



Season 5: Episode 6 – Implementing Socio-Economic Programs

Part 219 – Small Business Programs

Part 222 – Application of Labor Laws to Government Acquisitions

Part 223 – Environment, Energy & Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace

Part 226 – Other Socio-Economic Programs

Co-Host – Lou Chiarella

- Senior Counsel, Crowell & Moring LLP
- Adjunct Professor at the George Washington University Law School, Government Procurement Law Program.
- Deputy Assistant General Counsel in the Procurement Law Division, Office of the General Counsel, U.S. Government Accountability Office (GAO) (2001-2022).
- Army Judge Advocate (1988-2018), culminating with his assignment as Chief Counsel for the Army Futures Command Task Force, which resulted in the Army's largest acquisition-related reorganization in 50 years.



Co-Host – Dave Drabkin

Independent consultant with 41-plus years of federal government contracting experience in both the public and private sector.

Chairman of The Advisory Panel on Streamlining and Codifying Acquisition Regulations (Section 809 Panel), <https://discover.dtic.mil/section-809-panel/>



The President of the United States appointed Dave to the Service Acquisition Reform Act (SARA) and the Multiple Award Schedule (MAS) Panels.

DoD Program Manager for Federal Acquisition Streamlining Act (FASA) Implementation.

Dave has worked for the DoD, the General Services Administration (GSA) and the Homeland Security and Government Affairs Committee (HSGAC) of the U.S. Senate. He has also worked for Northrop Grumman Corporation and Dixon Hughes Goodman, LLP.

david@drabkinandassociatesllc.com

(703) 927-1116

Welcome Back, and Our Rules of Engagement

- Class will begin promptly at 2:00 pm ET.
- Class will end at 3:30 pm ET.
- Please use the Q&A panel to ask your questions
 - And if we are unable to answer the questions during the program today, we'll get back to you.

Today's Topics: Socio-Economic Programs

Part 219 – Small Business Programs

Part 222 – Application of Labor Laws to Government Acquisitions

Part 223 – Environment, Energy & Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace

Part 226 – Other Socio-Economic Programs

What's in the Documents Folder Today?

- Executive Order 13985 (Jan. 20, 2021), Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,
<https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01753.pdf>
- Executive Order 14091 (Feb. 16, 2023), Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,
<https://www.federalregister.gov/documents/2023/02/22/2023-03779/further-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal>
- POLICY AND PROCEDURES FOR THE DOD PILOT MENTOR-PROTEGE PROGRAM,
https://www.acq.osd.mil/dpap/dars/dfars/html/current/appendix_i.htm
- DOD Contractor's Safety Manual For Ammunition and Explosives,
<https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodm/414526m.pdf?ver=2018-12-03-081135-727>
- DoDM 5100.76 Safeguarding Sensitive Conventional Arms, Ammunition & Explosives
<https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodm/510076m.PDF?ver=5yPY5AkBNcNSniaDh8hXgQ%3D%3D>

DFARS 219 – Small Business Programs

- OSD and military departments and defense agencies each have a Director of Small Business Programs
- See PGI Guidance on how to advertise small business events
- Religious–related services (inclusion of nonprofit organizations)
 - Nonprofit organization – Described in section 501(c) of the Internal Revenue Code of 1986; and (2) Exempt from tax under section 501(a) of that Code.
 - May compete in SB set-aside
 - Limited sole-source exceptions
 - Check SAM registration for SB status
- See special solicitation provision if SB is expected to exceed size standard either by \$ or employee threshold

219.4 – Cooperation with SBA

- Small Business Specialist is primary focal point w/ SBA
- SBA procurement center representatives (PCR) for DoD “Humanitarian and civic assistance” means any of the following activities carried out in conjunction with authorized military operations in a foreign country:
 - Medical, surgical, dental, and veterinary care provided in areas of a country that are rural or underserved by professionals in those fields, including education, training, and technical assistance related to the care provided.
 - Construction of rudimentary surface transportation systems.
 - Well drilling and construction of basic sanitation facilities.
 - Rudimentary construction and repair of public facilities. (10 U.S.C. § 401(e))
- SBA PCRs will not review
 - For foreign military sales (see DFARS 225.7300);
 - In support of humanitarian and civic assistance;
 - In support of a contingency operation;
 - Awarded pursuant to a Status of Forces Agreement or other agreement with the government of a foreign country in which U.S. Armed Forces are deployed; or
 - Both awarded and performed outside the United States and its outlying areas.

219.5 – Setting Aside Acquisitions

- Don't set-aside acquisitions for supplies that were developed and financed by Canadian sources under the US-Canadian Defense Development Sharing Program
- Total small business set-asides – unless there are not 2 or more SBs set aside
 - Construction, including maintenance and repairs, under \$3 million;
 - Dredging under \$1.5 million; and
 - Architect-engineer services for military construction or family housing projects under \$1 million (10 U.S.C. § 2855).
- Chief of the Contracting Office or higher may reject SBA recommendations

219.6 – Certificate of Competency (CoC)

- Follow PGI guidance at 219.602 when making nonresponsibility determinations for a small business concern
- The CoC process requires SBA providing the small business with the reason for the nonresponsibility determination as well as the documents on which the determination was based (due process). The PGI guidance and procedures further this overall goal.
- Remember that in an LPTA source selection, responsibility-like evaluation criteria (e.g., experience, past performance) must be referred for a CoC.

Polling Question – Govt and Industry

- Have you assessed/been assessed liquidated damages for not meeting a contract's subcontracting goals?
 - a. Yes
 - b. No

219.7 – Subcontracting Program

- Test Program for Negotiation of Comprehensive SB Subcontracting Plans
 - Expires December 31, 2027
 - Eligibility 3 contracts for supplies, services (including construction) in the aggregate of \$1M includes qualified nonprofits in the Committee for Purchases from People Who Are Blind or Severely Handicapped and HBCUs.
 - DCMA designates ACO, assisted by a SB specialist
 - Negotiated annually w/ positive goals
 - Includes liquidated damage anticipated and other unique DFARS clauses (252.219-7004, 7004)
 - Comprehensive plan in lieu of individual plans
 - Annual review following close of FY
 - Compare actual subcontracting to goals
 - Failure to meet goals
 - Demonstrate “good faith” effort
 - Assessment of liquidated damages
 - 15 working days to respond
 - Final Decision
 - Substitutions of large companies for smalls listed in plan must be noticed to ACO

219.8 – Contracting w/ SBA (8(a))

- DoD COs has authority to sign 8(a) agreements, SBA retains overall authority
- May be awarded competitively or sole source
- Special guidance on selecting contracts for 8(a) program see PGI 219.803
- 8(a) firms should be given opportunity make a technical presentation
- Native Hawaiian firms have additional benefits
- Pricing
 - PGI 219.805-2
 - Certified cost or pricing data
 - SBA notified if contract w/drawn over the SAT
- Sole source awards over \$100M must have a justification

219.71 – Pilot Mentor-Protégé Program

- Purpose: to provide incentives for DoD contractors to assist protege firms in enhancing their capabilities and to increase participation of such firms in Government and commercial contracts.
- See Program procedures in folder
- Mentor gets credit to subcontracting goals
- COs must:
 - Negotiate advanced agreements
 - Modify Ks to add 252.232-7005 (Reimbursement of Subcontractor Advance Payments - DoD Pilot Mentor-Protégé Program)
 - Modify customary progress payments where requested to mentor firm
 - Modify to add CLIN for developmental assistance
 - Separate K for developmental assistance an exception
 - Limit reimbursement to \$1m w/o written determination
 - Monitor reporting requirements
 - Provide agreement to DCMA
- Segregate costs of developmental assistance
- DCMA will do annual performance review

DFARS 222.1 & .2 – Application of Labor Laws

- Labor Advisor w/in DoD defined as the departmental or agency headquarters labor advisor.
- PGI 222.101 provides internal DoD guidance for managing labor issues
- Responsibility for resolving impacts on performance is delegated to each department and agency
- Labor Advisor plays key role
 - Authority to remove items from facilities affected by work stoppages is limited – must consider impact on negotiations
 - Coordinate with management and labor
 - Concurrence can't be achieved, and items needed, Agency Head can decide military may be used
- Stevedoring interruptions – use military personnel as last resort.
- Questions about interpretation of DoL rules – refer to OSHA
- Variance with compliance requirements must be approved by OSHA
- Overtime – Coordinate with other contracting offices where impacts more than 1 contract

222.3 – Contract Work Hours & Safety Standards

- Upon Notification of violations
 - Immediately w/hold available funds
 - Written notification to Kor & right to appeal (60 days)
 - If insufficient funds available request Kor to make payment
 - Assessment final
 - No appeal w/in 60 days
 - Final order following appeal (may waive amounts under \$500)
 - Secretary of Labor takes final action to waive or adjust liquidated damages over \$500

222.4 – Labor Standards for Construction

- Apply Service Contract Labor Standards (SCLS) & Construction Wage Rate Requirements (CWRR) to installation support contracts if K is
 - principally for services but has a substantial and segregable amount of construction, alteration, renovation or repair work &
 - the aggregate amount of construction exceeds \$2,000
- SCLS applies to installation support requirements including
 - Plant operations
 - Installation services
- CWRR applies to Contract construction, alteration, renovation, painting, and repair requirements (i.e., roof shingling, building structural repair, paving repairs)
- Repairs vs Maintenance calls/orders determined at time of solicitation that require
 - >32 hours apply CWRR
 - <32 hours apply SCLS
 - Painting >200 sq feet CWRR
 - Don't split work to get under thresholds

Polling Question

- In construction contracts:
 - Government personnel: have you issued a pre-construction labor standards letter
 - a. Yes
 - b. No
 - Contractor personnel: have you received a pre-construction labor standards letter
 - a. Yes
 - b. No

See DFARS 222.406-1(b)

222.4 – Labor Standards for Construction

- Administration & Enforcement
 - Training for contract administration, labor relations, inspection and labor standard enforcement personnel
 - Periodic compliance reviews
- Preconstruction Letter & Conferences
 - Letter promptly after award to prime contractor, including
 - Construction Wage Rate Requirements statute;
 - Contract Work Hours and Safety Standards statute;
 - Copeland (Anti-Kickback) Act
 - Parts 3 and 5 of the Secretary of Labor's Regulations (Parts 3 and 5, Subtitle A, Title 29, CFR); and
 - Executive Order 11246 (Equal Employment Opportunity)
 - Employment of foremen, laborers, mechanics, and others;
 - Wages and fringe benefits payments, payrolls, and statements;
 - Differentiation between subcontractors and suppliers;
 - Additional classifications;
 - Benefits to be realized by contractors and subcontractors in keeping complete work records;
 - Penalties and sanctions for violations of the labor standards provisions; and
 - The applicable provisions of FAR 22.403; and
 - Ensure Kor sends a copy to each subcontractor

Polling Question

- Contractors – Have you been the subject of labor a Labor violation investigation?
 - a. Yes
 - b. No
- Government – Have you conducted a Labor violation investigation
 - a. Yes
 - b. No

See DFARS 222.406-8; PGI 222.406-8(a)

222.4 – Labor Standards for Construction

- Payrolls & statements – if not using DoL Form WH 347 submit DD Form 879
- Investigations
 - Notify the Contracting Officer's Representative
 - 60 days to appeal
 - Appeals must demonstrate
 - Didn't happen
 - Inadvertent
 - Assessment improperly computed
 - KO forward report to agency head
- Withholding/Suspension of payments
- Liquidated damages
 - Waivers for inadvertent following due care
- KO reporting requirements

More DFARS 222 Regulations

- 222. 8 – EEO - refer inquiries to labor advisor
- 222.10 – SCLS – Follow PGI 222.1008-1 for wage rate determinations
- 222.13 - EEO for Veterans –
 - Forward IAW FAR
 - Notify complainant of referral
 - Do not advise contractor of the identity of the complainant, nature of the complaint or the fact that a complaint was received
- 222.14 – Employment of Workers with Disabilities
 - Waivers KOs submit to labor advisor
 - Labor advisor will forward to
 - The agency head for waivers under FAR 22.1403(a). For the defense agencies, waivers must be approved by the Under Secretary of Defense for Acquisition.
 - The Secretary of Defense, without the power of redelegation, for waivers under FAR 22.1403(b).
 - Complaints KOs
 - Notify complainant of receipt
 - Will not identify the complainant, nature of complaint or its receipt to contractor

More DFARS 222 Regulations

- 222.17 – Combatting Trafficking in Persons
 - PGI 222.17 contains specific DoD guidance for combatting trafficking persons including policies, how to treat violations and checklists
- 222.70 – Construction in Noncontiguous States
 - "Noncontiguous State," as used in this subpart, means Alaska, Hawaii, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Islands, Navassa Island, Palmyra Atoll, and Wake Island.
 - Must employ individuals who are residents of that noncontiguous State and who, in the case of any craft or trade, possess or would be able to acquire promptly the necessary skills to perform the contract.
 - The head of the agency may waive the requirements of on a case-by-case basis in the interest of national security
- 222.72 – Compliance w/ Foreign Labor Laws
 - Use the clause at 252.222-7002, Compliance with Local Labor Laws (Overseas), in solicitations and contracts for services or construction to be performed outside the United States and its outlying areas.
 - Special clauses for Italy, Spain and Guam (222.73)

222.74 – Restrictions on Mandatory Arbitration

- Prohibition on using appropriated funds in FY requirements 10 or later for any contract (including task or delivery orders and bilateral modifications adding new work) in excess of \$1 million, unless the contractor agrees not to—
 - Enter into any agreement with any of its employees or independent contractors that requires, as a condition of employment, that the employee or independent contractor agree to resolve through arbitration—
 - Any claim under title VII of the Civil Rights Act of 1964; or
 - Any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention; or
 - Take any action to enforce any provision of an existing agreement with an employee or independent contractor that mandates that the employee or independent contractor resolve through arbitration—
 - Any claim under title VII of the Civil Rights Act of 1964; or
 - Any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention.
- No funds appropriated on or after FY10 may be expended unless the contractor certifies that it requires each covered subcontractor to agree not to enter into arbitration
- Doesn't apply to commercial items
- Waivers – SECDEF/DEPSECDEF may waive prohibition for national security must report to Congress all such waivers

DFARS 223 – Environment, Energy & Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace

- 223.3 - Hazardous Material Identification & Material Safety Data
 - KO provides data to safety officer
 - Ammunition & Explosives
 - Means liquid and solid propellants and explosives, pyrotechnics, incendiaries and smokes in the following forms:
 - Bulk,
 - Ammunition;
 - Rockets;
 - Missiles;
 - Warheads;
 - Devices; and
 - Components of (i) through (vi), except for wholly inert items.
 - Handle carefully to avoid mishaps, follow guidance at DoD 4145.26-M, DoD Contractors' Safety Manual for Ammunition and Explosives
 - Not Applicable to contracts for
 - Inert components containing no explosives, propellants, or pyrotechnics;
 - Flammable liquids;
 - Acids;
 - Oxidizers;
 - Powdered metals; or
 - Other materials having fire or explosive characteristics

DFARS 223 – Environment, Energy & Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace

- 223.4, Recovered Materials – PGI 223.405
- 223.5, Drug Free Workplace
 - Contractors must maintain a Drug Free Workplace
 - Applies to all contracts
 - Access to classified information
 - National security
 - Impacts health or safety of users of product or performance
 - Don't use DoD clause in Commercial Items, OCONUS or below the SAT
- 223-8, Ozone Depleting Substances
 - No K may include a specification or standard calling for the use of Class !
Ozone depleting substances w/o Flag/SES approval

223.71 – Storage, Treatment, & Disposal of Toxic or Hazardous Materials

- “Storage” means a non-transitory, semi-permanent or permanent holding, placement, or leaving of material. It does not include a temporary accumulation of a limited quantity of a material used in or a waste generated or resulting from authorized activities, such as servicing, maintenance, or repair of Department of Defense (DoD) items, equipment, or facilities.
- “Toxic or hazardous materials” means materials
 - referred to in section 101(14) & 102 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA);
 - that are of an explosive, flammable, or pyrotechnic nature; or
 - otherwise identified by the Secretary of Defense as specified in DoD regulations.
- No storage, treatment or disposal on DoD installations unless owned by DoD, member of armed forces or dependent unless exception applies
 - 11 Exceptions set out at DFARS 223-7104
 - May assess fees for authorized storage or disposal

223.72 – Safeguarding Sensitive Conventional Arms, Ammunition & Explosives (AA&E)

- Ammunition.
 - A device charged with explosive, propellants, and pyrotechnics, initiating composition, riot control agents, chemical herbicides, smoke, and flame for the use in connection with defense or offense, including demolition. Excluded from this definition are devices charged with chemical agents, defined in DoD Dictionary of Military and Associated Terms (Reference (q)), and nuclear and biological material. Ammunition including cartridges, projectiles, including missile rounds, grenades, mines, and pyrotechnics together with bullets, shot, and necessary primers, propellants, fuses, and detonators individually or having unit of issue, container, or package weight of 100 pounds or less. Blank, inert training ammunition and rimfire ammunition are excluded.
- Arms.
 - A weapon that will, or is designed to, expel a projectile or flame by the action of the explosive and the frame or receiver of any such weapon.
- Explosives.
 - Any chemical compound, mixture, or device, the primary or common purpose of which is to function by explosion. The term includes, but is not limited to, individual land mines, demolition charges, blocks of explosives (dynamite, trinitrotoluene, C-4, and other high explosives), and other explosives consisting of 10 pounds or more; for example, gunpowder or nitroguanidine.
- Applicable to contracts when
 - Provided as GFP
 - Development, production manufacture or purchase
- Doesn't apply to
 - Commercial Items
 - GOCO manufacturing facility
- Preaward must specify the use of AA&E in PR

223.73 – Minimizing the Use of Materials Containing Hexavalent Chromium

- Minimize hexavalent chromium in deliverables & construction materials no more than 0.1 % by weight
- Exceptions
 - Legacy systems - any program that has passed Milestone A in the defense acquisition management system, as defined in DoD Instruction (DODI) 5000.02
 - Sustainment of legacy systems
 - Authorized & approved by Flag/SES to critical defense applications where there is no substitute

DFARS 226 – Other Socioeconomic Programs

- 226.1 – Indian Incentive Program
 - PGI guidance on obtain funding at 226.103
- 226.71 – Preference for Local Small Businesses
 - Applies to Base Closures
 - Vicinity,” means the county or counties in which the military installation to be closed or realigned is located and all adjacent counties, unless otherwise defined by the agency head (like the Stafford Act, for BRAC).
 - Expect at least one local
 - Consider including evaluation factor extent to which offerors specifically identify and commit, in their proposals, to a plan to hire residents of the vicinity of the military installation that is being closed or realigned.

226.72 – Demonstration Project for Contractors Employing Persons w/ Disabilities

- Mandatory sources and SBA programs first
- Severely disabled means an individual with a disability (as defined in 42 U.S.C. § 12102) who has a severe physical or mental impairment that seriously limits one or more functional capacities
- Applies to Kongs that
 - employ 33% (of total workforce) severely disabled individuals over 12 months prior to solicitation
 - Pay minimum wage rate
 - Provide health insurance & comparable retirement plan
- Written justification required per FAR 6.302-5
- Required evaluation factor is percentage of severely disabled employees
- Counted against SDB goals if properly registered in SAM
- **Note:** Demonstration project without end date.

Last But Not Least

- More changes are arriving
- Executive Order 14091, Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (Feb. 16, 2023)
 - New EO directs federal agencies to undertake additional efforts to advance equity initiatives.
 - New EO targets the significant barriers still faced by underserved communities by requiring nearly every federal agency to integrate equity in their planning and decision-making.
 - By requiring agencies to consider equity, the Biden Administration is hoping to achieve more equitable and inclusive outcomes in nearly every facet of federal programs.
 - <https://www.federalregister.gov/documents/2023/02/22/2023-03779/further-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal>

See you all again on July 19th . . .

Same Bat Time . . .

Same Bat Channel . . .

THANKS!!!!!!

