

# SMALL BIZ BASICS

## Session 2: Small Biz Contracting Basics

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This presentation is for informational purposes only and not for the purpose of providing legal advice. You should contact your attorney to obtain advice with respect to any particular issue or problem.

# Session 2: Roadmap

- Differences between commercial and government contracting
- Contract type
- Impact on small business
- Identifying commercial products and commercial services
- FAR/DFARS clauses
  - E-verify,
  - Change Orders,
  - Termination for Convenience of the Government, and
  - Disputes
- Other legal and compliance considerations
  - Anti-assignment Act
  - Anti-kickback Statute
  - False Claims Act

# **Government Contracting**

**VS.**

# **Commercial Contracting**

# Sources of the Law

- Commercial (Private) Contracts:
  - Uniform Commercial Code
  - Common Law (Case law)
    - Philosophy: “Promotion of Commerce”
- Government Contracts:
  - Federal Acquisition Regulation
    - Agency Supplements
  - Special Authorities (OTAs)
    - Philosophy: “Fair and Transparent”

# Contracting Officer, or the CO or the KO

- “Warranted” Employee of the Government with the authority to bind the Government legally by signing a contractual instrument (FAR part 1.602) or Change Order, to the extent of their Warrant.
  - No “apparent authority” (“Implied Authority”??)
  - Ratification required of an Unauthorized Commitment.
    - Emergency Exceptions?
  - Same rule on Changes/modifications
    - Actions of Commanders and CORs

# Federal Acquisition Regulation, or the FAR

- A uniform set of policies and procedures that govern all acquisition activities of all federal agencies that do not have a specific exemption (like the FAA or the Postal Service).
- 53 Parts
- Requisite FAR clauses are listed in the agency's solicitation and in the contract.
- FAR provisions contain certification requirements, notices, and additional contract instructions.
- Many agencies have a supplement to the FAR to address the specific requirements of that agency.

# Federal Acquisition Regulations, or the FAR

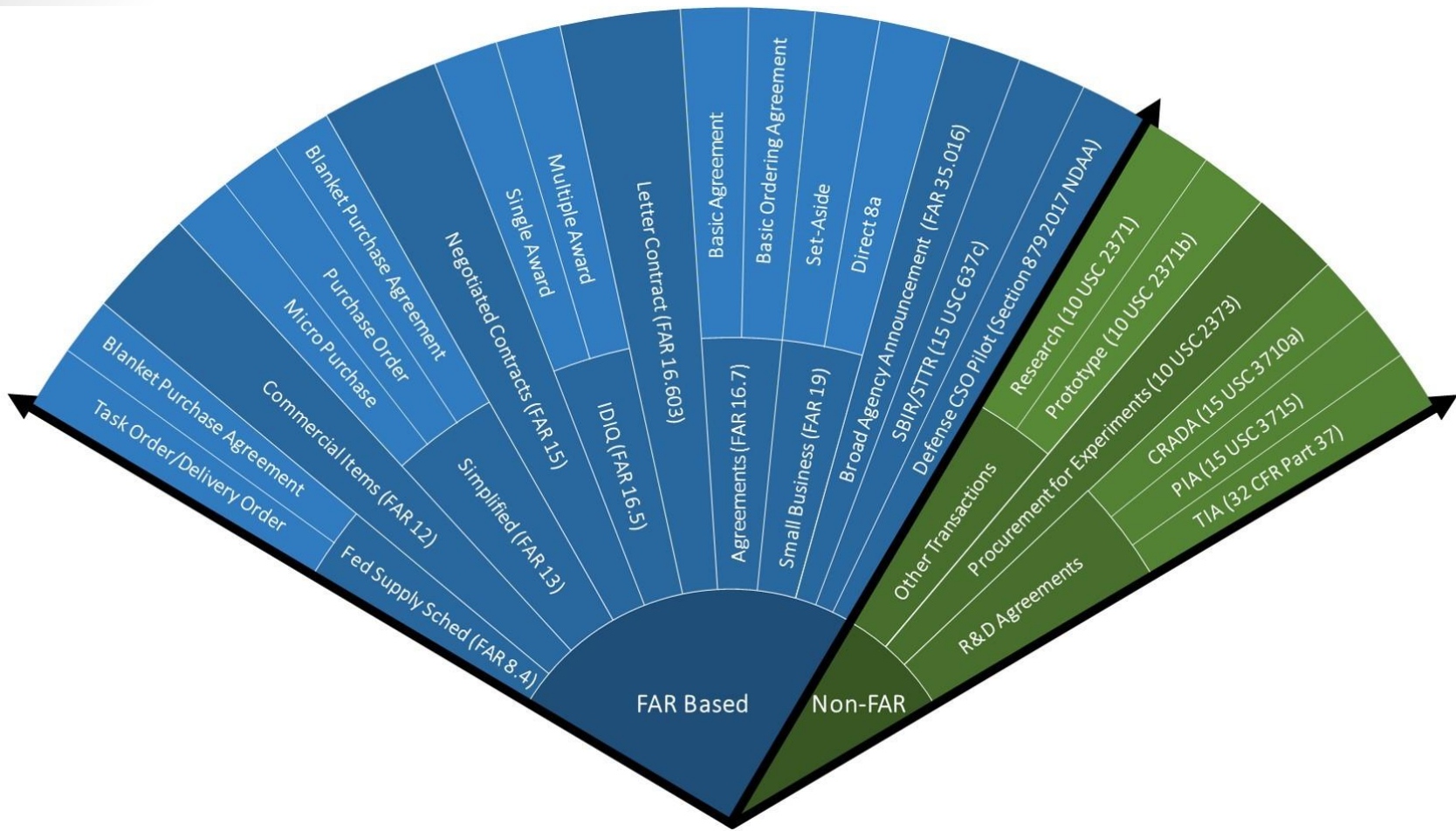
- Christian Doctrine
  - Even if not included in the actual contract, certain FAR clauses are STILL BINDING on the contractor.
  - Applies to clauses that implement fundamental public or procurement policies.
  - Examples: Termination for Convenience clause or Equal Opportunity.
- Flowdown
  - Some FAR clauses *must* be “flowed down” and some clauses *should* be flowed down to subcontractors or suppliers.
- Unilateral Change (Administrative or in-scope – FAR 43-2)
- Ability to Protest (FAR 33.1)
  - Agency, GAO, Court of Federal Claims





# Contract Types

- Firm Fixed Price
- Cost Reimbursement
- Cost-Plus Incentive Contracts
- IDIQ: Indefinite Delivery / Indefinite Quantity
- BOA: Basic Ordering Agreement
- T&M: Time and Materials



Source: <https://aaf.dau.edu/aaf/contracting-cone/>

# Statement of Work

## (Identifying Agency Need)

- SOW vs. SOO
  - Who is the expert? (Government or Contractor)
  - Risk Assumption (Specificity and Ambiguity)

# FAR Subpart 16.2 – Fixed-Price Contracts

- Most common – Firm Fixed-Price (FFP)
  - May also see Fixed-Price with Economic Adjustment (FP w/ EPA) for materials or labor that have regular price fluctuation (for example: Fuel)
  - Required on all sealed-bid contracts (FAR 14)
  - Best Contract type to be used with a SOW (“Price” is the only variable)
- Pros:
  - If contractor can perform for less, it benefits as more profit
  - Bidding strategies are more effective if material costs are similar across competitors
- Cons:
  - Contractor assumes the risk of price fluctuations in materials
  - May lead to losses rather than profit

# FAR Subpart 16.3 – Cost-Reimbursement Contracts

- Cost-reimbursement types of contracts provide for payment of allowable, incurred costs, to the extent permitted in the contract. These contracts establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed (except at its own risk) without the approval of the contracting officer.
- Typical types are Cost-Plus-Fixed-Fee, Cost-Plus-Award-Fee, Cost-Plus-Incentive-Fee
- Pros:
  - Government is at risk for cost increases (shifts economic risk to the govt.)
  - Profit is set as the Fee and does not increase or decrease but is set
- Cons:
  - Government gets benefit of cost savings
  - High level of sophistication required in accounting processes and systems – government audit of systems

# FAR Subpart 16.4 – Incentive Contracts

Incentive contracts are appropriate when the required supplies or services can be acquired at lower costs or with improved delivery or technical performance, by relating the amount of profit or fee payable under the contract to the contractor's performance.

Incentive contracts are designed to obtain specific acquisition objectives by--

- (1) Establishing reasonable and attainable targets that are clearly communicated to the contractor; and
  - (2) Including appropriate incentive arrangements designed to --
    - (i) motivate contractor efforts that might not otherwise be emphasized and
    - (ii) discourage contractor inefficiency and waste.
- Pros:
    - Incentive sets goals for contractor to increase profit from contract
    - Defined minimum and maximum compensation
  - Cons:
    - Puts onus on contractor to find ways to complete incentive goal
    - Target for incentive may be difficult to negotiate

# FAR 16.504 – Indefinite-Delivery Indefinite-Quantity Contracts

- An indefinite-quantity contract provides for an indefinite quantity, within stated limits, of supplies or services during a fixed period.
  - Gives Government flexibility on quantity and delivery schedule.
- The Government places orders for individual requirements through delivery orders (DO) and task orders (TO)
- Government's obligation is limited to a minimum number of units or dollars stated in contract. Once met, the Government can buy elsewhere; no obligation to continue to buy from contractor.
- Multiple-Award ID/IQ: the Government narrows the field of qualified contractors and then bids task orders or delivery orders among that narrow field.

# FAR 16.601 – Time and Materials “T&M” Contracts

- A time-and-materials contract may be used only when it is not possible at the time of placing the contract to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence.
  - Set a ceiling price
  - Contracting Officers must write a Determination and Finding (D&F) to use this form of contract.
- Certain commercial Items are regulated under FAR 12.207(b).
- Pros:
  - Rates are certain for labor hours and bid to include profit and overhead, so invoices will be predictable
  - Direct costs are paid as a reimbursement
- Cons:
  - Not many contracts qualify for this treatment
  - Contract ceiling can be met quickly if additional labor is needed and will require new funding allocations to the project



# FAR 16.703 – Basic Ordering Agreement (“BOA”)

- **NOTE:** This is not an actual contract.
- It is an Agreement to the basic terms that if the Government decides to purchase a supply or service from a vendor, these terms and conditions will apply to the sale.
- Unlike an ID/IQ, the Government has no requirement to place future orders against a BOA.

# Federal Acquisitions' Basics

- Congress appropriates funds for all federal expenditures for specific purposes and during certain timeframes
- Agencies obligate funds within their budgets for specific purchases/contracts
- Contract opportunities can be found at [sam.gov](http://sam.gov)
- Federal Acquisition Regulations (FAR) provides the guidelines for the procurement or acquisition of goods, construction or services through a Contract.
  - Defense Federal Acquisition Regulations Supplement (DFARS)
  - Civilian Agencies' Supplements

# Size Consideration

- Impact on Small Businesses
- Automatic Set-Asides
- SAT (Simplified Acquisition Threshold)
  - Much simpler acquisition methods
  - Less than \$250,000
    - Some exceptions for emergency or major disaster response
    - Purchases outside the U.S.
  - Commercial Goods/Services (FAR Part 12): Less than \$7M
- Micro-Purchases (Government Purchase Card):
  - Still requires “fair/reasonable”
  - Goods: \$10,000
  - Services: \$2,500
  - Construction Services: \$2,000

# Commercial Products/Services

- Some purchases are considered “commercial” products/services.
  - Required to comply with a limited number of FAR clauses.
  - If providing Commercial-Off-The-Shelf (COTS) items/services, compliance with even fewer FAR clauses is required.
- FAR 52.212-5, Contract Terms and Conditions Applicable to Commercial Items Contracts
  - Lists all FAR clauses that apply to Commercial Contracts.
  - Approximately 20 of those FAR clauses have a compliance requirement.



# CLIN Structure

**PART I - THE SCHEDULE**

**SECTION B - SUPPLIES OR SERVICES AND PRICES/COSTS:**

B-1. **LINE ITEM DESCRIPTION:** In accordance with this contract, the contractor, independently and not as an agent of the Government, shall provide all necessary materials, labor, equipment, and facilities, except as specified herein to be furnished by the Government, and shall do all that which is necessary or incident to the satisfactory and timely performance of the following Contract Line Item Number (CLIN):

<b><u>CLIN</u></b>	<b><u>SUPPLIES OR SERVICES</u></b>	<b><u>QUANTITY</u></b>	<b><u>UNIT</u></b>	<b><u>AMOUNT</u></b>
0001	Work as set forth in Primary Research, Inc., Small Business Innovation Research Program Proposal, dated 14 Jul 01, titled "Weightless Perpetual Motion Machine," incorporated herein as set forth in Part III, Section J, hereof.	5,976	Direct Productive Person Hours (DPPH)	\$600,588
0002	Data to be delivered under this contract shall be that cited in Contract Data Requirements list (CDRL), DD Form 1423s, Exhibit A, consisting of Exhibit Line Items Nos. A001 through A004. Format for preparation of reports shall be in accordance with Data Item Descriptions (DD Form 1664s), incorporated herein and attached as set forth in Part III, Section J, hereof.	1	Lot	Not Separately Priced
<b>TOTAL</b>				<b>\$600,588</b>

# How to Read a Federal Contract

- Uniform Contract Format (FAR 15.204-1)

## Section Title

### ***Part I -- The Schedule***

- A Solicitation/contract form.
- B Supplies or services and prices/costs.
- C Description/specifications/statement of work.
- D Packaging and marking.
- E Inspection and acceptance.
- F Deliveries or performance.
- G Contract administration data.
- H Special contract requirements.

### ***Part II -- Contract Clauses***

- I Contract clauses.

### ***Part III -- List of Documents, Exhibits, and Other Attachments***

- J List of attachments.

### ***Part IV -- Representations and Instructions.***

- K Representations, certifications, and other statements of offerors or respondents.
- L Instructions, conditions, and notices to offerors or respondents.
- M Evaluation factors for award.

# 15.204-2 -- Part I -- The Schedule

The contracting officer shall prepare the contract Schedule as follows:

(a) *Section A, Solicitation/contract form.*

(1) Optional Form (OF) 308, Solicitation and Offer-Negotiated Acquisition, or Standard Form (SF) 33, Solicitation, Offer and Award, may be used to prepare RFPs.

(2) When other than OF 308 or SF 33 is used, include the following information on the first page of the solicitation:

(i) Name, address, and location of issuing activity, including room and building where proposals or information must be submitted.

(ii) Solicitation number.

(iii) Date of issuance.

(iv) Closing date and time.

(v) Number of pages.

(vi) Requisition or other purchase authority.

(vii) Brief description of item or service.

(viii) Requirement for the offeror to provide its name and complete address, including street, city, county, state, and zip code, and electronic address (including facsimile address), if appropriate.

(ix) Offer expiration date.



# 15.204-2 -- Part I -- The Schedule

Continued:

(b) *Section B, Supplies or services and prices/costs.* Include a brief description of the supplies or services; e.g., item number, national stock number/part number if applicable, nouns, nomenclature, and quantities. (This includes incidental deliverables such as manuals and reports.)

(c) *Section C, Description/specifications/statement of work.* Include any description or specifications needed in addition to Section B (see [Part 11](#), Describing Agency Needs).

(d) *Section D, Packaging and marking.* Provide packaging, packing, preservation, and marking requirements, if any.

(e) *Section E, Inspection and acceptance.* Include inspection, acceptance, quality assurance, and reliability requirements (see [Part 46](#), Quality Assurance).

(f) *Section F, Deliveries or performance.* Specify the requirements for time, place, and method of delivery or performance (see [Subpart 11.4](#), Delivery or Performance Schedules, and [47.301-1](#)).

(g) *Section G, Contract administration data.* Include any required accounting and appropriation data and any required contract administration information or instructions other than those on the solicitation form. Include a statement that the offeror should include the payment address in the proposal, if it is different from that shown for the offeror.

(h) *Section H, Special contract requirements.* Include a clear statement of any special contract requirements that are not included in Section I, Contract clauses, or in other sections of the uniform contract format.

# 15.204-3 -- Part II -- Contract Clauses.

## 15.204-3 -- Part II -- Contract Clauses.

*Section I, Contract clauses.* The contracting officer shall include in this section the clauses required by law or by this part and any additional clauses expected to be included in any resulting contract, if these clauses are not required in any other section of the uniform contract format. An index may be inserted if this section's format is particularly complex.

### SECTION 8 - CONTRACT CLAUSES

CLAUSES INCORPORATED BY REFERENCE (FEB 1998) (FAR 52.252-2): This contract incorporates one or more clauses by reference, with the same force and effect as if they were given in full text. Upon request, the Contracting Officer will make their full text available. Also, the full text of a clause may be accessed electronically at this address: (to be provided by contracting activity)

#### I. FEDERAL ACQUISITION REGULATION (48 CFR CHAPTER 1) CLAUSES

<u>CLAUSE NUMBER</u>	<u>FAR CITATION</u>	<u>CLAUSE TITLE</u>	<u>DATE</u>
* 1.	52.202-1	DEFINITIONS	DEC 2001
* 2.	52.203-3	GRATUITIES APR 1984	
* 3.	52.203-5	COVENANT AGAINST CONTINGENT FEES	APR 1984
* 4.	52.203-6	RESTRICTIONS ON SUBCONTRACTOR SALES TO THE GOVERNMENT	JUL 1995

# 15.204-4 -- Part III -- List of Documents, Exhibits, and Other Attachments.

## **15.204-4 -- Part III -- List of Documents, Exhibits, and Other Attachments.**

*Section J, List of attachments.* The contracting officer shall list the title, date, and number of pages for each attached document, exhibit, and other attachment. Cross-references to material in other sections may be inserted, as appropriate.

# 15.204-5 -- Part IV -- Representations and Instructions.

The contracting officer shall prepare the representations and instructions as follows:

(a) *Section K, Representations, certifications, and other statements of offerors.* Include in this section those solicitation provisions that require representations, certifications, or the submission of other information by offerors.

(b) **Section L, Instructions, conditions, and notices to offerors or respondents.** Insert in this section solicitation provisions and other information and instructions not required elsewhere to guide offerors or respondents in preparing proposals or responses to requests for information. Prospective offerors or respondents may be instructed to submit proposals or information in a specific format or severable parts to facilitate evaluation. The instructions may specify further organization of proposal or response parts, such as -

- (1) Administrative;
- (2) Management;
- (3) Technical;
- (4) Past performance; and
- (5) Certified cost or pricing data (see Table 15-2 of [15.408](#)) or data other than certified cost or pricing data.

(c) **Section M, Evaluation factors for award.** Identify all significant factors and any significant subfactors that will be considered in awarding the contract and their relative importance (see [15.304\(d\)](#)). The contracting officer shall insert one of the phrases in [15.304\(e\)](#).

# Unique Federal Contracting Clauses and Statutes

## FAR 52.203-13

### Contractor Code of Business Ethics and Conduct

- Requires a company code of ethics and compliance, timely disclosure of certain procurement violations (bribery, fraud, false claims, etc.) to the government, and the implementation of a compliance program within 90 days of contract award.
- How to comply:
  - Create and implement an ongoing business ethics awareness and compliance program.
  - Create an internal control system that facilitates timely discovery of improper conduct in connection with Government contracts.
  - Create an internal reporting mechanism, such as a hotline, which allows employees to report suspected instances of improper conduct.
  - Include this FAR clause in all subcontracts valued at more than \$6M with a period of performance > 120 days.

# FAR 52.222-54

## Employment Eligibility Verification

- Requires contractors to enroll in the E-Verify program within 30 days of contract award, and to use E-Verify to initiate verification of employment eligibility of all employees assigned to work on the contract within 90 days, and all new hires of the contractor within 3 business days after date of hire.
- How to comply:
  - Enroll in E-Verify via the Internet at <http://www.dhs.gov/E-Verify>.
  - Verify employment eligibility of employees using E-Verify.
  - Include this FAR clause in all subcontracts > \$3,500, except subcontracts for COTS items/services.

# FAR 52.225-9

## Buy American – Construction Materials

- Requires only domestic construction material be used in performing the contract.
- There is a Buy American or Trade Agreements Act restrictions for goods as well.
- How to comply:
  - Use unmanufactured construction material mined or produced in the U.S, or
  - Use construction material that is COTS and manufactured in the U.S., or
  - Use construction material manufactured in the U.S., and which has a costs of components mined, produced or manufactured in the U.S. that is > 65% of cost of all of its components delivered in calendar year 2024 through 2028.
    - Will rise to 75% at the beginning of the calendar year in 2029
  - Obtain Buy American Act certificates from subcontractors.



# FAR Subpart 43.2, Change Orders

- Permits the Contracting Officer to make changes to the contract with OR WITHOUT the contractor's consent, so long as they are within the general scope of the contract.
- Contractor must continue to perform the changed order.
  - Failure to do so will be deemed an anticipatory breach by the contractor.
- Contract adjustment for any additional costs resulting from a change must be negotiated before contract completion.

# FAR 52.249-2, Termination for Convenience of the Government

- Permits the Government to completely or partially terminate performance under a contract when it is in its best interest.
  - Generally, few if any, limitations on when Government may use this clause.
- If the parties are unable to agree to a settlement amount, the Government is required to pay the costs incurred in performing the terminated work, costs of paying settlements with subcontractors, and a fair and reasonable profit on work already performed.
- Contractor is *NOT* entitled to anticipated profits.

# FAR 52.233-1, Disputes

- Contract Disputes Act (CDA) – 41 U.S.C. Chapter 71 controls.
- If CDA does not apply, all federal contract disputes are resolved with this clause.
- "Claim" means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding \$100,000 is not a claim under [41 U.S.C chapter 71](#) until certified. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under [41 U.S.C chapter 71](#). ...
- 6-year Statute of Limitations
- Certification:
  - "I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable; and that I am authorized to certify the claim on behalf of the Contractor."
- DFARS clause is different – please check the contract
- Prime contractor must continue performance diligently

# Compliance with other laws unique to Government Contracts

In addition to the FAR clauses discussed, contractors are also required to comply with the following laws:

- 5 U.S.C. 552a The Privacy Act of 1974;
- 18 U.S.C. 431 relating to officials not to benefit;
- 31 U.S.C. 1352 relating to limitations on the use of appropriated funds to influence certain Federal contracts;
- 40 U.S.C. 3701, *et seq.*, Contract Work Hours and Safety Standards Act;
- 41 U.S.C. 51-58, Anti-Kickback Act of 1986;
- 41 U.S.C. 423 relating to procurement integrity.
- 41 U.S.C. 4712 and 10 U.S.C. 2409 relating to whistleblower protections; and
- 49 U.S.C. 40118, Fly American.

# Anti-Assignment Act

- Federal law prohibits contractors from assigning contracts with limited exceptions for:
  - Assignments made with the consent of the Contracting Officer, such as a Novation.
    - Novations take place when, through merger or acquisition of ALL assets of the first contractor, the acquiring contractor assumes ALL the obligations of the first contractor.
  - Assignments of contract receivables to a bona fide banking institution as security for a loan or credit line.

# Anti-kickback Statute

- Generally, a “Kickback” is:
  - Any Money, Fee, Commission, Credit, Gift, Gratuity, Thing of Value, or Compensation of Any Kind
  - Provided, Directly or Indirectly to Any Prime Contractor, Owner’s Agent, Subcontractor or Their Employees
  - For the Purpose of Improperly Obtaining or Rewarding Favorable Treatment in Connection with a Prime Contract or Subcontract
- Any Person Who Knowingly Engages in Conduct Prohibited by the Act Can be Imprisoned Up to 10 Years, Fined or Both

# False Claims Act (FCA)

- False Claims Act (FCA), 31 U.S.C. §§ 3729 - 3733, a federal statute originally enacted in 1863 in response to defense contractor fraud during the American Civil War.
- The FCA provided that any person who knowingly submitted false claims to the government was liable for double the government's damages plus a penalty of \$11,181\* for each false claim.
  - \*adjusted for inflation (<https://www.govinfo.gov/content/pkg/CFR-2018-title28-vol2/xml/CFR-2018-title28-vol2-sec85-5.xml>).
- In addition to allowing the United States to pursue perpetrators of fraud on its own, the FCA allows private citizens to file suits on behalf of the government (called "*qui tam*" suits) against those who have defrauded the government.
  - Private citizens who successfully bring qui tam actions may receive a portion of the government's recovery.
- The Department of Justice obtained more than \$2.68 billion in settlements and judgments from civil cases involving fraud and false claims against the government in the fiscal year ending Sept. 30, 2023.

# QUESTIONS?

**Connect with me**

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