



PCI: Nuts, Bolts, and Beyond: To Be a Government Contractor

Isaias “Cy” Alba, Partner, Government Contracts, PilieroMazza PLLC



Isaias “Cy” Alba



Isaias “Cy” Alba, IV
Partner
Government Contracts
Pilieromazza PLLC
202.857.1000
ialba@pilieromazza.com

Cy Alba is a Partner at PilieroMazza. He counsels clients in a broad range of government contracting matters before government agencies and federal courts that include overall regulatory compliance with all of SBA’s small business programs. Cy represents small and mid-sized companies looking to structure compliant teaming, joint venture, and mentor-protégé agreements. He handles the prosecution and defense of small business size and status protests and appeals before SBA and OHA, as well as bid protests before GAO, COFC, and the U.S. Court of Appeals for the Federal Circuit.

About PilieroMazza

PilieroMazza—a business law firm—serves as a strategic partner to government contractors and commercial businesses from across the United States.

We deliver results for our clients by implementing legal and business solutions that take the client's best interests into consideration. Moreover, PilieroMazza's efficient operational structure and lean approach to staffing matters translates into competitive pricing for our clients, while providing the highest standard of client service and legal acumen.

PilieroMazza is privileged to represent clients in the following areas:

- Audits & Investigations
- Bid Protests
- Business & Transactions
- Business Succession Planning
- Construction
- Corporate and Organizational Governance
- Cybersecurity & Data Privacy
- Debt Financing
- Employee Incentive and Bonus Plans
- False Claims Act
- Fund Formation & Structuring
- Government Contracts
- Government Contract Claims & Appeals
- Intellectual Property & Technology Rights
- Labor & Employment
- Litigation & Dispute Resolution
- Mergers & Acquisitions
- Native American Law & Tribal Advocacy
- Nonprofits
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Overview of the FAR

Regulations that govern most federal procurements (not all!
– FAA, Postal Service, Legislative and Judicial Branches)

General Rule is that if the FAR is silent on something it is presumed to be an allowed action of the government

Many FAR provisions are permissive, not mandatory – so agencies may, not must, act in accordance with them

Most agencies have agency-specific supplements (most famous is the DFARS for DOD)

Overview of the FAR

FAR Part 2 – Definitions

FAR Part 8 – GSA Schedules

FAR Part 9 – Suspension/Debarment/Responsibility/OCIs

FAR Part 12 – Commercial Items

FAR Part 13 – Simplified Acquisitions

FAR Part 14 – Sealed Bidding

FAR Part 15 – Negotiated Procurements

FAR Part 16 – Contract Types

FAR Part 17 – Special Contracting (i.e., Multi-Year)

FAR Part 19 – Small Business Programs

FAR Part 27 – IP and Data Rights

FAR Part 31 – Cost Principles

FAR Part 33 – Protests and Disputes

FAR Part 52 – Contract Clauses

Rules of the Road

Law

- Law is paramount – overrides any inconsistent regulations (People often think the FAR is the be-all end-all; that is FALSE)
- There are a very large number of laws that apply to Federal Procurements (and separate laws for each State) – PAY ATTENTION AND UNDERSTAND THEM
 - The US Department of Justice sees a failure to read and understand the law applicable to you to be a form of RECKLESSNESS – opening you up to False Claims Act Liability (3X Damages)

Rules of the Road

Policy

- Does not have the force of law or regulation
- Usually deals with how agencies make decisions, how they respond to actions by contractors, or similar situations
- Can inform contractors as to the interpretation of agency regulations or agency interpretations of law
 - Regulations take time to promulgate and sometimes that is too slow and so agencies create policy guidance prior to the issuance of regulations.

Scaled Bids vs Offers

Different Rules Apply

- FAR 14 – Sealed Bids
- FAR 15 – Negotiated Contracts

Sealed bids are all opened and made public so all pricing is known upon award – usually used for specific items with known specifications, not for services (generally). Award made based upon price and then responsiveness of the bid to the requirements

Negotiated Procurements are the most common. RFPs are prepared by the government, all parties submit proposals, evaluated based upon established criteria, and then an award is made.

Debriefings are required after award for Negotiated Procurements but NOT for other types of procurements.

Contract Set-Asides (FAR Part 19)

Small Business

- Must be small under the Size Standards applicable to the NAICS code on any procurement
- Based upon 3-year average revenues (no exclusions – generally) – May go to 5-year average in 2019-2020
- Size includes all affiliates (as defined by SBA not corporate law or IRS)

13 CFR trumps the FAR in matters of Size or Status

Limitations on Subcontracting

Services

- 51% of the price paid must be performed by the prime contractor or similarly situated subs

Supplies

- 51% of the price paid must be performed by the prime contractor or similarly situated subs
- Nonmanufacturers follow the NMR – (1) Less than 500 employees, (2) regular dealer, (3) take ownership or possession of end product in manner consistent with industry practice, and (4) end product manufactured by a small business

Mixed Supplies/Services

- Follow the rules consistent with the type of contract that makes up the primary purpose – rules only apply to that portion of the contract

Limitations on Subcontracting

Construction

- Standard – 15% of the price paid to the contract, excluding materials, must be performed by the prime contractor or similarly situated subcontractor
- Specialty – 25% of the price paid to the contract, excluding materials, must be performed by the prime contractor or similarly situated subcontractor

Joint Ventures

- External – Follow appropriate rules for the JV itself
- Internal – Any work performed by the JV (members or affiliates of the non-qualified member all included) must be split no less than 40% going to the qualified member(s)

Affiliation

Common Ownership

Common Management

Identity of Interest

- Familial
- Economic Dependence
- Common Investments

Totality of the Circumstances

Joint Venturing for Set-Asides

General rule: when companies form a strategic alliance and have an identity of interest with one another, they are affiliated. Therefore, the default is that forming a joint venture will give rise to affiliation

HOWEVER, 13 C.F.R. § 121.103(h) lays out the exemptions to affiliation for joint ventures:

- Joint venture of two or more businesses may submit an offer as a “small business” so long as each is small under NAICS code assigned to the contract
 - And for other socioeconomic designations, the joint venture agreement complies with applicable SBA regulations
- Joint venture of one small business and one other-than-small business may submit an offer as a “small business” so long as the other-than-small business is the SBA-approved mentor, and the joint venture agreement complies with applicable SBA regulations
- “2-year rule”

Mentor-Protégé Program: Benefits Of Mentor-Protégé

One SBA Mentor-Protégé program (used to be two)

Mentor may provide protégé with various forms of financial, technical, and/or management assistance

Mentor and protégé may enter into subcontracts

Mentor may own up to 40% of the protégé

Mentor and protégé are exempt from affiliation based on the assistance provided under the mentoring relationship

- **KEY:** this means the mentor and protégé may form joint ventures for set-aside contracts

IP Protection (FAR Part 27)

Technical Data – recorded information of a scientific or technical nature; does not include computer software or financial, administrative, cost or price, or management data

Form Fit and Function Data – information needed to maintain or repair equipment

Segregation and Reintegration Data – information needed to remove parts or take a part and add to a new system

Commercial Software – modified commercial licenses used

Non-Commercial Software – FAR/DFARS standard rules apply

IP Protection

Types of Rights:

- Limited Rights –Government can only use the IP for the specific purpose in the contract
- Restricted Rights – Limited Rights but for Software
- Unlimited Rights – Government can use the IP for any purpose, including to publicize in an RFP or hire another contractor to support/modify
 - DOES NOT change rights commercially
- Government Purpose Rights – DOD only...rights limited for a period of time then go unlimited

Overview of OCIs

“An OCI arises when, because of other relationships or circumstances, a contractor may be unable, or potentially unable, to render impartial advice or assistance to the government, the contractor’s objectivity in performing the contract work is or might be impaired, and/or the contractor would have an unfair competitive advantage” – FAR 2.101

3 Types of OCIs:

- Unequal access to information
- Biased ground rules
- Impaired objectivity

Complex Analysis

- COs are required to identify and investigate OCIs as early as possible
- Assessing a potential OCI is a fact-specific inquiry
- OCIs are dynamic
- Many OCIs can be mitigated, neutralized, or avoided

Contract Family Characteristics

Types of Fixed Price Contracts

1. Firm Fixed Price (FFP)
2. Fixed Price with Economic Price Adjustment (FP w/EPA)
3. Fixed Price with Award Fees (FPAF)
4. Fixed Price Incentive (FPI)
5. Level of Effort Contracts

Types of Cost Reimbursement Contracts

1. Cost-Plus-Percentage-of-Cost (CPPC)
ILLEGAL
2. Cost Reimbursement (C) (No Fee)
3. Cost Sharing (CS)
4. Cost-Plus-Fixed-Fee (CPFF)
5. Cost-Plus-Award-Fee (CPAF)
6. Cost-Plus-Incentive-Fee (CPIF)
7. Time & Materials or Labor Hour Contracts
(technically, not FP or CR but related to CR)

Statutory/Regulatory Limitations

Sealed Bidding – FAR Part 14

- Must use FFP or FP-EPA contract types.

Competitive Negotiations – FAR Part 15

- May use any type of contract or a combination of types.

Commercial Item Acquisitions – FAR Part 12

- FFP, FP-EPA, and (under limited circumstances) T&M and LH. May not use a CR contract type.

DOD Research & Development contracts (R&D) – DFARS 235.006

- Limits on use of FP contracts.

Cost-Plus-a-Percentage-of-Cost Contracts prohibited (FAR 16.102(c); 41 U.S.C. § 3905(a))

- Prohibition applies to subcontracting as well. FAR 16.102(c).
- Removes Contractor incentive to increase profit by increasing costs.

Commercial Products and Services (FAR Part 12)

Procurement reform in 1990's – to take advantage of commercial marketplace

- Gives Government access to companies that are not willing to go through MIL-Specs and audits.
- Gives Government benefit of products and competitive pricing found in commercial marketplace.
- “More taste, less filling”

Statutory preference for buying commercial items

Primes should incorporate commercial items to the maximum extent practicable. FAR 12.102(c)

Federal Supply Schedules (FAR Part 8)

GSA (and VA) awards ID/IQ contracts to thousands of vendors.

Contractors “get on schedule” by submitting proposal to GSA in response to an open-ended Schedule Solicitation.

Contractor must disclose commercial price and discount information

- Catalog
- Specific comparable commercial sales (“Basis of Sale”)
Contracting officer must determine that proposed pricing is fair and reasonable.
- No contractor-to-contractor price competition during Schedule award process.
- May be contractor-to-contractor competition if agency places orders against multiple-award Schedule Contract.

Federal Supply Schedules

Agencies place task and delivery orders against FSS contracts.

- Mandatory source of supply for some Federal customers; non-mandatory (but encouraged) for others. *See GSAM/GSAR Clause 552.538-78.*

FAR Subpart 8.4 provides procedures for ordering against Schedule contracts using task and delivery orders.

- May execute BPAs between Schedule contract holders and ordering agencies against which orders can be placed.
- GSA administers Schedule contracts, but ordering agencies administer BPAs and issue task and delivery orders.
- Customer agencies are encouraged to seek (and Contractors may offer) additional discounts in BPAs and orders issued against Schedule Contract.
- Customer agencies must seek price reduction when placing orders above Simplified Acquisition Threshold. FAR 8.404(d).

Federal Supply Schedules

Simplified Process

- Reduces time and cost
- Satisfies competition requirements/synopsis not needed
- Separate determination of fair and reasonable price not needed
- Responsibility determinations not needed
- Reduced chance of protest

Limitations:

- Must be commercial items.
- Supply contract must be fixed price.
- Services contract must use either hourly rates or fixed prices for task.
- Vendors' prices are public.
- Vendors pay industrial Funding Fee to GSA.
- Vendors cannot provide "Incidentals" that are not on Schedule.

Bid Protests (FAR 33)

A bid protest is a challenge to a procuring agency's actions related to a federal procurement

- Bid protests are different from size or status protests, which challenge the size or socioeconomic status of the awardee and are handled by the U.S. Small Business Administration

Two types of bid protests:

- Pre-award protest
- Post-award protest

Where Can You File a Bid Protest?

Agency

U.S. Government Accountability Office (GAO)

U.S. Court of Federal Claims (COFC)

For FAA procurements: FAA's Office of Dispute Resolution for Acquisitions (ODRA)

When Must You File a Bid Protest?

Pre-Award Protests

- Must be filed by the due date for proposals
- **Common mistake:** waiting until after award to try to raise issues that should have been filed as a pre-award protest, before proposals were due
- Examples of pre-award protests:
 - Improper or unclear solicitation terms
 - Solicitation limits competition
 - Failure to set aside the procurement
 - Exclusion from the competitive range

When Must You File a Bid Protest?

Post-Award Protests

- Timing varies based on the forum
 - Agency-Level & GAO: 10 days from when you knew or should have known the basis for protest
 - COFC: sooner the better, but no near-term deadline
 - ODRA: later of 7 days from when you knew or should have known the basis for protest, or 5 days after your debriefing
- Act quickly once you receive the award notice
 - Promptly request a debriefing
 - Determine your preferred forum
 - Calculate the protest deadline

REAs vs. Claims

REA: No official definition

- Request for compensation (time, money, or both) based on changes, suspensions of work, or other factors that may arise during contract performance
- Filed as part of contract administration and negotiations between the parties; falls short of claim in procedural requirements and formality

Claim:

- Written demand seeking the payment of money in sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract
- Filed under the Contract Disputes Act; formal dispute that may lead to litigation

REA Basics

REAs may be submitted any time during contract performance or close out, but not after

- Contractor typically should assert right to REA within 30 days of the change giving rise to the REA
- However, failure to provide 30-day notice will not bar the REA or claim unless the government was prejudiced

No particular format required

- Typically takes the form of a letter to the contracting officer with exhibits – submitted by client or PM?
- Detail change to direct costs, markups, time to complete – the more detail, the more likely it will be granted
- DoD certification requirement

May include attorneys' fees, administrative costs, and internal costs

No obligation for CO to respond

Claim Basics

Generally, must be filed within six years after claim accrues

No particular format required

- Typically takes the form of a letter to the contracting officer with exhibits
- Must constitute a clear and unequivocal written statement that gives the contracting officer adequate notice of the basis and amount of the claim
- Identify as claim under Contract Disputes Act and request a contracting officer's final decision
- Certification requirement

Claim preparation fees are NOT recoverable

- Should issue final decision within 60 days (or ask for extension)

Should I File an REA or a Claim?

File an REA when a contractor has a good working relationship with the agency and the government has indicated a willingness to reach an amicable resolution; or where there is a need to show contractor willingness and good faith to negotiate

File a claim if there is animosity, or a clear indication in prior discussions and correspondence that the government does not believe the contractor is entitled to an equitable adjustment (i.e., there is a dispute)

Before making the decision to file a claim, avoid references to the matter as a “dispute”

Questions?



Isaias "Cy" Alba, IV
Partner
Government Contracts
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ialba@pilieromazza.com

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