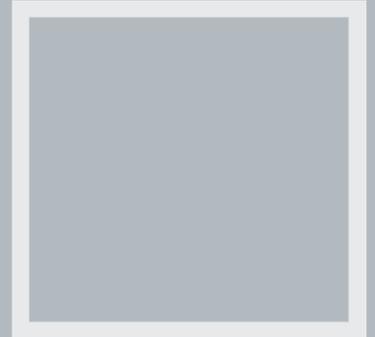


Annual Update on Government Contracts Seminar

September 26, 2017



It's a Small World: Advantages for Small Businesses

Anna S. Ross



Advantages & Considerations for Small Business Contractors

- SBA Contracting Program
- Advantages for Small Business Contractors
- Compliance Considerations for Large & Small Businesses
- Key Takeaways

Small Business Administration (SBA) Contracting Program



Role of the SBA

- Sets overall requirements for small businesses
 - Meaning of a “small business concern” (SBC):
 - A business that is “independently owned and operated and which is not dominant in its field of operation.” (15 U.S.C. § 632(a)(1))
 - A “business concern” is an entity that:
 - is for profit
 - with a place of business located in the United States, and
 - which operates primarily within the United States or contributes significantly to the U.S. economy by paying taxes or using American products, materials, or labor (13 C.F.R. § 121.105(a)(1))

Role of the SBA

- Size standards and other requirements for small businesses:
 - A business cannot exceed the small business size standard for the relevant procurement action
 - Two types of size standards:
 - Number of employees, or
 - Annual receipts
 - SBA assigns size standards by NAICS Code

Role of the SBA

- Works with other agencies to help carry out particular goals in government contracting
 - Goal of awarding at least 23% of all prime government contract dollars to small businesses
 - Specific statutory goals for certain types of small businesses
- The SBA also runs programs targeted at helping small businesses

Features of the Contracting Program

- Background

- Creates several different categories of SBCs that may be eligible for certain types of set-aside and sole source contracts
- SBA oversees these programs
- SBA issues regulations implementing these programs

- Types of Small Business Programs / Categories

- 8(a) Business Development (SDB) Program
- Veteran-owned small business (VOSBs)
- Service-disabled veteran-owned small business (SDVOSB) Program
- Women-owned small business (WOSB) Program
- Historically Underutilized Business Zone (HUBZone) Program

8(a) Business Development Program

- A program for SBCs:
 - Unconditionally owned and operated by one or more socially and economically disadvantaged individuals who are of good character (and are U.S. citizens and reside in the United States)
 - That demonstrate potential for success
- Two stages of participation:
 - Developmental stage
 - Transitional stage
- The federal government has a statutory goal to award 5% of prime contracts and subcontracts to SDBs

VOSBs

- A program for SBCs:
 - At least 51% owned by one or more veterans
 - For which the management and daily business operations are controlled by one or more veterans
- Except for VA contracts, VOSBs self-certify their status
 - Updates to VA certification process:
 - On November 6, 2015, the VA published a proposed rule to clarify the eligibility requirements for businesses to obtain “verified” status, including re-defining certain terms (80 Fed. Reg. 68795)
 - Given the adverse comments the VA received in response to its proposed rule, on September 1, 2017, the VA withdrew the proposed rule (82 Fed. Reg. 41579)

SDVOSBs

- A program for SBCs:
 - At least 51% directly and unconditionally owned by one or more service-disabled veterans
 - For which the management and daily business operations are controlled by one or more service-disabled veterans (or if the service-disabled veteran has a permanent and severe disability, the spouse or permanent caregiver of that veteran)
- SDVOSBs benefit from sole source and set-aside procurements
- The federal government has a statutory goal to award 3% of prime contracts and subcontracts to SDVOSBs

WOSBs

- A program for SBCs:
 - At least 51% directly and unconditionally owned and controlled by one or more women who are U.S. citizens
 - Management and daily business operations are controlled by one or more women
- Requirement to self-certify and submit documents verifying eligibility to the WOSB Program Repository

WOSBs

- Distinguishes between WOSBs and Economically Disadvantaged WOSBs (EDWOSBs)
- WOSBs and EDWOSBs qualify for certain set-aside and sole source contracts in industries designated by the SBA as
 - Underrepresented (WOSB)
 - Substantially underrepresented (EDWOSBs)
- March 2016, WOSB Program expanded to 113 industries
- The federal government has a statutory goal to award 5% of prime contracts and subcontracts to WOSBs

WOSBs

- Self-certification issues
 - National Defense Authorization Act for FY 2015
 - Directed the SBA to end the self-certification option for the WOSB program and implement a certification process
 - Not yet implemented, certification process still under review
 - Provided authority for Contracting Officers to issue sole-source contracts under the Program
 - Implemented in December 2015 in FAR 19.1506

HUBZone Program

- Provides contracting preferences to SBCs that are located in an SBA-designated HUBZone
- Qualifications:
 - Must be certified by SBA to qualify
 - Principal office must be located in a HUBZone
 - At least 35% of employees must reside within a HUBZone
- The federal government has a statutory goal to award 3% of prime contracts and subcontracts to HUBZone certified SBCs

Advantages for Small Business Contractors



Small Business Set-Aside Contracts

- FAR Part 19
 - FAR 19.502(b) requires Contracting Officers to set-aside any acquisition over \$150,000 for small business participation when there is a reasonable expectation that:
 - At least two small business offers will be obtained and
 - Award will be made at fair market prices
 - Otherwise known as the “Rule of Two”

Sole Source Contracts

- Sole source development opportunities under the following programs:
 - SDB sole source contracts
 - HUBZone sole source contracts
 - SDVOSB sole source contracts
 - WOSB sole source contracts

Limitations on Subcontracting

■ FAR 52.219-14

By submission of an offer and execution of a sole source or set-aside contract, the SBC agrees that in performance of the contract in the case of a contract for --

- **Services (except construction):** At least 50% of the cost of contract performance incurred for personnel shall be expended for employees of the SBC
- **Supplies (other than procurement from a nonmanufacturer of such supplies):** The SBC shall perform work for at least 50% of the cost of manufacturing the supplies, not including the cost of materials
- **General construction:** The SBC will perform at least 15% of the cost of the contract, not including the cost of materials, with its own employees
- **Construction by special trade contractors:** The SBC will perform at least 25% of the cost of the contract, not including the cost of materials, with its own employees

Limitations on Subcontracting

- 13 C.F.R. § 125.6

- Changed the formulas for calculating compliance with the limitations on subcontracting

- Allows SBCs to take credit for work performed by similarly situated subcontractors
- Specifically, excludes from the limitations on subcontracting calculation the percentage of the award amount that the prime contractor spends on contracts with similarly situated entities — deeming such work not to be “subcontracted work” for purposes of complying with the rule
- Discrepancy between SBA and FAR clause has led to confusion
 - The VA issued a Class Deviation incorporating the new regulations by reference
 - Other agencies continue to use the current FAR clause, which does not reflect the new regulations

Limitations on Subcontracting

- Draft FAR rule implementing changes should help to eliminate confusion
 - The FAR Council has a list of “Open FAR Cases” (last updated September 11, 2017) indicating that the FAR Council is working on a Revision of FAR 52.219-14, Limitations on Subcontracting, which implements SBA’s final rule and regulatory clarifications
 - The FAR Council will be sending the draft rule to the Office of Federal Procurement Policy after receiving DoD approval to publish

Kingdomware Implications

- *Kingdomware v. United States* (2016)
 - The VA tried to take the position that it could order off of the GSA schedule without first applying the Rule of Two
 - The Supreme Court disagreed
 - Found that the Rule of Two is mandatory and that its text required the VA to apply it to all contracting determinations
 - Held that the VA could not evade the rule by meeting its contracting goals or by ordering through the GSA schedule
 - Takeaway: The Rule of Two is mandatory and applies to all VA procurements, including orders off of the GSA Schedule

SBIR Program

- Small Business Innovation Research (SBIR) Program
 - R&D program through which U.S.-owned and controlled businesses with 500 or fewer employees propose new concepts to Federal agencies
 - Involves about \$5 billion in annual awards
 - Unlike other SBA programs, each SBIR agency runs its own program

- Participating agencies include:
 - Dept. of Defense
 - National Institutes of Health
 - Dept. of Energy
 - NASA
 - U.S. Dept. of Agriculture
 - Dept. of Homeland Security

SBIR Program

- Three-phase program:
 - Phase I – Startup:
 - Establishes the technical merit, feasibility, and commercial potential of R&D efforts
 - Typically issues awards to small businesses up to \$150,000 for 6 months
 - Phase II – Expansion:
 - Expands on Phase I work and provides funding based on results and merit potential of the work
 - Typically issues awards to small businesses up to \$1 million
 - Phase III – Technological Support:
 - Relevant agency helps move the innovative product from a laboratory to the marketplace
 - No SBIR funds support Phase III – large businesses are eligible for awards

STTR Program

- Small Business Technology Transfer (STTR) Program
 - Federal research and development program that provides a portion of federal research and development efforts to small businesses for cooperative research & development
 - Three-phase structure similar to the SBIR Program

Mentoring Programs

- There are several different mentor organizations and resource programs sponsored by the federal government:
 - Mentors & counselors
 - Development centers
 - Outreach programs
- Mentor-Protégé Program:
 - Goals:
 - Develop strong protégé firms using business development assistance provided by a mentor
 - Help protégé firms successfully compete for government contracts

Program Developments

- All Small Mentor-Protégé Program
 - Established in 2016 to extend SBA-approved mentor-protégé relationships to every small business
 - Previously there were separate programs for each constituency
 - Protégé firms are eligible to form a joint venture (JV) with an SBA-approved mentor
 - JV will only qualify for contracting set-asides for which it is eligible
 - JV must be separately identified in SAM as a JV with its own name, DUNS number, and CAGE code
 - All JV agreements must be in writing and must state the purpose of the JV, provide that the protégé owns at least 51% of the JV entity, and specify each party's responsibilities with respect to the JV
 - The protégé must certify to SBA and the contracting officer that the JV complies with SBA requirements
 - The SBA does not review or approve JV agreements prior to award for contracts other than 8(a) contracts, but the JV agreement will be reviewed by SBA in the event of a size or status protest filed in response to an award

Exemptions from Onerous Requirements

- Small businesses are exempt from several onerous requirements for government contractors:
 - Cost Accounting Standards
 - Requirement to have a Small Business Subcontracting Plan
 - Requirement to develop and implement a business ethics awareness and compliance program and internal control system

Compliance Considerations for Large and Small Businesses



Affiliation

- The size of a small business concern is determined by adding the annual receipts and number of employees for the entity itself **and all of its domestic and foreign affiliates**
- Concerns and entities are affiliates of one another when either:
 - One entity controls or has the power to control the other, or
 - A third party or parties controls or has the power to control both entities
- The control need not actually be exercised to qualify as “control,” if the power to control exists

Affiliation

- Factors to consider:
 - Common ownership (e.g., control through stock ownership, stock options, voting trusts)
 - Common management (e.g., interlocking management, common facilities)
 - “Newly organized concern”—previous relationships with or ties to another concern
 - Contractual relationships (e.g., joint venture agreements, franchise and license agreements)

(Additional guidance provided in the SBA regulations and the FAR)

Affiliation

- Joint Venture Rules

- New regulations issued by the SBA in May 2016 allow a joint venture to qualify as small for government procurement purposes if each partner to the joint venture qualifies individually as small
- Applicable size standard dictated by the NAICS code assigned to the solicitation

Subcontracting

- Use of SBCs by large contractors—required in some circumstances
- FAR 52.219-9, Small Business Subcontracting Plan
 - Requires large businesses awarded prime contracts and non-commercial item subcontracts **in excess of \$700,000** (or \$1.5 million for a contract for construction of a public facility) that offer further subcontracting opportunities to **submit a small business subcontracting plan** to the appropriate contracting agency

Subcontracting

- Small Business Subcontracting Plan Requirements
 - Separate percentage goals for using SBCs and each category of SBCs
 - A statement of the total dollars planned to be subcontracted to SBCs
 - A description of the principal types of supplies and services to be subcontracted to SBCs
 - A description of the methods used to develop subcontracting goals and identify potential sources for solicitation purposes
 - Assurances that the contractor will comply with certain federal requirements related to small business contracting
 - Can rely on self-certifications
- Types of Small Business Subcontracting Plans
 - Commercial
 - Individual

Representation as an SBC

- FAR 52.219-28, Post-Award Small Business Program Rerepresentation
 - SBC contractor's size is established at the date of proposal with price, thus effectively locking in the size for the duration of the contract
- Several exceptions to this rule:
 - If a contract's duration is longer than 5 years, a contractor will be required to recertify its small status for business purposes (prior to the end of the 5th year of the contract)
 - If the contractor undergoes a triggering event (including a merger, sale, acquisition, or contract novation), must recertify within 30 days
 - If a contracting officer requests a new size certification in connection with a specific order under a multiple award contract, a contractor will need to recertify for purposes of that order
- Other caveats: SBA's conflicting position regarding 8(a) size requirements

Misrepresentation Issues

- Willful Misrepresentation
 - Affirmative, willful, and intentional certifications of small business size and status prohibited. Examples:
 - Submission of a bid, proposal, or other offer for a set-aside contract or one otherwise classified for SBCs
 - Submission of a bid, proposal, or other offer for a grant to procurement that encourages a federal agency to classify the proposal as an award to an SBC
 - Registration on any federal electronic database for the purpose of being considered an SBC
 - Willful representation results in a deemed “total loss” to the government and can result in repayment of the entire price of the contract
- Potential Civil False Claims Act liability or criminal false statement
- Bid protest issues – size protests are routed through the SBA

Compliance Updates & Trends

- Recent False Claims Act decisions and actions:
 - In August 2017, DOJ announced a \$16 million settlement with Virginia-based defense contractor ADS resolving allegations that ADS and its subsidiaries violated the False Claims Act by submitting claims for payment under fraudulently obtained small business set-aside contracts
 - Also in August 2017, a district court ruled that there was no potential cap on damages in a case involving accusations that a nuclear waste cleanup company falsely certified compliance with small business participation requirements (government not limited to remedies provided in the 10-year, multibillion-dollar contract to clean up a river)
- These cases may signal that DOJ will become more proactive in combatting small business fraud

Key Takeaways



How's the Government Doing?

- FY 2016 Results

- Federal government reached its overall small business federal contracting goal for the 4th consecutive year
 - Awarded **24.34%** of federal contract dollars to small businesses (totaling \$99.96 billion)
- Mixed results in individual categories:

| Categories | Goal | 2016 % / \$ |
|------------------------------|------|------------------|
| Small disadvantaged business | 5% | 9.52% / \$39.1B |
| SDVOSB | 3% | 3.98% / \$16.34B |
| WOSB | 5% | 4.79% / \$19.67B |
| HUBZone | 3% | 1.67% / \$6.8B |

Key Considerations for Small & Large Businesses

- SBA programs offer unique opportunities for small businesses
 - Certain designations can create even more contracting opportunities
- Determining whether a business qualifies as small can be tricky
 - Control is often a central issue when determining whether a business is truly small
 - Affiliation rules matter a lot!
 - Misrepresentation can lead to contractual and bid protest consequences along with potential civil and criminal liability
 - Consider a mandatory disclosure if you discover a misrepresentation of size status

Mandatory Disclosures

Erin L. Toomey



Mandatory Disclosure Overview

- In place since November 2008
- Fundamental shift of government contracting to quasi-law enforcement
- Requires:
 - Real compliance programs
 - Cooperation with government investigations
 - Mandatory disclosures of fraud and similar conduct in connection with contracts

FAR 52.203-13

- If contract is greater than \$5.5 Million and period of performance is greater than 120 days, all contractors must:
 - Have a written code of business ethics and conduct within 30 days of contract award
 - Make a copy of the Code available to each employee engaged in performance of the contract
 - Make mandatory, timely disclosures of certain violations of law
 - Exercise due diligence to prevent and detect criminal conduct and promote a culture that encourages ethical conduct

FAR 52.203-13

- All contractors except small businesses and commercial item contractors, within 90 days of award, must:
 - Make reasonable efforts not to include as a “principal” an individual whom due diligence would have exposed as having engaged in conduct that is in conflict with the Contractor’s code of business ethics and conduct
 - Establish an ongoing business ethics awareness and compliance program
 - Implement an internal control system to facilitate timely discovery
 - Implement an internal control system to ensure corrective measures
 - Fully cooperate with any government agencies responsible for audits, investigations or corrective actions

FAR 52.203-13

- **Mandatory Disclosure Requirements**
 - Mandates that contractors disclose known violations by its principals, employees, subcontractors or agents
 - Disclosure to the OIG with a copy to the Contracting Officer

FAR 52.203-13

- Mandatory Disclosure Requirements
 - Disclosure required when contractor/subcontractor has
 - Credible evidence that
 - In connection with the award, performance, or closeout of the contract or any subcontract under the contract
 - A principal, employee, agent, or subcontractor has committed
 - A violation of Federal criminal law involving
 - fraud,
 - conflict of interest,
 - bribery, or gratuity violations; or
 - A violation of the civil False Claims Act (FCA)

FAR 52.203-13

- “Principal” defined as “an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a division or business segment; and similar positions)”
- Failure to disclose = breach of contract
- Does not seem to require contractors to disclose information about higher-tiered contractors (including the prime or a higher-tiered subcontractor) or violations by government employees

FAR 52.203-13

- FCA violations very broad, especially under the implied certification theory – Courts disagree about what constitutes a violation
- Contractors must be diligent about flowing down this clause to subcontractors when applicable
 - Required flow-down in all subcontracts over \$5.5 million/120 day threshold
 - The clause does not **require** contractors to review/approve its subcontractors' codes or systems, but it may be a good practice to confirm that the subcontractors have such codes and systems

Suspension / Debarment

- Failure to make a mandatory disclosure is an independent basis for suspension / debarment
 - FAR 9.406-2 and 9.407-2
 - Includes a requirement to make a mandatory disclosure when there is credible evidence that the contractor received a “significant overpayment”
 - Disclosure obligation continues until 3 years after final payment
 - Disclosure required to the “government” but not clear if that is the OIG, Contracting Officer, or both

Process

- Disclosure made to the Agency OIG and the Contracting Officer
- Will forward to, and will involve, as necessary:
 - Department of Justice (DoJ)
 - Department of Defense Contract Audit Agency (DCAA)
 - Assess the adequacy of the proposed restitution
 - Agency Office of Suspension-Debarment (OSD)
 - DoD OSD must sign off before a disclosure can be closed
 - When the disclosing entity is a “Top 100” DoD Contractor, automatic referral to criminal investigators
 - Other interested agencies
- Treated as confidential when submissions properly marked
- Agencies sometimes, but not always, provide a closeout letter

What Is Credible Evidence?

- No definition in FAR
- Mostly an issue with FCA violations
- Little guidance from IGs/DoJ – “they should know it when they see it”
- Rough standard – “possible violation”
 - 25-50% likelihood?
 - Certainly below probable – 50%

Disclosure

- What?
 - Contracts involved
 - Internal investigations
 - Actors involved/culpability/responsibility
 - Estimated government loss
 - Complete description of dates, details and personnel
 - Duration, national security implications, privacy issues, public safety threats
 - Corrective actions taken
 - Proposed restitution

Disclosure

- When?
 - “Timely” is the requirement
 - No guidance from FAR or IGs
 - Tension with need for internal investigation
- IGs seem less concerned with timeliness than quality of disclosures

Experience To Date

- More than 1,300 disclosures made
- Majority are from DoD
 - Most common:
 - Labor mischarging
 - Nonconforming parts
 - Significant overpayments
 - Conflicts of interest
 - False certifications
 - False claims

Experience To Date

- Second largest agency is GSA
 - Trade Agreement Act violations
 - Price reduction violations
 - Misclassified business type
 - Services not performed

Experience To Date

- IGs say
 - Contractors file minor matters, but not major matters
 - Disclosures of major matters seem to “downplay” the significance of the violation rather than cooperating with achieving a resolution
 - Seem motivated by imminent government discovery
- Resolution averages six months

Lingering Questions

- Need to identify culpable individuals following the issuance of the Yates Memo in September 2015?
- Developments regarding implied certification under the False Claims Act
- Confidentiality and potential waiver of the attorney-client privilege
- Risk of a lawsuit by a *qui tam* relator following the submission of a mandatory disclosure

Additional Disclosure Requirements

- **Trafficking in Persons**
 - FAR 52.222-50, disclosure is part of cooperation
- **Cybersecurity Disclosures**
 - DFARS 252.204-7012, Safeguarding Covered Defense Information and Cyber Incident Reporting
- **Counterfeit Electronic Parts**
 - DFARS 252.246-7007, Contractor Counterfeit Electronic Part Detection and Avoidance System
 - Requires reporting to the Contracting Officer and GIDEP

Best Practices

- Have a compliance program tailored to your business, including:
 - A compliance code/handbook
 - A training program
 - A compliance officer (someone with clear responsibility)
- Having an effective compliance program reduces violations and provides more favorable treatment if a violation occurs

Best Practices

- Disclosure must be detailed to be effective
 - Recount information from employees
 - Include relevant documents
- Poll “principals” on a routine basis regarding whether they have knowledge of a basis for a mandatory disclosure

Key Considerations for Subcontract Flowdowns

Micah T. Zomer



Agenda

- FAR Basics
- Definition of Subcontract Flowdowns
- Prime and Subcontractor Perspectives
- Mandatory Flowdowns
- Non-Mandatory Flowdowns
- Commercial Item Flowdowns
- Approaches to Drafting Flowdowns
- Identifying Applicable Version
- Defining Terms/Parties

FAR Basics

- Formation and administration of U.S. Government prime contracts is subject to and governed by the Federal Acquisition Regulation (FAR) and 20+ agency FAR supplements
 - e.g., Department of Defense FAR Supplement (DFARS), Department of Energy Acquisition Regulation (DEAR), etc.
- FAR codified at Title 48, Chapter 1 of the Code of Federal Regulations (CFR); agency supplemental regulations are codified at subsequent chapters (e.g., DFARS codified at Title 48, Chapter 2)
- FAR and supplemental regulations can be accessed through various websites:
 - www.acquisition.gov
 - www.farsite.hill.af.mil

FAR Basics

The screenshot shows the website <https://www.acquisition.gov/browsefar>. The navigation bar includes links for Home, Federal Acquisition Regulation (FAR), Supplemental Regulations, Acquisition Systems, Archives, and CAO.gov. The main content area is titled "Federal Acquisition Regulation (FAR)" and includes a "Full Screen" button. Below the title is a "Table of Contents" section with a grid of page numbers (1-53) and a list of FAR parts with their titles and download links (HTML).

Home » Federal Acquisition Regulation (FAR)

Federal Acquisition Regulation (FAR)

FAC Number/Effective Date: 2005-94,2005-95 / 01-19-2017 - Download Entire FAR - PDF HTML Full Screen

| FAR PARTS | | | | | Title & Number | Select the download format |
|-------------------|----|----|----|----|---|----------------------------|
| Index | | | | | | HTML |
| Table of Contents | | | | | Part 1 - — Federal Acquisition Regulations System | HTML |
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| 11 | 12 | 13 | 14 | 15 | 1.3 Agency Acquisition Regulations | HTML |
| 16 | 17 | 18 | 19 | 20 | 1.4 Deviations from the FAR | HTML |
| 21 | 22 | 23 | 24 | 25 | 1.5 Agency and Public Participation | HTML |
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FAR Basics

- FAR Subpart 52.2 (and DFARS Subpart 252.2) contains the text of the clauses that are included in government solicitations and contracts
- Prescription before each clause cites to the “enabling” provision, which dictates when the clause should be included in a solicitation or contract
 - Application of clause depends on a number of factors, including:
 - Contract type (e.g., fixed-price, cost reimbursement, commercial item, etc.)
 - Type of work to be performed (e.g., sale of goods, provision of services, construction, architect-engineer, etc.)
 - Total anticipated contract value (inclusive of all options)

FAR Basics

52.203-7 Anti-Kickback Procedures.

As prescribed in [3.502-3](#), insert the following clause:

Anti-Kickback Procedures (May 2014)

3.502-3 Contract clause.

The contracting officer shall insert the clause at [52.203-7](#), Anti-Kickback Procedures, in solicitations and contracts exceeding the simplified acquisition threshold, other than those for commercial items (see [Part 12](#)).

Definition of Subcontract Flowdowns

- Subcontract flowdowns are the FAR 52.2 clauses that a prime contractor must or should “flow down” to its subcontractors
- Some flowdowns, as with standard terms and conditions, are a method of allocating risks between the parties
- Other flowdowns are required for a higher-tiered contractor (Prime) to comply with its prime contract / subcontract

Prime's Perspective

- There are some clauses in the prime contract that must be flowed-down, or the Prime will be in breach
- **But**, not all provisions **must** be or even **can** be flowed-down
 - EFT Payment Provisions through the System for Award Management (SAM)
 - Disputes Clause
- Since the subcontract is likely only for a subset of the Prime's requirements, some provisions are likely not applicable
- There are other clauses which, while not mandatory, should be modified and flowed-down in order to protect the Prime's interests (e.g., Termination Clauses, Stop-Work Order, Changes)

Subcontractor's Perspective

- Subcontractor needs to accept the clauses the Prime must include to cover its legitimate risk (e.g., termination, warranty, etc.)
- Subcontractor needs to be able to identify the clauses that are not mandatory flowdowns, that do not cover a Prime's legitimate risk, or that cause a burden on the subcontractor
- Challenge for the subcontractor is to convince the Prime that these superfluous clauses add unnecessary costs, are overly burdensome to the subcontractor, or are just unfair
- Subcontractor needs to consider whether, once accepted, it will be able to flow down clauses to its own lower-tier subcontractors

Mandatory Flowdown Clauses

- Mandatory flowdown clauses are those that a Prime is required to include in subcontracts, as required by the clause
 - Inclusion of these clauses is non-negotiable
- The flow down of “mandatory” clauses is often conditional based on:
 - Contract type
 - Type of work to be performed
 - Total anticipated subcontract value (including all options)

Mandatory Flowdown Clauses

52.225-13 Restrictions on Certain Foreign Purchases

(c) The Contractor shall insert this clause, including this paragraph (c), in all subcontracts.

52.222-41 Service Contract Labor Standards

(l) *Subcontracts*. The Contractor agrees to insert this clause in all subcontracts subject to the Service Contract Labor Standards statute.

252.225-7016 Restriction on Acquisition of Ball and Roller Bearings

(f) The Contractor shall insert the substance of this clause, including this paragraph (f), in all subcontracts, except those for—

- (1) Commercial items; or
- (2) Items that do not contain ball or roller bearings.

Non-Mandatory Flowdown Clauses

- There are a number of clauses that, while not mandatory, should be modified and flowed-down in order to protect the Prime's interest
 - Examples include:
 - Changes
 - Termination for Convenience
 - Termination for Default
 - Stop-Work Order
 - DPAS

Non-Mandatory Flowdown Clauses

- Changes Clauses (FAR 52.243-1 – Fixed-Price)
 - Prime’s Perspective
 - Prime needs to flow down the ability to make unilateral changes with its subcontractors in the event of a government unilateral change
 - Prime should shorten the notice time period referenced at paragraph (c) of the clause from 30 days to 15 days
 - Subcontractor’s Perspective
 - Subcontractor should draw a distinction between a government-directed change and a Prime-directed change

Non-Mandatory Flowdown Clauses

- Termination for Convenience (FAR 52.249-2 – Fixed-Price Supply and Service)
 - Permits the Government to unilaterally terminate for convenience the prime contract at any time
 - Prime's Perspective
 - Should flow down this clause to **all** subcontractors
 - Should shorten the 1-year termination settlement proposal period, so that the Prime can include any subcontractor proposals in the Prime's proposal to the government
 - Subcontractor's Perspective
 - Limit application so that the Prime may only terminate for convenience the subcontract only when the prime contract has been terminated for convenience by the government

Commercial Item Flowdowns

- The FAR limits the clauses a Prime may flow down to subcontracts for commercial items
 - FAR 52.212-5(e)(1) and FAR 52.244-6(c)(1) list clauses that a Prime is required to include in its commercial item subcontracts; many of these “required” clauses only apply under certain conditions
 - FAR 52.212-5(e)(2) and FAR 52.244-6(c)(2) both provide that, in addition to the listed clauses, a Prime may flow-down to subcontracts for commercial items “**a minimal number of additional clauses necessary** to satisfy its contractual obligations.”

Commercial Item Flowdowns

- The DFARS similarly limits the clauses a Prime may flow down to subcontracts for commercial items
 - DFARS 252.224-7000, “Subcontracts for Commercial Items”:
 - (a) The Contractor is not required to flow down the terms of any Defense Federal Acquisition Regulation Supplement (DFARS) clause in subcontracts for commercial items at any tier under this contract, unless so specified in the particular clause.
 - (b) While not required, the Contractor may flow down to subcontracts for commercial items a minimal number of additional clauses necessary to satisfy its contractual obligation.

Commercial Item Flowdowns

- Additional limits on the clauses that may be flowed down to commercial item subcontracts
 - FAR 12.504 and DFARS 212.504: Lists laws that are not applicable to subcontracts at any tier for the acquisition of commercial items
 - Exemptions for commercial item subcontracts are identified directly in some of the clauses themselves, for example:
 - FAR 52.203-14, “Display of Hotline Poster(s)”
 - FAR 52.219-9, “Small Business Subcontracting Plan”
- Given the limitations on flowdown clauses in commercial item subcontracts, it is important to for the Prime and Subcontractor to determine upfront whether the supplies/services at issue are “commercial items” as defined at FAR 2.101

Approaches to Drafting Flowdowns

- Incorporation by reference versus in full text
 - FAR 52.102: Clauses should be incorporated by reference to the maximum practical extent, rather than being incorporated in full text

Approaches to Drafting Flowdowns

- The FAR contemplates that Primes develop flowdowns on a contract-by-contract basis
 - Requires a great deal of time and resources; not feasible for most companies
- More common method is for the Prime to develop a document (or documents) that contains the FAR, DFARS, and supplemental acquisition regulation flowdowns from all of its prime contracts and then separate those clauses into various categories

Approaches to Drafting Flowdowns

- Categories of Clauses
 - Based on Value
 - The following clauses apply to subcontracts/orders with a value of \$150,000 or more
 - Based on Type of Work
 - The following clauses apply to subcontracts/orders for services
 - Based on Contract Type
 - The following clauses apply to cost-reimbursement subcontracts/orders
 - The following clauses apply to non-commercial item subcontracts/orders
 - Hybrid
 - The following clauses apply to non-commercial item subcontracts/orders with a values of \$150,000 or more

Approaches to Drafting Flowdowns

- Include language next to clause identifying the conditions under which the clause applies
 - These conditions, if any, are usually (but not always) set forth in the flowdown paragraph of the clause
- Identifying applicability conditions provides guidance to subcontractors as to which clauses apply to them, which helps streamline the negotiation process

Identifying Applicable Version

- Primes are required to flow down the version of the clause that is in the Prime's contract
- Important for parties to understand which version of clause applies
 - Subcontractor's substantive compliance obligations may differ based on version of the clause
 - e.g., March 2015 version of FAR 52.222-50, Combatting Trafficking in Persons, requires some contractors to develop compliance plan; no such requirement in earlier versions of the clause
 - Flowdown obligations may differ based on the version of the clause, as flowdown thresholds change
 - e.g., FAR 52.203-13, Contractor Code of Business Ethics and Conduct, flowdown threshold increased from \$5M to \$5.5M

Identifying Applicable Version

- Prime's Perspective
 - Best practice is to specifically identify the date of the applicable version for each applicable prime contract
 - Other option is to include the version of the clause that applies most broadly and provides the Prime with the most protection
 - e.g., Should choose the version of the clause with lower dollar threshold
- Subcontractor's Perspective
 - Subcontractor should ensure that it knows which version applies; do not assume it's the current version
 - Earlier versions of FAR clauses can be accessed at the "Archives" tab of www.acquisition.gov website

Identifying Applicable Version

The screenshot shows the website <https://www.acquisition.gov/browsefar>. The navigation menu includes: Home, Federal Acquisition Regulation (FAR), Supplemental Regulations, Acquisition Systems, Archives (highlighted with a yellow circle), and CAO.gov. The main content area is titled "Federal Acquisition Regulation (FAR)" and includes a breadcrumb "Home » Federal Acquisition Regulation (FAR)". Below the title, there is a link for "FAC Number/Effective Date: 2005-94,2005-95 / 01-19-2017 - Download Entire FAR" with PDF and HTML icons, and a "Full Screen" button.

| FAR PARTS | | Title & Number | Select the download format | | | |
|-------------------|----|----------------|----------------------------|----|--|--|
| Index | | | HTML | | | |
| Table of Contents | | | | | | |
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| Title & Number | Select the download format |
|---|----------------------------|
| Part 1 — Federal Acquisition Regulations System | HTML |
| 1.1 Purpose, Authority, Issuance | HTML |
| 1.2 Administration | HTML |
| 1.3 Agency Acquisition Regulations | HTML |
| 1.4 Deviations from the FAR | HTML |
| 1.5 Agency and Public Participation | HTML |
| 1.6 Career Development, Contracting Authority, and Responsibilities | HTML |

Defining Terms/Parties

- FAR/DFARS clauses include terms which are geared to prime contracts
- When flowing down the clauses, the Prime should alter these terms to fit the subcontract
 - “Contract” means “Subcontract”
 - “Contracting Officer” means an authorized representative of Buyer
 - “Contractor” means “Seller”
 - “Government” means “Buyer”
 - “Disputes clause” means the disputes clause of the subcontract

Defining Terms/Parties

- Substitution of parties is not appropriate for some clauses
 - For the intellectual property clauses, the rights and responsibilities should be between the Subcontractor and the Government, not between the Subcontractor and the Prime

Takeaways

- Read the text of the clauses to determine whether the clauses are mandatory flowdowns and identify any conditions under which the flowdowns apply
- Flow down and modify those clauses necessary to mitigate and allocate legitimate risks (e.g., Changes and Termination clauses)
- Determine early on whether the supplies/services at issue are “commercial items” and identify those clauses inapplicable to commercial item subcontracts
- Identify the approach to drafting flowdowns appropriate for your company
- Clearly identify which version of the clause applies
- Include language defining the terms/parties so that the clauses make sense in the context of the subcontract

Federal Bid Protests: Pitfalls and Pointers

Frank S. Murray



Pitfalls, Pointers & A Practical Example

- Pitfalls

- Avoiding surefire ways to lose a protest

- Pointers

- When, where, how and why to file a successful protest
- Bid protest rules to live by

- Practical Example

- Real-life protest example of taking a proactive approach to solicitation issues, leading to a contract win

Why File a Bid Protest?

- The agency violated a statute, regulation or provision of the solicitation
- When second-in-line for award — a protest is continuation of marketing efforts
 - Highlight advantages your proposal provides
 - Why it would have been selected in proper evaluation
- When the incumbent — protest allows continuation of prior contract while protest pending
- If sustained (or if agency delays in taking corrective action), can recover attorneys fees

Who Can File a Bid Protest?

- “Interested Party”

- Actual or prospective offeror whose direct economic interest would be affected by either:

- Award of a contract; or
 - Failure to award a contract

- “Direct economic interest” – protester generally needs to show it would be next-in-line for award or able to participate in competition/recompetition if protest sustained

- Ineligible offerors can’t protest (unless protesting eligibility)
 - Subcontractors/suppliers are not “interested parties”

Who Can File a Bid Protest?

- If actual offeror, need to show a reasonable chance of winning award if the protest succeeds
 - If winning the protest wouldn't put you in line for award or give you a chance to participate in a recompetition, not an "interested party"
- If prospective offeror, need to show ability to participate in competition going forward, if protest successful
 - Example: Large business protesting a S/B set-aside

When Can You File a Protest?

- Timeliness is key in bid protests
- Solicitation Defect Challenges
 - MUST be filed prior to deadline for receipt of proposals under solicitation, or, if protest concerns an amendment to solicitation, prior to closing date/time of that amendment
- Other Protest Challenges
 - At GAO and agency, 10 days after knew or should have known of protest basis
 - At COFC, no set deadline, but unexplained/unreasonable delay in filing can hurt case for injunction against contract performance or lead to dismissal of protest

What Can You Protest?

- You CAN protest:
 - Solicitation terms (pre-award)
 - Exclusion from Competitive Range (pre-award)
 - Evaluation and Award Decision (post-award)
 - GSA Schedule Orders/BPA buys (FSS)
 - Award of task order/delivery order if it is outside scope of original contract
- You CAN'T protest:
 - Solicitation terms (after award)
 - Inadequate debriefing
 - Task order/delivery order award decision under IDIQ contract (if less than \$10M)

Common “Solicitation Defect” Protest Grounds

- RFP not detailed enough
- RFP too detailed, too restrictive (sets standards that are not needed)
- Many brand-name or equal issues
- Need more time to respond
- RFP is ambiguous (“patent ambiguity” vs. “latent ambiguity”)
- Small-business issues (failure to set aside, wrong size standard, HUBZone issues, Kingdomware VOSB/SDVOSB set-aside issues)
- Sole-source RFP or synopsis

Common Protest Grounds That Don't Relate to Solicitation Defects

- Failure to follow evaluation criteria in solicitation
- Use of unstated evaluation criteria
- Improper past performance evaluation
- Lack of meaningful discussions
- Improper best value determination
- Unequal treatment
- Latent ambiguity in RFP

Pitfalls: Protest “Don’ts”



Eleven Ways to Lose A Protest

1. Write a bad proposal

- Don't try to outsmart the agency and give them what you think they want, instead of what they are asking for
- If you don't give info the RFP seeks, don't expect GAO or COFC to bail you out

2. Use the “kitchen sink” approach, and stick with it through the whole protest

3. Rely on conspiracy theories

- Bias/bad faith nearly impossible to prove
- Focus on facts that show what agency did wrong, not on potential motives underlying agency action

Eleven Ways to Lose A Protest

4. Wait too long to protest
 - Missing 10-day deadline at GAO is a show-stopper
 - Also applies to supplemental protests based on agency report materials
5. Pursue protest arguments on a “piecemeal” basis
 - Waiting until responding to agency report to raise protest issues that should’ve been raised in initial protest: now untimely
6. Be vague or speculative

Eleven Ways to Lose A Protest

7. Focus on errors that don't matter
 - Need to show competitive prejudice
8. Ask GAO or the Court to second-guess the government on a judgment call
 - Distinction between a bad decision (you'd decide differently) and a wrong decision (violates law/RFP)
9. Challenge or criticize Solicitation terms in post-award argument
 - Need to challenge how agency applied terms, not the terms themselves

Eleven Ways to Lose A Protest

10. Sit on a solicitation issue without protesting, in case you win the award anyway
 - Why protest before I know I need to, right? **WRONG**
 - “Rolling the dice” always comes up snake eyes
11. Try to challenge agency evaluation of awardee without a lawyer – and therefore no protective order
 - Won’t get to see behind the curtain
 - Agency produces only redacted response to you, but GAO gets the whole picture
 - Arguing with one hand tied behind your back

Pitfalls: Protest “Do’s”



11 Protest Rules to Live By

- **Rule 1:** Better to seek legal advice too soon than too late
 - Protest deadlines are strict and unforgiving
 - If you have any question about whether you have a protest issue, better to seek legal advice right away than to wait and find out that the issue is now untimely

11 Protest Rules to Live By

- **Rule 2:** If you think there's something wrong or unfair about the procurement before you've even submitted your proposal, that's a "solicitation defect" issue that needs to be protested before proposals are due
 - Solicitation defect protests must be filed prior to due date for initial proposals (or next closing date for proposals if error is in amendment)
 - Common "solicitation defect" issues:
 - RFP not detailed enough or too detailed/restrictive
 - brand-name or equal issues
 - RFP is ambiguous
 - issues with evaluation scheme
 - small business issues (failure to set aside, wrong size standard, HUBZone issues)

11 Protest Rules to Live By

- **Rule 3:** Avoid protest issues by paying attention to the solicitation and what the agency is asking for when preparing your proposal
 - Section L tells you what your proposal should include/how it should be formatted
 - Section M tells you how the agency will evaluate proposals and select a winner
 - Focus on provisions drafted by the agency and understand what the agency is asking for
 - Write proposal that responds to the RFP **as issued** – **not** to the RFP you think the agency **should have** issued

11 Protest Rules to Live By

- **Rule 4:** Use agency protests to your advantage on solicitation defect issues (but generally not for post-award/evaluation issues)
 - Agency protests are less formal, less costly, and can be less adversarial than a GAO protest, but are best used when asking the agency to revise a solicitation pre-award (i.e., a “solicitation defect” issue)
 - “Foot-in-the-door” for later GAO protest if agency denies or declines to act before proposals due
 - Less likely to obtain relief if you are asking agency to voluntarily reverse its award decision, and awaiting agency action on post-award agency protests can affect ability to protest at GAO or obtain stay of performance

11 Protest Rules to Live By

- **Rule 5:** When eliminated from competitive range, do not defer debriefing until after award – ask for it right away
 - When eliminated from competitive range, you have the right to defer your debriefing until after the award, but not a good idea to do so if you think your elimination was improper/erroneous
 - Ask for a pre-award debriefing and file protest before agency moves on with evaluation/award
 - better chance of getting “corrective action” or getting back into the competition

11 Protest Rules to Live By

- **Rule 6:** Always request a debriefing in writing immediately upon notification of award decision
 - Debriefings can extend protest deadlines, including deadlines for automatic stay, but you have to request debrief in writing within three **calendar** days of notification
 - If notified by e-mail, make it a practice to reply immediately with request for debriefing
 - Ask for debriefing even if you win award
 - Be alert to FSS issues (no debriefing required)

11 Protest Rules to Live By

- **Rule 7:** Always accept the first debriefing date offered by the agency
 - Automatic stay deadline is keyed to the first date offered for the debriefing, so if you decline the first date and try to delay the debriefing until later, you could lose the chance to obtain a stay of performance if you do decide to protest the award

11 Protest Rules to Live By

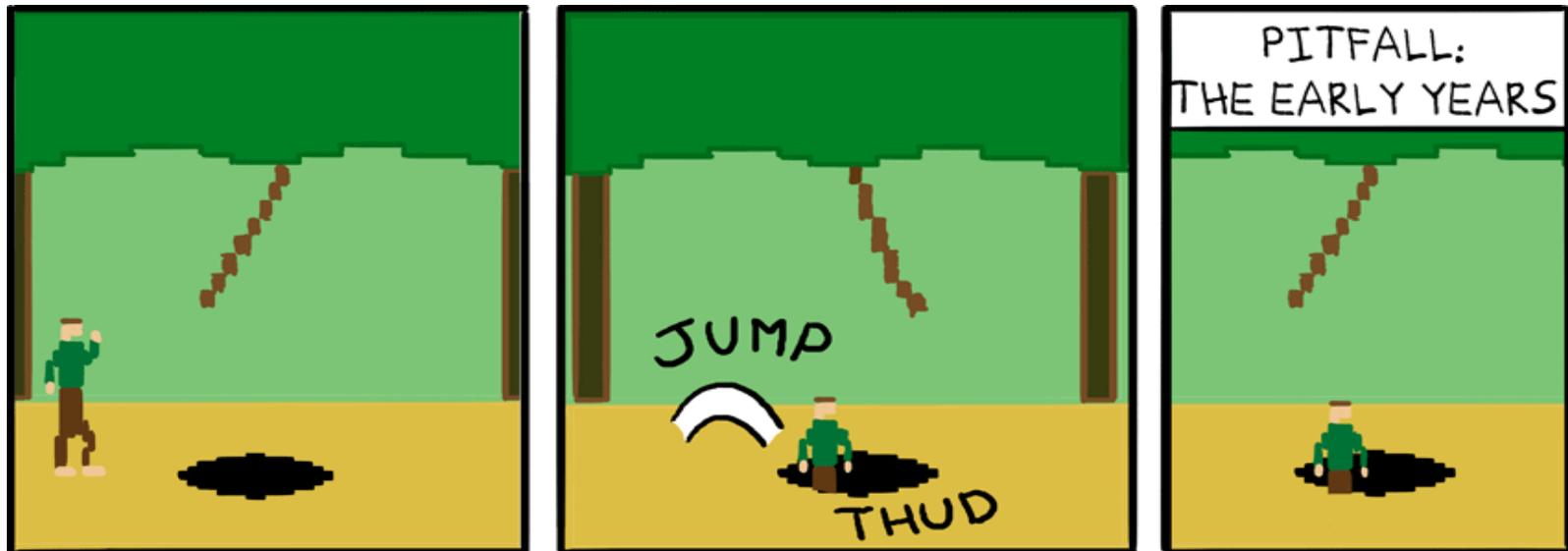
- **Rule 8:** Know the rules/deadlines for obtaining an automatic stay of performance – and be sure to follow them
 - Remember debriefing deadlines/rules
 - Ask agency to identify/confirm date contract was awarded
 - Calendar days – “within 5 days of debriefing”
 - Some agencies take position that, if debriefing offered on Tuesday, protest must be filed on Friday to get stay (even though under normal GAO rules, a deadline that falls on a weekend carries over to the next business day)
 - Err on side of caution; better to be safe than sorry

11 Protest Rules to Live By

- **Rule 9:** Protect your rights as an awardee by intervening in a protest
 - Intervening allows you to stay involved in the process and to help the agency respond to the protest allegations and defend the award
 - Also shows that you are concerned/invested in the outcome and willing to fight for the award, which could factor into agency decision on whether to take “corrective action” of reopening competition or reevaluating the award decision

11 Protest Rules to Live By

- **Rule 10:** Know where the trapdoors are, and avoid them
 - GAO [Dirty Harry voice]: “Go ahead, make my day.”



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11 Protest Rules to Live By

- **Rule 11: Read Foley Bid Protest Guide**

- Foley & Lardner Guide to Federal Procurement Protests, 2nd ed., by David Ralston and Frank Murray, now available in 3-part series of Practical Law articles
- Provides detailed discussion of:
 - Protest jurisdiction & timeliness requirements
 - Stay of contract award/performance
 - Protest process & available relief
 - Common protest grounds
 - Advantages/disadvantages of each protest forum

Pointers: Protest Success Story



Clarifying Contract Requirements

- InfraMap Corp., B-405167.6, Feb. 6, 2012
 - RFP for Underground Utility Location (UUL) services on Army facility, base year plus 4 option years
 - Offerors required to bid firm, fixed annual price to provide all location/marketing services required
 - Low price, technically acceptable award
 - InfraMap was incumbent, lost two prior rounds but successfully protested and Army recompeted

The Problem With the Solicitation

- RFP projected that UUL requirements would increase by 10% per year over 2010 requirements
- Agency issues amendment requiring final proposal revisions in four days
- On same date, Army's Chief Engineer informed InfraMap that the RFP's workload would encompass UUL work required by an electrical privatization project, which would represent a massive increase in workload beyond what was projected in RFP

Army's Position: What Problem?

- Army position was that the contract would obligate contractor to perform whatever services were needed at the fixed contract price, and that the 10% annual increase projection was based on number of permits, not mileage (so permits could be gamed)
- No mention in RFP of utilities privatization workload; none of the other bidders were likely to be aware of the inclusion (or magnitude) of that additional work in contract

InfraMap Fights the Battle

- InfraMap faced with two unappealing options:
 - If bid based solely on RFP's express workload projections, might win contract but be required to perform work well beyond what it priced into bid
 - But, if bid based on real (albeit unstated) requirements, InfraMap price would be higher than other bidders and lose the LPTA competition
- InfraMap took option 3
 - Filed a pre-award protest challenging RFP workload projections as failing to accurately reflect level of work to be performed under the contract, depriving offerors of information needed to compete equally and intelligently

The Army Fights Back

- Army filed motion to dismiss InfraMap's protest as untimely
- Argued that the RFP's workload projections were unchanged from original solicitation; thus, had to be protested prior to original closing date months prior
- InfraMap pointed out that it had no reason to question the RFP's workload projections until the conversation with the Army Engineer, and InfraMap protested before the next closing date
- GAO: InfraMap protest was timely

But InfraMap Wins the War

- Agency report showed agency had not performed any meaningful analysis to support its claim that the utilities privatization workload would be consistent with RFP projection
- GAO sustained InfraMap protest and recommended that Army perform detailed analysis of impact of utilities privatization workload and amend the RFP “to provide sufficient information to convey the level of work associated with” the increased requirements
- InfraMap leveled the playing field by making sure all bidders would be aware of the actual contract requirements... AND InfraMap won the award when the RFP was clarified and recompeted!

What is New and On the Horizon?

Erin L. Toomey



Overview

- Commercial Item Updates
- Emphasis on Buy American
- Privacy Act Training
- Security Clearance Requirements
- Cybersecurity Updates
- Freedom of Information Act
- Gift Giving Restrictions
- Changes in Employment-Related Requirements

Commercial Item Updates

- National Defense Authorization Act (NDAA) for FY 2017
 - Section 871: Requires DoD procurement officials to conduct or obtain market research to support a price reasonableness determination for commercial items in any bid or offer submitted in response to a solicitation
 - For major weapons systems, subsystems and components, may use information submitted under 10 U.S.C. 2379(d) as market research
 - For all other commercial items, procurement officials may require the offeror to submit the information necessary for conducting market research

Commercial Item Updates

- NDAA FY 2017 (cont...)
 - Section 872: Adds a new paragraph to the price reasonableness analysis requirements in 10 U.S.C. 2379(d) as follows:
 - “An offeror may submit information or analysis relating to the value of a commercial item to aid in the determination of the reasonableness of the price of such item. A contracting officer may consider such information or analysis in addition to the information submitted pursuant to paragraphs (1)(A) and (1)(B).”

Commercial Item Updates

- NDAA FY 2017 (cont...)
 - Section 873: DoD must maintain a centralized capability to provide assistance to defense agencies making
 - Commercial item determinations
 - Conducting market research
 - Analyzing price reasonableness
 - Section 874: Requires revisions to the DFARS to provide a list of defense-unique provisions that are inapplicable to
 - Commercial item contracts
 - Commercial item subcontracts
 - COTS items contracts

Commercial Item Updates

- NDAA FY 2017 (cont...)
 - Section 875: Requires the DoD to use commercial or non-government specifications and standards for all acquisitions
 - DFARS will be revised to encourage contractors to propose commercial or non-government standards that fulfill the intent of military specifications and standards
 - Section 876: Restricts agencies from entering into a non-commercial item contract in excess of \$10M for the following services:
 - Facilities-related
 - Knowledge-based (except engineering)
 - Construction
 - Transportation

Commercial Item Update

- General Services Acquisition Regulation (GSAR) – Transactional Data Reporting
 - Pilot Program began in June 2016
 - Potential transition to a horizontal pricing model for identified General Services Administration (GSA) Federal Supply Schedule (FSS) contracts
 - Pilot limited to approximately 30% of the FSS contracts and approximately 43% of the GSA Schedules sales volume
 - Pilot was optional to eligible Schedule holders but required for new FSS offerors or FSS contractors up for their 5 year renewal for identified Schedules
 - Over 1,000 contractors opted into the pilot
 - In August 2017, GSA made participation by new contractors voluntary

Buy American

- April 18, 2017 – Buy American and Hire American Executive Order
 - “[I]t shall be the policy of the executive branch to maximize, consistent with law, through terms and conditions of Federal financial assistance awards and Federal procurements, the use of goods, products, and materials produced in the United States”
 - “Produced in the United States” means “for iron and steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States”

Buy American

- April 18, 2017 – Buy American and Hire American Executive Order
 - Executive departments and agencies retain discretion to use authorized exceptions to Buy American laws
 - Domestic non-availability
 - Unreasonable cost
 - Purchase of commercial IT
 - Resale
 - When it is in the public interest
 - Does not impact exceptions for procurements
 - At or below the micro-purchase threshold
 - For use outside of the U.S.
 - Trade Agreements Act waivers still apply

Buy American

- April 18, 2017 – Buy American and Hire American Executive Order
 - Could lead to stricter enforcement of the BAA and TAA
 - Focus on these requirements could make compliance “material” to the government’s decision to pay an invoice, thereby supporting a civil False Claims Act case

Privacy Act Training

- January 19, 2017 – Final Rule (81 FR 93476)
- FAR 52.224-3, Privacy Training
- Requires contractors subject to the Privacy Act of 1974 (5 U.S.C. 552a) to conduct training
 - Initial and annual training – role based
 - At a minimum, privacy training shall cover:
 - The provisions of the Privacy Act including penalties for violations of the Act
 - The appropriate handling and safeguarding of personally identifiable information (PII)
 - The authorized and official use of a system of records or any other PII
 - Restrictions on the use of unauthorized equipment to create, collect, use, process, store, maintain, disseminate, disclose, dispose, or otherwise access, or store PII
 - The prohibition against the unauthorized use of a system of records or unauthorized disclosure, access, handling, or use of PII or systems of records
 - Procedures to be followed in the event of a potential or confirmed breach of a system of records or unauthorized disclosure, access, handling, or use of PII
 - Maintain records tracking training
 - Flowdown to subcontracts (including commercial item subcontracts)

Security Clearance Requirements

- May 18, 2016 – Change 2 to the National Industrial Security Program Operating Manual (NISPOM)
 - Written program in place by November 30, 2016
 - Among other things, the program must
 - Develop a capability to gather insider threat information across the contractor facility commensurate with the contractor's size and operations
 - Describe procedures to access, share, compile, identify, and report relevant and credible information covered by any of the 13 personnel security adjudicative guidelines indicative of a potential or actual insider threat
 - Deter employees from becoming insider threats
 - Detect insiders who pose a risk to classified information
 - Mitigate the risk of an insider threat

Security Clearance Requirements

- Among other things, the program must
 - Formally appoint a senior company official as the insider threat program senior official (ITPSO)
 - Needs to be a U.S. citizen and have a security clearance
 - May be the Facility Security Officer (FSO)
 - Conduct and document annual self-inspections
 - Report information indicative of a potential or actual insider threat that is covered by any of the 13 personnel security adjudicative guidelines
 - Develop a system or process to identify patterns of negligence or carelessness in handling classified information
 - Implement protection measures to monitor user activity on classified information systems in order to detect activity indicative of insider threat behavior
 - Provide insider threat program management and awareness training to cleared employees

Security Clearance Requirements

- May 11, 2016 DSS issued a new guide on mitigating and managing affiliate operations for entities bound by Foreign Ownership, Control, or Influence (FOCI) mitigation agreements
 - Requires contractors to submit an Affiliated Operations Plan (AOP) prior to leveraging any affiliated operations that describes:
 - All operations and services it intends to share with affiliates
 - The potential risks of collaboration
 - How those risks will be mitigated
 - Affiliated operations includes sharing human resources, personnel, and legal counsel
 - DSS has AOP templates available at www.dss.mil

Cybersecurity

- FAR 52.204-21, Basic Safeguarding of Covered Information Systems
 - “Federal contract information” (FCI): “not intended for public release, that is provided by or generated for the Government under a contract to develop or deliver a product or service to the Government, but not including information provided by the Government to the public (such as on public Web sites) or simple transactional, such as necessary to process payments.”
 - “Covered contractor information system” means “an information system that is owned or operated by a contractor that processes, stores, or transmits” FCI
 - Subject to 15 standards, relating to 6 of the 14 security control families in NIST SP 800-171

Cybersecurity

- DFARS 252.204-7012
 - Applies to defense contractors that process, store or transmit “covered defense information”
 - Security requirements for cloud computing service providers governed by DFARS 252.239-7010
 - “Covered defense information” (CDI): unclassified controlled technical information (as described in the CUI registry) or other information that requires safeguarding or dissemination controls and is:
 - Marked or otherwise identified in the contract, task order or delivery order and provided to the contractor by or on behalf of DoD in support of the performance of the contract; or
 - Collected, developed, received, transmitted, used or stored by or on behalf of the contractor in support of the performance of the contract

Cybersecurity

- DFARS 252.204-7012
 - Requires compliance with more than 100 security requirements specified in 14 families of security controls by the National Institute of Standards and Technology (NIST) 800-171 by **December 31, 2017**
- June 2017 DoD Industry Day Takeaways
 - Key to compliance is to have a System Security Plan (SSP) and Plan of Action and Milestones that **accurately** reflect the status of a contractor's compliance with the NIST 800-171 security controls
 - SSP describes
 - The boundary of a contractor information system
 - The operational environment for the system
 - How the security requirements are implemented
 - The relationships with or connections to other systems

Cybersecurity

- June 2017 DoD Industry Day Takeaways
 - DCMA audits will focus on
 - Verifying that the contractor has a SSP
 - Verifying that the contractor submitted to the DoD CIO, within 30 days of any contract award made through October 2017, a list/notification of the 800-171 security requirements not yet implemented
 - Verifying that the contractor possesses a DoD approved External Certificate Authority issued medium assurance public key infrastructure certificate

Cybersecurity

■ Best Practices

- Identify where there may be gaps between the NIST standards and your current system – address them in the SSP
- Review the entire contract to identify CDI, including
 - SOW
 - Section I – contract clauses
 - Section J – attachments
- When in doubt if information qualifies as CDI, seek clarification from the Contracting Officer or DoD CIO office
- Resist flowdown of the requirement if performance won't require access to CDI
 - If selling a commercial item with no modifications for DoD, it is unlikely that CDI is required for performance

Freedom of Information Act (FOIA)

- June 30, 2016 – FOIA Improvement Act of 2016
 - Promote greater transparency and openness in government
 - “Rule of 3” – Agencies must make available for public inspection in an electronic format copies of all non-exempt records that have been requested 3 or more times
 - If the agency timely notifies the requestor of a delay, the delay is excused for an additional 10 days – if the information is not provided within those 10 days, the agency may not assess any search fees
 - Exception if there are more than 5,000 pages

Freedom of Information Act (FOIA)

- **Best Practices**

- Increase the focus on properly marking documents submitted to the government to identify applicable FOIA exemptions
 - Exemption 4 is most common: “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential”

Gift Giving Restrictions

- November 18, 2016 U.S. Office of Government Ethics (OGE) issued a final rule revising portions of the Standards of Ethical Conduct for Executive Branch Employees
 - Gift defined
 - “any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value”
 - “includes services as well as gifts of training, transportation, local travel, lodgings and meals, whether provided in-kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred”

Gift Giving Restrictions

■ Gift defined

- Some exceptions

- Personal friendship – connection on social media alone not enough
- Greeting cards and items with little intrinsic value intended primarily for presentation (e.g., plaques, certificates and trophies) – must not have significant utility beyond its presentational value
- Modest item of food or **non-alcoholic** refreshments such as soft drinks, coffee and donuts, offered other than as part of a meal
- Gift with a market value of \$20 or less on a single occasion as long as the employee does not accept gifts with a market value in excess of \$50 from one person in a given year
 - “Person” includes an individual, company, association or other type of organization
 - No gifts of cash permitted – some gift cards are equivalent to cash
 - Can’t pool funds from multiple individuals
 - Market value determined by what the general public pays – not what the person providing the gift paid

Gift Giving Restrictions

- Government employees should consider declining a permissible gift if a reasonable person would question the employee's integrity or impartiality as a result of accepting the gift
- Changes to the ability of federal employees to accept an offer of free attendance at widely attended gatherings and other events
 - Event must include an opportunity to exchange ideas and views among invited persons to qualify
 - Written authorization from agencies required prior to accepting free attendance
 - Prior to approval, agency ethics designee must consider the risk it will create an appearance of improper influence or result in improper influence
 - Does not include free travel to the event (refer to federal travel regulations)
- Allows free attendance at an event where the employee will speak on behalf of his/her agency

Grant and Cooperative Agreements

- May 16, 2017 OMB extended the deadline to comply with the December 2013 “Super Circular” procurement standards
 - Extended to December 26, 2017
 - Procurement standards (2 CFR 200.317-200.326) require non-Federal entities to establish procurement procedures for subawards and subcontracts addressing:
 - Organizational and personal conflicts of interest
 - Contractor integrity, compliance with public policy, record of past performance, and financial and technical resources
 - Maintenance of records reflecting the procurement method rationale, selection of contract type, contractor selection or rejection, and the basis for the contract price

Grant and Cooperative Agreements

- Procurement standards (2 CFR 200.317-200.326) require non-Federal entities to establish procurement procedures for subawards and subcontracts addressing:
 - Promotion of full and open competition that ensures objective contractor performance and eliminates unfair competitive advantages
 - Development of solicitation documents that incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured and that apprise offerors of all requirements they must fulfill and all factors to be used in evaluating bids or proposals
 - Measures to ensure that minority businesses, women-owned businesses, and labor surplus area firms are used when possible
 - Inclusion of cost or price analysis in connection with every procurement action, including contract modifications, and the separate negotiation of profit in cost reimbursement contracts
 - Preservation of contract award-related documentation for review by the government or pass-through entity upon request

Employment Related Requirements

- EEO-1

- August 2017 - Pay data collection component (Component 2) of the revised EEO-1 Report stayed effective immediately
- EEO-1 Report used in previous years (Component 1) should be submitted by March 31, 2018

- VETS-4212

- Extension to 2017 filing deadline from 9/30/17 to 11/15/2017
- Accommodate the needs of those impacted by the hurricanes

Employment Related Requirements

- Fair Pay and Safe Workplaces Act
 - October 24, 2016 – Court enjoined many sections of the rule
 - FAR 52.222-57, Representation Regarding Compliance with Labor Laws (Executive Order 13673)
 - FAR 52.222-58, Subcontractor Responsibility Matters Regarding Compliance with Labor Laws (Executive Order 13673).
 - FAR 52.222-59, Compliance with Labor Laws (Executive Order 13673)
 - FAR 52.222-61, Arbitration of Contractor Employee Claims (Executive Order 13673)
 - March 27, 2017 – President Trump revoked this Executive Order
 - June 2017 – Class Deviation issued to ensure contracts/solicitations are issued/amended to remove FAR 52.222-60, Paycheck Transparency (Executive Order 13673)