Berry Amendment
Government Wide?	Yes	Yes	No, only DOD
Prohibit purchase of goods?	No, proposal evaluation “penalty”: <ul style="list-style-type: none"> • 20% – large business (FAR) • 30% – small business (FAR) • 50% – DFARS 	Yes	Yes
Requirements?	<ul style="list-style-type: none"> • Manufactured in the U.S. (or qualifying country, for DOD); and • Cost of domestic or qualifying components exceeds 50% of total component cost 	<ul style="list-style-type: none"> • End-products that are manufactured or “substantially transformed” in the U.S., or • End-products that are “substantially transformed” in a designated country 	<ul style="list-style-type: none"> • Prohibited from acquiring certain products unless grown, reprocessed, reused, or produced in the U.S.
Scope?	All supplies and construction materials; not applicable to services.	<ul style="list-style-type: none"> • Certain Federal Supply Groups • Threshold: Supplies or Services (\$180K); Construction (\$7.0M) 	Hand and measuring tools, food, and textiles (including clothing, canvas, wool, cotton, silks, yarn, synthetic and natural fibers)
Exceptions?	<ul style="list-style-type: none"> • Public interest • Non-availability • Unreasonable cost • Resale 	<ul style="list-style-type: none"> • Small business set-asides • Items indispensable for national security • Sole-source contracts • End-products for resale • Other specific services • Waiver by agency head (rarely available) • Designated countries 	<ul style="list-style-type: none"> • Non-availability • Emergency acquisitions • Purchases beneath \$250,000 • Items supporting combat operations • Resale • Incidental incorporation into a non-textile end product (<i>de minimis</i>)

Proposal Submission Timing Rules



G A O

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: The Haskell Company

File: B-292756

Date: November 19, 2003

Tenley A. Carp, Esq., and Edward M. Whelan, Esq., McGuire Woods, for the protester.

Damon Martin, Esq., Naval Facilities Engineering Command, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

Protests

- Fora/Forums
- Basic Rules
- Protective Orders
- Outcomes and Results

What is a Bid Protest?

- FAR 33.101 Protests

“Protest” means a written objection by an interested party to any of the following:

- (1) A solicitation or other request by an agency for offers for a contract for the procurement of property or services.
- (2) The cancellation of the solicitation or other request.
- (3) An award or proposed award of the contract.
- (4) A termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

“Protest venue” means protests filed with the agency, the Government Accountability Office, or the U.S. Court of Federal Claims. U.S. District Courts do not have any bid protest jurisdiction.

What is a Bid Protest?

- An option for ALL contractors doing business with the federal government
- All protests challenge some form of Government conduct related to a procurement
 - The terms of the Solicitation
 - The evaluation of offers
- Can only be brought by an “interested party”
- Even protests based on offeror conduct are challenges to the agency’s decision to award notwithstanding such conduct
 - Organizational Conflicts of Interest
 - Procurement Integrity
- Protest Issues
 - Errors in the Solicitation or the Request For Quotations
 - Errors in award decision
 - Failure to comply with the terms of the Solicitation, regulations, law, scope

Should I Protest?

- Upsetting the customer vs. protecting your interests
- What do you want out of the protest?
 - Information on why you lost
 - Stay of performance
 - Another round of proposals
- Time
- Money – the higher you go, the more it costs
 - Agency → GAO → COFC

Possible Protest Allegations

■ Pre-Award

- Solicitation Ambiguities
 - Solicitation subject to two or more reasonable interpretations
 - Solicitation contains inconsistencies or contradictions
- Unduly Restrictive Specifications
- Improper Evaluation Methodology

■ Post-Award

- Flawed Technical Evaluation
- Flawed Cost Evaluation
- Deviation from Stated Evaluation Criteria
- Lack of Meaningful Discussions
- Flawed Best Value Decision
- Unreasonable Past Performance Evaluation

Typical Protest Remedies

- Modification of the Solicitation
- Re-Evaluation of Proposals
- Re-Opening of Discussions
- Solicitation of Revised Proposals
- Contract Termination
- Bid and Proposal Costs
- Partial Recovery of Protest Costs

Alternative Forums – Key Differences

	<u>Agency</u>	<u>GAO</u>	<u>Court of Federal Claims (COFC)</u>
Suspension Of Procurement	Automatic suspension if protest filed within 10 days of award or 5 days after receipt of requested and required debriefing	Automatic suspension if protest filed within 10 days of award or 5 days after receipt of requested and required debriefing and GAO notifies agency within same time period	Temporary Restraining Order and Preliminary Injunction (Discretionary)
Discovery	Ordinarily none	“Agency Report” to include relevant documents and written response to protest allegations; protester may seek particular, relevant documents	Potentially full-blown discovery; at minimum, receipt of Agency’s administrative record
Remedies	Full range of remedies available	Full range of remedies available, plus protest costs, including “reasonable” attorneys’ fees	Injunction or declaratory judgment; may award bid and proposal preparation costs
Appeals	No direct appeal, may file a protest at GAO or COFC	No direct appeal, may seek reconsideration or file protest at USCOFC	Federal Circuit

Timing at GAO

- Request debriefing within 3 days of notification of award
- Protest within 10 days of debriefing
 - Protest within 5 days of debriefing to obtain stay of performance (if a debriefing is required when requested)
- Agency files “Agency Report” within 30 days
- File “Comments” on Agency Report within 10 days
- Decision required by statute within 100 days

Performance

- Products
 - Overall accuracy & Compliance
 - Section 508
 - Cybersecurity
 - Relevant Specifications
- Services
 - Overall Accuracy and Compliance
 - Labor Qualifications
 - Service Contract Act
- Special GSA Schedule Rules (Multiple Award Schedule or MAS)
 - Commercial Sales Practices Format (CSPF)
 - Price Reductions Clause (PRC)
 - Transactional Data Reporting (TDR)
 - Trade Agreements Act (TAA)

Products

- Overall Accuracy & Compliance
- Section 508
- Cybersecurity
- Relevant Specifications

Overall Accuracy & Compliance

APPEALS OF -- PYROTECHNIC SPECIALTIES, INC., ASBCA No. 57890 (2017)

17-1 BCA P 36696 (A.S.B.C.A.), ASBCA No. 57890, 2017 WL 1177972

ASBCA

APPEALS OF -- PYROTECHNIC SPECIALTIES, INC.

Under Contract No. W52PJ-04-C-0098

March 13, 2017

APPEARANCE FOR THE APPELLANT:

Mr. David Karlson
Chief Executive Officer

APPEARANCES FOR THE GOVERNMENT:

Raymond M. Saunders, Esq.,
Army Chief Trial Attorney
Robert B. Neill, Esq.,
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE PAGE

Pyrotechnic Specialties, Inc. (PSI, the contractor, or appellant) appeals from the termination for default of its contract with the Department of the Army, Army Contracting Command — Rock Island¹ (the government). PSI's contract was terminated for default after the government rejected two production lots for their failure to pass multiple acceptance tests, which placed the contractor in a delinquent status under the contract's delivery schedule. PSI also seeks to recover \$802,589 in unreimbursed costs relating to the government's alleged wrongful rejection of a production lot. We have jurisdiction over these appeals under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109. A hearing was

the Board. We deny the appeals.

0098 (the contract) to PSI (R4, tab s produced under the contract were the Army and the Defense Contract various contracting officers (COs) DCMA personnel acted as Quality ion Requests (CARs) (see, e.g., R4, tab 50 at 1). Contract performance espondence reflecting the divergent

TK 124 Mod 0 Signal, Smoke and signal that allows military personnel case of a service member overboard 0, 71)

ded to the contract during contract

performance for a total quantity of 152, 180 signals and a total dollar amount of \$7,575,305 (R4, tabs 23, 28, 33, 38, 40, 47, 68-69).

APPEAL OF -- MILITARY AIRCRAFT PARTS, ASBCA No. 60904 (2017)

17-1 BCA P 36707 (A.S.B.C.A.), ASBCA No. 60904, 2017 WL 1355020

ASBCA

APPEAL OF -- MILITARY AIRCRAFT PARTS

Under Contract No. SPE4A7-13-M-4596

March 27, 2017

APPEARANCE FOR THE APPELLANT:

Mr. Robert E. Marin
President

APPEARANCES FOR THE GOVERNMENT:

Daniel K. Poling, Esq.,
DLA Chief Trial Attorney
Edward R. Murray, Esq.,
Trial Attorney
DLA Aviation
Richmond, VA

OPINION

This timely appeal involves the withdraw in the fuselage of the KC-135 aircraft. M for delivery of the supplies had passed, the assemblies that substantially compli

processed pursuant to the expedited procedures of Board Rule 12.2. A hearing was conducted on 2-3 March 2017 and briefing was completed on 21 March 2017. For the following reasons, the appeal is denied.

FINDINGS OF FACT

1. On 15 November 2012, the Defense Logistics Agency Aviation (DLA) issued Request for Quotations No. SPE4A7-13-T-2198 for eight air duct assemblies, National Stock Number (NSN) 1660-01-590-7060 (R4, tab 3 at 1-2, 4, 12).

2. The duct assembly is a component of the air conditioning ductwork for the KC-135, which provides warm and cool air to the aircraft. The ductwork is located in the fuselage of the KC-135 and is in a "crowded area" surrounded by other systems, such as hydraulic lines, watering bundles, and webbing. If this particular duct assembly failed, it would at the very least begin vibrating and break some of the brackets, causing the ductwork to move. If it came loose, it could begin breaking other brackets and potentially impact other equipment, such as a hydraulic line. (Tr. 1/183-86)

3. For these reasons, the duct assembly is designated as a "CRITICAL APPLICATION ITEM" (R4, tab 1 at 6, tab 3 at 6). FAR 46.203(c) identifies a "critical application item as one in which the failure of the item could injure personnel or jeopardize a vital agency mission."

4. The duct assembly includes three components at issue in this litigation. The first component is a lock bolt (Part No. BACB30DX) (R4, tab 34). Three of these lock bolts are used to fasten a metal assembly onto one end of the part, where it clamps to the next piece of ductwork (tr. 1/196-200). This stiffens the ductwork and allows the attachment of two rods, which prevents the part from vibrating or moving (tr. 1/197). If one of the bolts failed, the part would start to come loose and likely cause the other bolts to fail, causing "that area to start coming apart" (tr. 1/198). The BACB30DX

"It is well established that the government has the right to insist on 'strict compliance' with its specifications."

"The law is well settled that the government has a right to obtain 'precisely what is specified in the contract' including strict compliance with any contract specifications."

Cybersecurity Overview

- Federal Information Security Modernization Act (FISMA)
- National Institute of Standards and Technology (NIST)
 - NIST SP 800-53: standards for contractors operating systems on behalf of federal agencies
 - NIST SP 800-171: standards for contractors in possession of “Controlled Unclassified Information (CUI)” on non-federal systems
- Cybersecurity Maturity Model Certification (“CMMC”)
 - Proposed Rule, Comments due February 26, 2024
- FedRAMP
 - Certification process for contractors providing cloud services

Cybersecurity Overview

- FAR 52.204-21: Basic Safeguarding of Covered Contractor Information Systems
 - Protects Contractor information systems that process, store, or transmit “Federal Contract Information”
 - Subject to 15 basic security requirements from NIST SP 800-171
 - No reporting requirements
- DFARS 252.204-7012: Safeguarding Covered Defense Information (CDI)
 - DoD contractors must provide “adequate security” for “covered defense information” (CDI); generally, NIST 800-171
 - Requires “rapid reporting” within 72 hours of discovery of breach
- Cybersecurity Maturity Model Certification program

Intellectual Property Rights

- Limited Rights (Technical Data)
 - Data developed exclusively at private expense
 - Government may only use internally, may not disclose to 3rd parties
- Restricted Rights (Non-Commercial Computer Software)
 - Non-commercial computer software developed exclusively at private expense
 - Government may use internally on single computer, and may modify, but may not duplicate or disclose to 3rd parties
- Government Purpose Rights
 - Developed with mix of public and private funds
 - Government may use internally or for a “U.S. government purpose”
 - Expire after 5 years, then become unlimited rights
- Unlimited Rights – Government may use for any purpose
- Commercial License Rights – same rights as given to commercial customers
- Specifically Negotiated License Rights

Software EULAs

GSAR 552.212-4(w) Commercial supplier agreements - unenforceable clauses.

- (i) Applicability.
- (ii) End user.
- (iii) Law and disputes.
- (iv) Continued performance.
- (v) Arbitration; equitable or injunctive relief.
- (vi) Updating terms.
- (vii) No automatic renewals.
- (viii) Indemnification.
- (ix) Audits.
- (x) Taxes or surcharges.
- (xi) Non-assignment.
- (xii) Confidential information.

Section 508 (FAR Subpart 39.2)

- Requires Federal agencies to make their electronic and information technology accessible to people with disabilities
 - Generally applicable to all IT purchases
 - Applies to both hardware and software
- Contractors may complete “Voluntary Product Accessibility Templates” (VPATs) to demonstrate compliance with section 508
- Example:
 - Less than 48” high for wheelchair accessibility
 - Remote interface screen control
 - High-contrast screen
 - Voice-controlled operation



Relevant Specifications

- Solicitation and resulting contract may include specifications for performance
- Specifications may also be included by reference to universal standards adopted by GSA or DOD

RR-C-271F

3.3.2.4 Class 4, flat-link chain. The flat-link chain shall be similar to figure 7 and shall be in accordance with the requirements as shown in table II.




FIGURE 7. Type II, class 4, weldless flat-link chain.

TABLE II. Type II, class 4, weldless flat-link chain.

Nominal metal thickness (inch)	Number of links per foot (approx)	Weight per 100 feet (approx) (pounds)		Breaking load (min) ¹ (pounds)		Trade number
		Steel	Brass	Steel	Brass	
0.083	8.5	16	17	1,600	1,120	2-0
0.065	17	12.5	13	990	695	113
0.103	9.75	35	37	2,190	1,535	210
0.125	9	40	42	3,240	2,270	280

¹ Maximum working load limit is 25 percent of breaking load.

Services

- Labor Qualifications
- Service Contract Labor Standards
- Davis Bacon Act

Labor Qualifications

- Most professional services contracts call for labor categories with established labor qualifications
 - Education
 - Experience
- Most labor categories also have a description/scope component
 - “Category 1 will perform functions X, Y, Z . . .”
- Risks
 - Audit risk
 - Breach/FCA risk
 - Protest risk

Service Contract Labor Standards (SCLS)

- Formerly, The McNamara-O'Hara Service Contract Act of 1965 (SCA)
- Requires contractors to pay no less than the monetary wages and fringe benefits determined to be prevailing in a particular locality
 - Wage determinations provided by DoL
- The SCLS applies to Federal contracts:
 - In excess of \$2,500;
 - Performed in the U.S., its territories and possessions; and
 - That are principally for services performed through the use of *service employees* (i.e., concession staff, IT services, intermittent labor services, etc.)

Davis Bacon Act

- Applies to contracts principally for construction, and generally for laborers and mechanics
- Functions similarly to the SCLS

ASBE0016-008 01/01/2020

AREA 1: ALAMEDA, CONTRA COSTA, MONTEREY, SAN BENITO, SAN FRANCISCO, SAN MATEO, SANTA CLARA, & SANTA CRUZ

AREA 2: CALAVERAS, COLUSA, FRESNO, KINGS, MADERA, MARIPOSA, MERCED, SAN JOAQUIN, STANISLAU, & TUOLUMNE

	Rates	Fringes
Asbestos Workers/Insulator (Includes the application of all insulating materials, Protective Coverings, Coatings, and Finishes to all types of mechanical systems)		
Area 1.....	\$ 71.16	23.39
Area 2.....	\$ 54.26	23.39

Special GSA Schedule Rules

- GSA Schedules Overview
- Commercial Sales Practices Format (CSPF)
- Price Reductions Clause (PRC)
- Transactional Data Reporting (TDR)
- Trade Agreements Act (TAA)

How Does the GSA Schedules Program Work?

- Regulated by FAR Part 8
- GSA awards contracts to multiple vendors for the same types of commercial products and/or services
- Vendors compete for orders
- Agencies identify best value and issue purchase orders against selected Schedule
- Limits commercial pricing flexibility
- Pre- and Post-Award Audits

Historical GSA Schedules

- Schedule 00CORP | Professional Services Schedule
- Schedule 03FAC | Facilities Maintenance & Management
- Schedule 36 | Imaging & Document Solution
- Schedule 51 V | Hardware Superstore
- Schedule 56 | Buildings and Building Materials
- Schedule 58 I | Professional Audio/Video
- Schedule 66 | Scientific Equipment & Services
- Schedule 67 | Photographic Supplies & Services
- Schedule 70 | Information Technology
- Schedule 71 | Furniture
- Schedule 71 II K | CFMS
- Schedule 72 | Furnishings and Floor Coverings
- Schedule 73 | Cleaning Supplies & Food Service
- Schedule 75 | Office Supplies & Services
- Schedule 76 | Publication Media
- Schedule 78 | SPORTS
- Schedule 81 I B | Shipping & Packaging
- Schedule 84 | Security, Fire, Law Enforcement
- Schedule 736 | Temporary Staffing
- Schedule 738 X | Human Capital Management

TODAY – Single Schedule (kind of)

Who Purchases From GSA Schedules?

- Federal Government, including
 - Executive branch
 - Congress
 - Military
- Independent federal agencies
- Some Government contractors
- States & localities
- Other authorized entities

Price Reductions Clause (PRC)

- Historically, the heart of Schedule compliance
- The Price Reductions Clause serves to maintain the relationship between three prices:
 - The GSA price
 - The BOA price
 - The commercial list price
- Changes to the relationship subsequent to award trigger the Clause
- Examples
 - Schedule discount is 10%, Basis of Award gets 10%
 - 1:1 ratio – easier to manage
 - Schedule discount is 20%, Basis of Award gets 30% ... not so easy

	Disclosed Discount	Ratio	New Discount
Basis of Award Customer	3%	1	4%
GSA	6%	2	?

Transactional Data Reporting (TDR)

- “Pilot” program
 - Initially, was mandatory for new contracts or renewals on select Schedules
 - Now optional – future plan?
- Eliminates the need to submit a CSPF and ongoing BOA tracking for PRC compliance
 - Eliminates price as part of any pre-award audit
- Contractors required to submit reporting monthly on all GSA sales on 11 data points

Trade Agreements Act (TAA)

- FAR Subpart 25.4
- All Schedule products and services must comply with the TAA
 - Most non-GSA procurements above \$180k, too
- Products – must be a product of the United States or a designated country:
 - It is wholly the growth, product, or manufacture; or
 - It is “substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed”
- Services must be performed by a company “established” in an eligible country
 - No concrete guidance, but location of headquarters qualifies

TAA: Summary of Eligible Countries

- See FAR Part 25 for current list of eligible countries
 - United States
 - Caribbean Basin Countries
 - Free Trade Agreement Countries
 - Least Developed Countries
 - WTO Government Procurement Agreement Countries
- Ineligible Countries: Brazil, China, India, Russia, South Africa, Malaysia

What is a Substantial Transformation?



Substantial Transformation Guidelines

- Origin of components is generally irrelevant where there has been a substantial transformation.
- Assembly operations that are minimal or simple generally will not result in a substantial transformation.
- Components packed together as a set are not necessarily substantially transformed by virtue of being so packed.
- Components themselves must undergo some change in character
- Products sold as “optional” configurations in a combined unit still may meet TAA requirements
- ...and then there’s downloadable software.

Claims

- Claims Overview
- Monetary Claims
- Subcontractor Claims

Claims Overview

- Governed by the Contract Disputes Act of 1978 (“CDA”), 41 U.S.C. §§ 7101-7109
- Defined by FAR § 2.101
- Elements of a claim
 - Written demand to the Contracting Officer
 - Seeking as a matter of right
 - Payment of money in a sum certain;
 - Adjustment or interpretation of contract terms;
 - Other relief arising under or relating to the contract (e.g., reformation or rescission)
 - Submitted to the Contracting Officer for a final decision

Reasons for Filing a Claim

- Non-Payment of Invoice
- Changes
 - Bilateral Change: parties agree and negotiate terms
 - Unilateral Change: government issues change order; contractor receives costs plus profit
 - Constructive Change: disagreement over contract terms
- Differing Site Conditions
 - Category I: subsurface or latent physical conditions differing from those indicated in contract; contractor must show reliance on government representation
 - Patent: unusual physical conditions, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in work
- Delays
 - Excusable: unforeseeable and beyond contractor's control
 - Compensable: government-ordered or attributable to fault of government
 - Concurrent: both parties played a role; will offset contractor's recovery

Monetary Claims

- Sum Certain – demand for a fixed sum
- Alternatives to a fixed sum:
 - Mathematical formula by which the Government can determine the amount of the claim
 - Enlarged claim doctrine: COFC/Boards can exercise jurisdiction over a claim for an amount in excess of the amount presented to the Contracting Officer for a Final Decision if:
 - Increase is based on the same set of operative facts; or
 - Contractor neither knew nor reasonably should have known, at the time the claim was presented to the Contracting Officer, of the factors justifying an increase in the amount of the claim
- Certification required for any claim that exceeds \$100,000

Claims Litigation Process

- File Claim with Contracting Officer
- Claim Granted or Denied
 - If Government does not respond, contractor can treat claim as “deemed denied”
- If denied, appeal to the appropriate Board of Contract Appeals or the Court of Federal Claims
 - Civilian Board of Contract Appeals (CBCA)
 - Armed Services Board of Contract Appeals (ASBCA)

Subcontractor Claims

- With some exceptions, subcontractors cannot file claims directly with Government Contracting Officer
 - Subcontractor does not have privity of contract with the Government
- Prime contractor must “sponsor” subcontractor’s claim
 - Requires more than a “rubber-stamp” approval of subcontractor’s claim
 - Prime must ensure claim is being submitted in good faith and there are good grounds for the claim
 - If claim is above \$100,000, prime must certify
 - False certification carries FCA risk

Audits & Investigations & Other Adverse Actions

- Government Audit Rights
- OIG Audits
- Entrance/Exit Conferences
- DCAA Audits
- DOJ Investigations

Government Audit Rights

- **FAR 52.215-2 Audit and Records - Negotiation.**
- **FAR 52.215-2 Audit and Records – Negotiation Alternate I.**

- **GSAR 552.215-70 Examination of Records by GSA.**

The Contractor agrees that the Administrator of General Services or any duly authorized representatives shall, until the expiration of 3 years after final payment under this contract, or of the time periods for the particular records specified in Subpart 4.7 of the Federal Acquisition Regulation (48 CFR 4.7), whichever expires earlier, have access to and the right to examine any books, documents, papers, and records of the Contractor involving transactions related to this contract or compliance with any clauses thereunder...

Origins Of An OIG Audit

- Past historic risk factors
- Renewal involving significant Schedule revenue
- Contracting Officer referral
- IOA referral (GSA)
- Whistleblower allegation
- Competitor complaint
- Targeted OIG enforcement effort
- DOJ investigation
- Voluntary or Mandatory disclosure
- It's just your time

Defense Contract Audit Agency

- Performs several types of audits
 - Pre-award audit of business systems
 - Price Proposals
 - Cost Accounting Standards compliance
 - Contract Financing and Final Voucher submissions
 - Incurred Cost Proposals
- Looking for a consistent cost tracking system
 - Earned Value Management
 - Compliance with special Government terms

Other Audits

- Small Business Administration
- DoL/OFCCP
- GAO
- DCMA

DOJ Investigations

- Civil vs. Criminal
 - How do you know?
 - Search warrants
- Either way, call your lawyer
- Don't obstruct
- Cooperation is important
- Preserve the privilege

Termination

- Termination for Default (T4D)
- Termination For Convenience (T4C)

Terminations Overview

- Government can terminate your contract in 2 ways
 - Termination for Default
 - Termination for Convenience
- Termination for Default – failure to perform
- Termination for Convenience – termination is in the Government's best interest
 - Clause unique to Government contracts
- Termination process and contractor's rights differ depending on how the contract is terminated
 - Contractors entitled to more under T4C

Terminations Clauses

FAR Clause	Description
52.249-1	Termination for Convenience of the Government (Fixed-Price) (Short Form).
52.249-2	Termination for Convenience of the Government (Fixed-Price).
52.249-3	Termination for Convenience of the Government (Dismantling, Demolition, or Removal of Improvements).
52.249-4	Termination for Convenience of the Government (Services) (Short Form).
52.249-5	Termination for Convenience of the Government (Educational and Other Nonprofit Institutions).
52.249-6	Termination (Cost-Reimbursement).
52.249-7	Termination (Fixed-Price Architect-Engineer).
52.249-8	Default (Fixed-Price Supply and Service).
52.249-9	Default (Fixed-Price Research and Development).
52.249-10	Default (Fixed-Price Construction).
52.249-12	Termination (Personal Services).

Termination for Default (T4D)

- Government allowed to terminate for actual or anticipated failure to perform
- Typically, T4D preceded by a Cure Notice
 - Cure Notice is a letter identifying the performance issues
 - Contractor has 10 days to correct the performance defect
 - Contractor submits letter to the Contracting Officer to explain performance deficiencies, how these deficiencies have been or will be corrected, and assurances work going forward will meet contract requirements
- Consequences
 - If Government does T4D, contractor must stop work immediately
 - Contractor has to pay the Government's costs in re-procuring the contract, and may have to repay any profit from the contract as well as liquidated damages
 - Negative past performance rating that will impact your ability to obtain future awards
 - Potential suspension/debarment

Termination for Convenience (T4C)

- FAR 52.249-2 (Fixed-Price): The Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest.
- Government has the right to terminate at any time for any reason
 - Limitations: termination must be in the Government's best interests and must not be done in bad faith
- Government must pay contractor. Three-part formula:
 - Costs incurred
 - Reasonable profit on those costs
 - Settlement costs
- Contractor NOT entitled to anticipatory profits

Additional Topics

- Tax
- Environmental
- Immigration
- Export Regulations
- Grants

Thank You!

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