



PUBLIC
CONTRACTING
INSTITUTE

GovCon 101: Supply Chain Concerns

August 28, 2023

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Nice to Meet You!



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Overview

How You Buy

Competition
Terms & Conditions

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Cybersecurity + Software

What You Cannot Buy

Sanctions
Section 889

1. HOW YOU BUY...

Competition



Competition In Subcontracting

- Competition in Contracting Act (CICA), 41 U.S.C. § 3301
 - Federal government **shall** use “full and open competition” through the use of competitive procedures
- As a policy matter, this also applies to subcontracting
 - FAR 52.244-5, Competition in Subcontracting
 - Approved Purchasing Systems
- FAR 52.244-5 is included in:
 - Non-commercial prime contracts
 - Prime contracts > \$250,000
- Subcontract competition requirements may be less rigorous for certain types of subcontracts:
 - Commercial products/services
 - Firm-fixed price
 - Lower-value agreements (*e.g.*, < \$10,000; < \$250,000)
 - Mentor-Protégé relationships

FAR 52.244-5, Competition in Subcontracting

- Clause requires prime contractors to award subcontract “on a competitive basis to the maximum practical extent...”
- “Competition” focuses on the contractor’s **process**, not necessarily the price
 - *U.S. ex rel. Garzione v. PAE Government Services*, 164 F. Supp.3d 806 (E.D. Va. 2016) (dismissing whistleblower complaint because prime contractor competed a requirement, despite the fact that award was made to the highest-priced offeror)
- “FAR 52.244-5 requires the contractor to select subcontracts/purchase orders on a competitive basis to the maximum practical extent. To know if this has been achieved the analyst needs to know the following”:
 - Number of bids requested
 - Number of bids received
 - Number of bids responsive

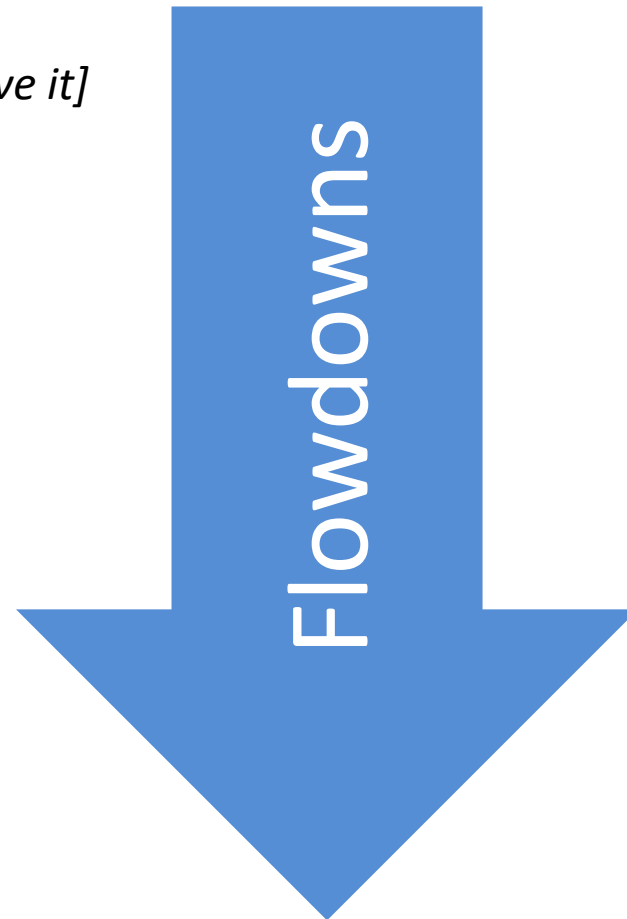
DCMA Contractor Purchasing System Review (CPSR) Guidebook (September 10, 2021)

FAR 52.244-5, Competition in Subcontracting

- Competition priorities for the government when consenting to subcontracts:
 - 44.202-2(a)(5): adequate price competition
 - 44.202-2(b)(2): treatment of affiliates
 - 44.202-2(b)(3): noncompetitive procurements
- Hallmarks of a contractor's Purchasing System:
 - 44.303(a): market research
 - 44.303(b): price competition
 - 44.303(e): treatment of affiliates
 - 252.244-7001(c)(7): competitive sourcing
 - 252.244-7001(c)(8): determination of fair and reasonable prices

Terms & Conditions (cont'd)

- Most government contracts include terms and conditions that need to be “flowed down” to subcontractors/suppliers
 - How far?
 - *“All the way down...” [if you can believe it]*
- Types of flowdowns
 - Mandatory
 - Necessary
 - Other



Terms & Conditions (cont'd)

- **Mandatory flowdowns** in commercial subcontracts

- FAR 52.244-6 (noncommercial prime) & FAR 52-212-5(e) (commercial prime)

1. FAR 52.203–13, Contractor Code of Business Ethics and Conduct
2. FAR 52.203–15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009
3. FAR 52.203-19, Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements
4. FAR 52.204-21, Basic Safeguarding of Covered Contractor Information Systems
5. FAR 52.204-23, Prohibition of Contracting for Hardware, Software, and Services Developed by Kaspersky Lab and Other Covered Entities
6. FAR 52.204-25, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment
7. **FAR 52.204-27, Prohibition on a ByteDance Covered Application**
8. FAR 52.219–8, Utilization of Small Business Concerns
9. FAR 52.222–21, Prohibition of Segregated Facilities
10. FAR 52.222–26, Equal Opportunity
11. FAR 52.222–35, Equal Opportunity for Veterans
12. FAR 52.222–36, Equal Opportunity for Workers with Disabilities
13. FAR 52.222-37, Employment Reports on Veterans
14. FAR 52.222-40, Notification of Employee Rights Under the National Labor Relations Act
15. FAR 52.222-41, Service Contract Labor Standards
16. FAR 52.222–50, Combating Trafficking in Persons
17. FAR 52.222-51, Exemption from Application of the Service Contract Labor Standards to Contracts for Maintenance, Calibration, or Repair of Certain Equipment— Requirements
18. FAR 52.222-53, Exemption from Application of the Service Contract Labor Standards to Contracts for Certain Services—Requirements
19. FAR 52.222-54, Employment Eligibility Verification (“E-Verify”)
20. FAR 52.222–55, Minimum Wages under E.O. 13658
21. FAR 52.222-62, Paid Sick Leave under E.O. 13706
22. FAR 52.224-3, Privacy Training
23. FAR 52.225-26, Contractors Performing Private Security Functions Outside the United States
24. FAR 52.226-6, Promoting Excess Food Donation to Nonprofit Organizations
25. FAR 52.232-40, Providing Accelerated Payments to Small Business Subcontractors
26. FAR 52.247–64, Preference for Privately Owned U.S.-Flag Commercial Vessels

Terms & Conditions (cont'd)

- **Necessary flowdowns**
 - Clauses that, as a practical matter, the prime needs to include to meet prime contract requirements
- **Examples:**
 - Cybersecurity (esp. DFARS 252.204-7012)
 - Buy American/Country of Origin
 - Sourcing restrictions (incl. DFARS 252.246-7008, Sources of Electronic Parts)
 - Technical data rights/computer software rights
 - Cost or pricing data
 - Background check/facility access
 - H-Clauses

Terms & Conditions (cont'd)

- Other flowdowns
 - “Standard” terms & conditions
- Examples:
 - Termination (incl. Termination for Convenience)
 - Default
 - Delivery/Shipping
 - Inspection/Warranty
 - Changes
 - Audit
 - Disputes
 - Choice of Law

Terms & Conditions (cont'd)

- Be aware of the *Christian Doctrine*
 - *G.L. Christian & Assocs. v. United States*, 312 F.2d 418, 160 Ct. Cl. 1 (1963)
 - Certain rules and contract clauses have the force and effect of law even though not expressly incorporated in a prime contract
 - “Deeply ingrained strand of public procurement policy”
 - Such as, for example, the Termination for Convenience clause
 - Open debate as to whether the *Christian* doctrine applies at the subcontractor level
 - BUT...

Terms & Conditions (cont'd)

- The Office of Federal Procurement Policy (OFCCP) has issued at least two decisions extending *Christian* to subcontractors in the healthcare field
 - **Radically expansive view** of *Christian* doctrine
 - *OFCCP v. UPMC-Braddock*, ARB Case No. 08-048 (May 29, 2009)
 - Relates to Federal Employee Health Benefits Program (administered by Office of Personnel Management)
 - “Equal Rights” clauses under jurisdiction of Department of Labor and OFCCP may be subject to the *Christian* doctrine or incorporated into subcontracts by operation of language of authorizing statute or Executive Order
 - In 2013, the D.C. District Court **affirmed** OFCCP’s ruling by granting the Government’s motion for summary judgment
 - The case was appealed to the D.C. Circuit and was **dismissed** as moot in 2014 because the Secretary of Labor issued a five-year moratorium on the enforcement of the socioeconomic requirements for TRICARE subcontractors
 - *OFCCP v. Fla. Hosp.*, DOL OALJ No. 2009-OFC-00002 (Oct. 18, 2010)
 - Relates to TRICARE (administered by the Department of Defense)
 - Complaint **dismissed** on appeal



2. WHAT YOU CAN BUY...

Country of Origin



The “Country of Origin” Maze

The Buy American Act

The Trade Agreements Act



**Executive Orders –
Products + Pharmaceuticals**

**Buy America Act
(Infrastructure/
Transportation)**

DoD Specialty Metals

**The 2009
Recovery Act**

DHS Kissell Amendment

DoD Berry Amendment

DoD Photovoltaic Devices

**Build America,
Buy America**

And Many, Many More...

Buy American Act (BAA)



Non-Manufactured Products



Mined or Produced in the U.S.

Manufactured Products



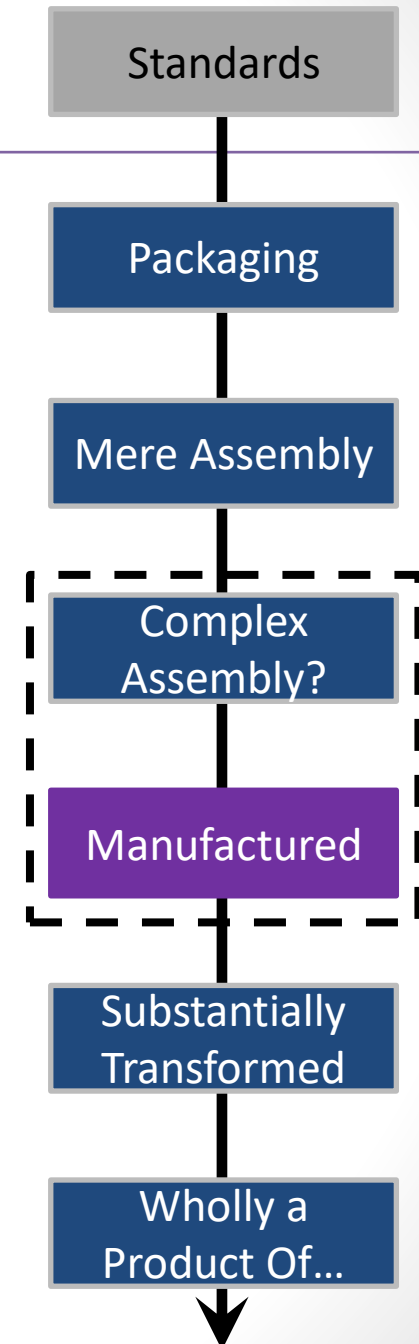
1. **Manufactured** in the U.S.;
and
2. Majority **domestic content**

- ✓ Products made predominantly from iron and steel: **≥ 95%** domestic content
- ✓ Other manufactured products: **≥ 60%** domestic content
 - *Partial* exception for COTS products to domestic content test
 - Domestic content requirement rising incrementally beginning January 2024 to 65-75%

• If it's not "domestic"... it is **foreign**

Buy American Act (cont'd)

- The BAA does not define “manufactured”
- Inconsistent interpretations by courts/Boards
- Key takeaways
 - “Manufacturing” requires more than mere U.S. packaging, but assembly of discrete items into a final form *may* be sufficient
 - **Highly fact-dependent**
 - Reassembly in the U.S. of a disassembled product is not enough
 - Considers whether the item being purchased by the government “is made and its identity established” in the U.S.
 - Does not necessarily require “substantial transformation” (which must be established under the TAA)



Buy American Act (cont'd)



- Waivers available
 - Public interest
 - Nonavailability (FAR 25.104 + other determinations)
 - **Unreasonable cost**
 - Commercial IT products (under review?)
 - Commissary/resale
- If the foreign product is **substantially cheaper** than the domestic one, then the BAA may be waived
 - **20%** for most acquisitions
 - **30%** if the lowest domestic offer is from a small business
 - **50%** for *Department of Defense acquisitions*
 - “Critical items” and “critical components” will get an additional “adder”

BAA vs. TAA

- Here's how it works...
 - The BAA generally applies to procurements > \$10,000
 - But if:
 1. The **product** being purchased is covered by a Free Trade Agreement (FTA);
 2. The **agency** conducting the procurement is covered by an FTA; and
 3. The **cost** of the procurement is at or above the FTA threshold (approx. \$183,000 for supplies as of 2023)...
 - Then...

A red rectangular box containing the letters "TAA" in a large, white, bold, sans-serif font with a slight drop shadow.A dark blue rectangular box containing the letters "BAA" in a large, white, bold, sans-serif font with a slight drop shadow.

Trade Agreements Act (TAA)

- Contractors must deliver an article that is:
 - “Mined, produced, or manufactured in the United States”; or
 - “Substantially transformed in the United States 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.”

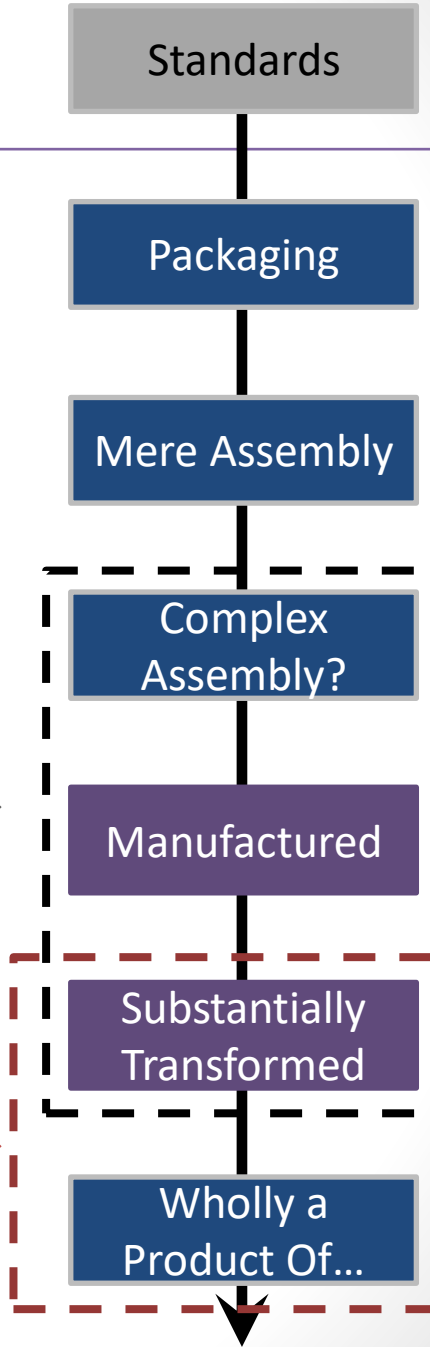


Trade Agreements Act (cont'd)

- Typical questions in assessing “substantial transformation”:
 - How has the “name, character or use” changed?
 - What level of complexity is involved in assembly process?
 - How many components are there?
 - What technologies are involved?
 - How many operations are required?
 - What machinery or tooling is used?
 - How long does the process take?
 - What types of technical skills must employees possess?
 - What is the expense and value added of the assembly?



Trade Agreements Act (cont'd)



TAA Designated Countries

Afghanistan

Angola

Antigua and
Barbuda

Armenia

Aruba

Australia

Austria

Bahamas

Bahrain

Bangladesh

Barbados

Belgium

Belize

• Benin

• Bhutan

• Bonaire

British Virgin
Islands

Bulgaria

Burkina Faso

Burundi

Cambodia

Canada

Central African
Republic

Chad

Chile

Colombia

Comoros

Costa Rica

Croatia

Curacao

Cyprus

Czech Republic

Democratic
Republic of
Congo

Denmark

Djibouti

Dominica

Dominican
Republic

El Salvador

Equatorial
Guinea

Eritrea

Estonia

Ethiopia

Finland

France

Gambia

Germany

Greece

Grenada

Guatemala

Guinea

Guinea-Bissau

Guyana

Haiti

Honduras

Hong Kong

Hungary

Iceland

Ireland

Israel

Italy

Jamaica

Japan

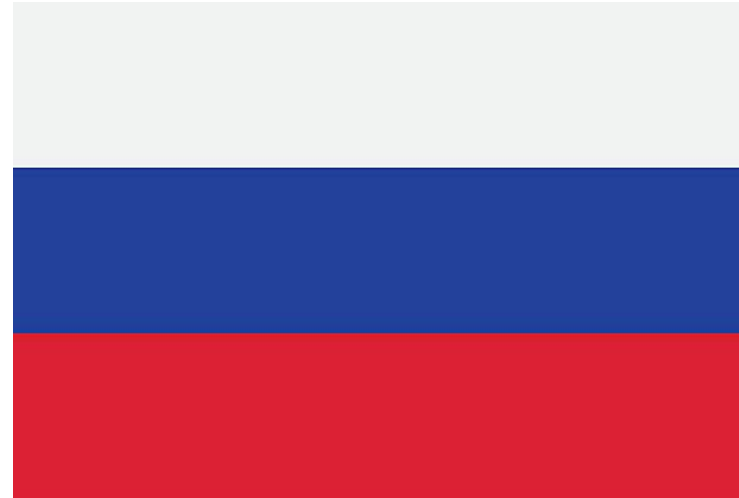
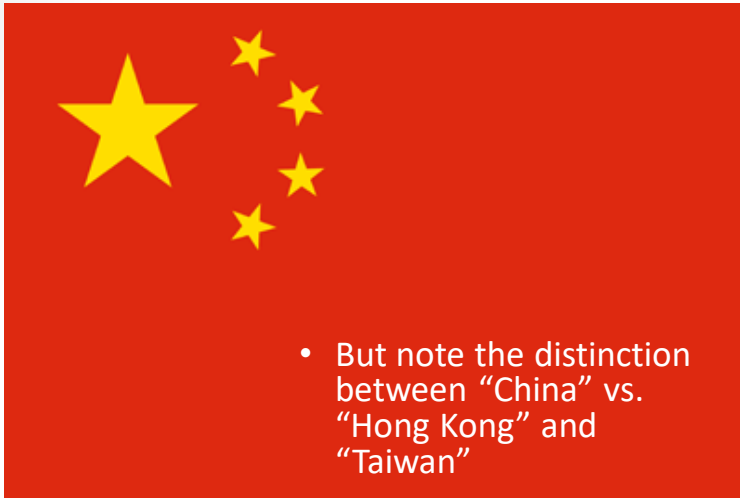
Kiribati

Laos

TAA Designated Countries (cont'd)

Latvia	Mozambique	Saint Lucia	Spain
Lesotho	Nepal	Saint Vincent and the Grenadines	Sweden
Liberia	Netherlands	Samoa	Switzerland
Liechtenstein	New Zealand	Sao Tome and Principe	Taiwan
Lithuania	Nicaragua	Senegal	Tanzania
Luxembourg	Niger	Sierra Leone	Timor-Leste
Madagascar	Norway	Singapore	Togo
Malawi	Oman	Sint Eustatius	Trinidad and Tobago
Mali	Panama	Sint Maarten	Tuvalu
Malta	Peru	Slovak Republic	Uganda
Mauritania	Poland	Slovenia	Ukraine
Mexico	Portugal	Solomon Islands	United Kingdom
Moldova	Romania	Somalia	Vanuatu
Montenegro	Rwanda	South Korea	Yemen
Montserrat	Saba	South Sudan	Zambia
Morocco	Saint Kitts and Nevis		

TAA: Examples of Non-Approved Countries



3. WHAT YOU CANNOT BUY...

Sanctions



Sanctions (cont'd)

- Sanctions restrict **transactions** with prohibited parties
- Approximately 30 different U.S. sanctions programs
- Frequent updates
- U.S. Treasury Department, **Office of Foreign Assets Control (OFAC)**



Sanctions (cont'd)

Comprehensive

- ✓ Cuba
- ✓ Iran
- ✓ North Korea
- ✓ ~~Sudan~~
- ✓ Syria
- ✓ Crimea + Luhansk + Donetsk Regions of Ukraine

Selective

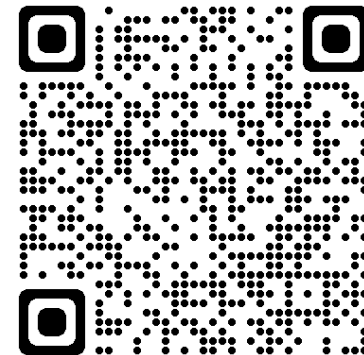
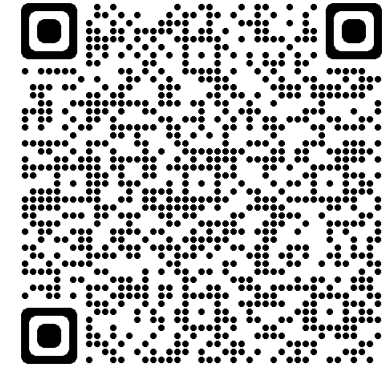
- ✓ Myanmar/
Burma
- ✓ Belarus
- ✓ Nicaragua
- ✓ Russia
- ✓ Somalia
- ✓ Yemen
- ✓ Zimbabwe

Programmatic

- ✓ Chinese Military Companies
- ✓ Counter-Terrorism
- ✓ Drug Trafficking
- ✓ Hostages
- ✓ Weapons/Proliferation

Sanctions (cont'd)

- Specially Designated Nationals (SDN) List
- Denied Persons List
- Entity List
- Unverified List
- Military End User (MEU) List
- ITAR Debarred List
- Excluded Parties List (SAM.gov)
- Many, many more...



Trade.gov Consolidated Search Engine

Sanctions (FAR Subpart 25.7)



Iran



Cuba

North Korea



Sudan

Myanmar/Burma



Syria

FAR 52.225-20 and 52.225-25

Section 889: Anti-Huawei & ZTE

- Section 889 of FY2019 NDAA
- Prevents the **sale or use** of products or services incorporating certain Chinese technology
- Covers products and services that incorporate telecommunications equipment produced by the following companies (plus affiliates):
 - ✓ Huawei Technologies Co.
 - ✓ ZTE Corp.
 - ✓ Hytera Communications Corp.
 - ✓ Hangzhou Hikvision Digital Technology Co.
 - ✓ Dahua Tech. Co



Section 889: FAR Clauses

FAR 52.204-25	FAR 52.204-24	FAR 52.204-26
All contracts	All solicitations	All solicitations
<p>Contractors prohibited from providing to the USG any covered telecommunications equipment or services as a substantial or essential component of any system, or as a critical technology as part of any system.</p> <p>Contractors prohibited from using any telecommunications equipment or services as a substantial or essential component of any system, or as a critical technology as part of any system.</p>	<p>Certification: Offerors to represent whether it will/will not provide covered telecommunications equipment or services to the USG in the performance of the specific contract/subcontract/solicitation.</p> <p>Offerors to represent whether does/does not use covered telecommunications equipment or services.</p>	<p>Certification: Offerors must represent whether it does/does not provide covered telecommunications equipment or services to the USG, generally, whether as a prime or subcontractor.</p> <p>Offerors must represent whether it does/does not use covered telecommunications equipment or services.</p>

4. WHAT YOU CANNOT SEE... (YET)

Cybersecurity + Software



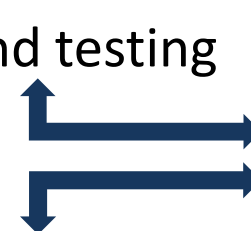
Cybersecurity + Software

- Executive Order 14028 signed by President Biden on May 12, 2021
- Focuses on:
 - Sharing threat information between industry/government
 - Modernizing federal government cybersecurity
 - Including creation of a new federal Cyber Safety Review Board
 - Enhancing software supply chain security, especially for “critical software”



Cybersecurity + Software (cont'd)

- Enhancing Software Supply Chain Security
 - Defining “Critical Software”
 - Establishing secure software development and testing practices
 - NIST 800-218
 - Formalizing certification/attestation requirements
 - Attestations required beginning Sep. 2022; form under review
 - Researching requirements for Software Bill of Materials (SBOM)
 - Labeling – especially for IoT (Internet of Things)
 - Voluntary “U.S. Cyber Trust Mark” program proposed in July 2023; still rolling out
 - FAR rules pending...



U.S. CYBER TRUST MARK

Quiz/Recap

1. What advantage does the government believe it gains from requiring competition in contracting?
 - a. Better price
 - b. Better quality/technical solutions
 - c. Reduced risk of fraud, waste, and abuse
 - d. All of the above.

ANSWER: D, All of the above. All of the listed answers are advantages that the federal government believes it will obtain by prioritizing competition in contracting, expecting that its contractors will realize similar benefits by requiring competition in the supply chain.

Quiz/Recap (cont'd)

2. True or False: A prime contractor must include all of its FAR/DFARS clauses in every subcontract, including commercial subcontracts.

ANSWER: False. The prime contractor is required to include in a subcontract only those clauses that specifically state they need to be flowed down. But the prime contractor may also flow down other clauses, as needed.

For commercial subcontracts, the list of mandatory flowdowns is limited to the ~26 clauses listed at FAR 52.244-6 or 52.212-5(e), but additional clauses may still need to be flowed down as a practical matter.

Quiz/Recap (cont'd)

- 3. True or False:** The *Christian* doctrine can incorporate FAR/DFARS clauses into a subcontract by operation of law.

ANSWER: False. The *Christian* doctrine applies only at the prime contract level, potentially modifying a contract between the government and prime contractor when that contract omits a contract clause reflecting a deeply ingrained strand of public procurement policy. There is no binding authority applying the *Christian* doctrine at the subcontract level.

Quiz/Recap (cont'd)

4. Which of these is a valid exception to the Buy America Act?
- a. Buying a commercial product
 - b. Product is unavailable domestically
 - c. Product is difficult to obtain at a reasonable cost
 - d. None of the above

ANSWER: B, Product is unavailable domestically. There is no exception for commercial products, although there is a partial exception (relating solely to content) for COTS products that are not made wholly or predominantly of iron or steel. And “difficulty” in obtaining a product at a reasonable cost is not a valid exception; there needs to be a substantial price difference – between 20-30% – in order for the government to waive the BAA requirements based on an unreasonable cost.

Quiz/Recap (cont'd)

5. Which of the following is **not** a country with which government contractors are prohibited from doing business?
- a. Russia
 - b. Cuba
 - c. North Korea
 - d. Sudan
 - e. Iran

ANSWER: A, Russia. While the U.S. has implemented targeted sanctions against specific individuals and industries in Russia, and while the U.S. remains concerned about national security threats stemming from Russia, the FAR does not prohibit all transactions with Russia. Only specific entities and sectors in Russia are targeted by OFAC sanctions.

Quiz/Recap (cont'd)

6. **True or False.** Effective May 2021, all companies providing software that will be used by the federal government are required to provide a software bill of materials (SBOM).

ANSWER: False. While President Biden's Executive Order directed agencies in 2021 to investigate SBOMs, and while Congress proposed such a requirement in the draft 2023 National Defense Authorization Act, the requirement was ultimately dropped. Still, since September 2022, companies providing software to the federal government are required to attest to the fact that the software was developed in a secure environment (as detailed in NIST Special Publication 800-218). CISA has proposed a form that would formalize this attestation. The form is currently under review.

The attestation is separate, however, from a formal SBOM. SBOMs are not yet required, although many government agencies seem to be moving in that direction.

Questions?



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