

# Federal Government Contracts: Overview

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**A Practice Note providing an overview of the federal government contracting process. This Note provides tips on how to become a US government contractor and reviews the various types of federal government contracts and procurements, including simplified acquisition procedures, sealed bids, negotiated procurements, commercial item acquisitions, federal supply schedules, and subcontracts. This Note also addresses specific requirements for government contracts, including cost accounting standards, US export controls and sanctions, and bid protests, as well as implementing an effective compliance program to address these requirements.**

US government procurement spending exceeds \$400 billion annually. The federal government purchases from contractors a variety of goods and services ranging from major weapons systems to janitorial services.

The formation and administration of US government contracts is governed by the Federal Acquisition Regulation (FAR) and over 20 agency FAR supplements, including the Department of Defense FAR Supplement (DFARS), the Department of Energy Acquisition Regulation (DEAR) and the General Service Administration Acquisition Regulation (GSAR). The president and Congress play an active role in the political aspects of government procurement by issuing executive orders and laws and through the funding process. Regulations, case law and administrative decisions provide further guidance to contractors regarding their legal obligations in the award, performance and closeout of federal government contracts.

This Note provides an overview of the federal government contracting process and discusses legal requirements specifically applicable to federal government contractors. It includes:

- Keys to getting started as a government contractor.
- A guide to federal agency contracting procedures.
- An overview of the different types of government contracts and procurements.
- Strategies for effectively managing government-unique legal requirements.
- Implementing an effective compliance program.

## PRELIMINARY CONSIDERATIONS

### FINDING GOVERNMENT OPPORTUNITIES

Marketing to the government is similar to marketing to commercial customers. Contractors can identify the applicable market and customer base by understanding who the company's potential customers are and what products and services the company can offer those potential customers.

Information regarding the US government's current and future procurement plans can be obtained by reviewing:

- Federal agency forecasts.
- US government budget materials on the Office of Management and Budget website.
- Contract solicitations available on the Federal Business Opportunities website.
- Grant solicitations available on the Grants.gov website.
- Past awards to competitors on the USASpending.gov website and on the Federal Procurement Data System website.

Potential federal government contractors should consider:

- Building customer relationships by networking with US government officials to understand government requirements and help shape future needs.
- Attending trade shows targeted towards the US government as a customer (for example, defense trade shows).

- Working with congressional delegations and other interested government officials to advocate on the contractor's behalf.

## ELIGIBILITY

Before submitting a bid or proposal in response to a US government solicitation, a company must register in the System for Award Management (SAM) database. The contractor's information in SAM must be updated annually or when information changes. The SAM database requires a contractor to:

- Register under the company's Data Universal Numbering System (DUNS) number.
- Provide background information regarding the company.
- List the North American Industry Classification System (NAICS) codes applicable to the type of work the company performs. The SAM website then takes the background information (including number of employees and annual receipts) and the applicable NAICS codes, and indicates whether for each applicable NAICS code the company qualifies as a small business under the Small Business Administration's (SBA) size standards (see Box, Small Business Concern Participation).
- Complete various representations and certifications contained in the FAR and, if the company does business with the Department of Defense, the DFARS. These representations and certifications are then incorporated by reference in all solicitations to which the contractor submits a proposal and all resulting contract awards to the contractor.
- Identify the bank account where the contractor wants electronic fund transfer payments to be deposited, as this is the US government's main form of payment to the contractor.

Some of the data fields in SAM are publicly available, while others, such as the contractor's bank account information, are not visible to the public and are not subject to disclosure under the Freedom of Information Act (FOIA).

US government contracts can only be issued to responsible contractors as determined by the federal government's Contracting Officer (CO) before award. A responsibility determination focuses on the contractor's:

- Ability to perform the contract requirements (for example, the contractor's financial capabilities and experience, managerial abilities and technical ability to perform the contract).
- Past performance record.
- Standing as a good corporate citizen with high integrity and ethics.
- Capacity to satisfy the contract's performance requirements in light of the contractor's experience and other commercial and business commitments.

## GETTING GOVERNMENT BUSINESS

A contractor can increase its chances of successfully bidding on a government solicitation by:

- Differentiating its products and services to show value-added and overall government return on investment.
- Pursuing sole-source opportunities if it has a unique product or service the government needs.

- Working with other complementary contractors or businesses in subcontracting or teaming arrangements to obtain introductions to a particular customer or simply to expand business.
- Ensuring that the company's record is beyond satisfactory by maintaining internal controls and safeguards to promote proper contract performance.

## UNDERSTANDING FEDERAL AGENCY CONTRACTING PROCEDURES

### KNOW WHO HAS AUTHORITY

When contracting with the federal government, a contractor should know who has the authority to contractually bind the government. The CO is generally the only individual with the authority to obligate the federal government in contract and later modify or terminate that contract. The CO works with several government officials in overseeing all aspects of the contractual activity from award to contract closeout, including:

- The Administrative Contracting Officer (ACO).
- The Contracting Officer's Technical Representative (COTR).
- Auditors.
- Quality inspectors.

The CO's agents do not have the authority to change the terms and conditions of the contract or order additional or changed work, unless the CO has expressly delegated this authority to them in writing.

### DIFFERENT TYPES OF PROCUREMENTS

Although the government's purchase of goods and services is streamlined through the FAR, there are a variety of procurement types the government may use to solicit proposals and award contracts. The government is responsible for choosing the type of procurement, which depends on the type and complexity of the goods or services solicited. The government solicits proposals from contractors through the following different types of procurements:

- Simplified acquisition procedures (see Simplified Acquisition Procedures (FAR Part 13)).
- Sealed bids (see Sealed Bids (FAR Part 14)).
- Negotiated procurements (see Negotiated Procurements (FAR Part 15)).
- Commercial item acquisitions (see Commercial Item Acquisitions (FAR Part 12)).
- Federal supply schedules (FSS) (see Federal Supply Schedule (FAR Subpart 8.4)).
- Subcontracts (see Subcontracts (FAR Part 44)).

### Simplified Acquisition Procedures (FAR Part 13)

The government can only use simplified acquisition procedures for the acquisition of supplies and services, including construction, research and development and commercial items, if the aggregate value of the estimated cost of the procurement and the resulting contract does not exceed the simplified acquisition threshold. There are different requirements for purchases below the micro-purchase threshold. Agencies must use simplified acquisition procedures to "the maximum extent practicable" (48 C.F.R. § 13.003(a)). Simplified

acquisition procedures include relaxed competition requirements and reduced compliance obligations for contractors.

### Sealed Bids (FAR Part 14)

Under sealed bidding, the government uses full and open competition to select contractors on the basis of price competition with publicly opened bids. The government issues an Invitation for Bid (IFB) and a contractor then submits a sealed bid, which constitutes the contractor's offer to the government. The government publicly opens the sealed bids and announces an award to the lowest bidder. The issuance of an award to a contractor constitutes the government's acceptance of the contractor's offer. Sealed bid procurements are generally used by the government for the purchase of standard commodity items such as food and clothing.

### Negotiated Procurements (FAR Part 15)

Contracting by negotiation permits the government to award a contract based on factors other than price. In a negotiated procurement, the government uses full and open competition and issues a Request for Proposal (RFP). The contractor then submits a proposal in response to the RFP. The agency can engage in discussions with offerors about their proposals. The agency then awards a contract to the offeror who provides the best value, taking into account price and all other factors specified in the RFP, such as technical superiority, quality and past performance.

Agencies often use negotiated procurements when cost-technical tradeoffs are likely or when the agency is procuring complex supplies or services.

### Commercial Item Acquisitions (FAR Part 12)

The government has a stated preference to acquire commercial items, including the acquisition of commercial services. Commercial item procurements seek to more closely resemble acquisition policies in the commercial marketplace. Commercial items are not limited to commercial off-the-shelf (COTS) items. For example, if the good is "of a type" that has been sold, leased or licensed, or offered for sale, lease or license to the general public for non-governmental purposes, it constitutes a commercial item (FAR 2.101).

Commercial item procurements must be fixed-price or fixed-price with economic price adjustment, although there are limited exceptions for labor-hour and time-and-materials contracts requiring various high-level government approvals. Commercial item contracts can be solicited under sealed bidding or negotiated procurement procedures. The contracts are streamlined to resemble non-government commercial contracts by being exempt from many typical government contract requirements and including fewer FAR and FAR agency supplement clauses. For more information on commercial item contracting, see Practice Note, Government Contracts: Reduced Risk Through Commercial Item Contracting ([5-532-3257](#)).

### Federal Supply Schedule (FAR Subpart 8.4)

The General Services Administration (GSA) manages a program where a contractor's commercial item supplies or services may be listed under one of GSA's many FSS contracts, organized by product

and service categories and sub-categories. Under FSS contracts, contractors negotiate prices in advance with the GSA CO. Any federal agency (and some state and local government entities) may purchase products or services from a contractor's FSS contract through the issuance of task or delivery orders.

Many pricing and compliance considerations are associated with FSS contracts, including:

- Most favored customer pricing.
- Price reductions for failure to adhere to most favored customer pricing.
- Industrial Funding Fee reporting and payment requirements.
- Trade Agreements Act compliance.

### Subcontracts (FAR Part 44)

Becoming a government subcontractor is an easy and effective way to enter the government contracts marketplace. FAR 44.101 defines "subcontract" as a contract entered into by a subcontractor to furnish supplies or services for performance of a federal government prime contract or subcontract. Subcontracts include, but are not limited to, purchase orders.

Government subcontracts are a hybrid of a federal government contract and a commercial contract in that federal government contracting laws, rules, regulations and FAR and FAR agency supplement clauses apply to the extent they are incorporated into the subcontract. Subcontracts are also governed by commercial law such as the Uniform Commercial Code, other statutory laws and common law.

There are some clauses the prime contractor or higher-tiered contractor must flowdown to the subcontractor or it is in breach of its prime contract or higher-tiered contract, but not all provisions have to be (or can be) flowed down. A prime contractor with a non-commercial item prime contract can, and is encouraged to, issue commercial item subcontracts "to the maximum extent practicable" (FAR 52.244-6).

### DIFFERENT TYPES OF FEDERAL GOVERNMENT CONTRACTS

Sealed bidding, simplified acquisition, commercial item and FSS procurements all must be conducted on a fixed-price basis, with limited exceptions. Fixed-price basis means that the contractor and the government agree on a price at the outset of the contract and the contractor must deliver the specified goods or perform the specified services for that fixed-price, absent any government approved changes. The government may, however, enter into a negotiated contract on a cost-reimbursement basis. This means that the government reimburses the contractor for allowable costs that have been properly allocated to the contract, along with a specified profit.

#### Fixed-Price Contracts

Under fixed-price contracts, the government agrees to pay a certain price for a product or service at the time of award. The contractor:

- Bears the risk of excess performance costs.
- Has the greatest profit opportunity if the contractor can manage or reduce the costs of performance.

There are two types of fixed-price contracts:

- **Fixed-price with economic price adjustment contracts.** The stated contract price can be increased or decreased for specified contingencies (FAR 16.203-1(a)). Adjustments can be based on established prices, actual costs of specified labor or material or cost indexes of labor or material.
- **Fixed-price incentive contracts.** These contracts adjust the contractor's profit and establish the final contract price by using a formula based on the relationship of final negotiated total cost to total target cost (FAR 16.204).

### Cost-Reimbursement Contracts

Under cost-reimbursement contracts, the government agrees to pay the contractor's allowable costs incurred during contract performance up to the cost ceiling specified in the contract. Allowable costs are those costs that comply with all of the following:

- Reasonableness.
- Allocability.
- The Cost Accounting Standards (if applicable), generally accepted accounting principles and practices appropriate to the circumstances.
- The terms of the contract.
- Any limitations in FAR Part 31 (FAR 31.201-2).

Many costs incurred in the ordinary course of a contractor's commercial operations are not allowable under cost-reimbursement government contracts. A cost is allocable to a contract if it can be assigned or charged to one or more cost objectives on the basis of relative benefits received or another equitable relationship (FAR 31.201-4). A contractor performing a cost-reimbursement contract must have an accounting system that distinguishes between direct and indirect costs and allowable and unallowable costs.

Cost-reimbursement contracts usually include a fee that is the contractor's profit for the contract. Cost-reimbursement contracts reduce the cost risk to the contractor, but they also limit profit opportunity because the fee is capped. The government generally uses cost-reimbursement contracts when either:

- The contract requirements are not defined well enough to predict the costs of total performance.
- The risks are so high that it would be difficult for the government to attract companies to compete for award (for example, research and development contracts).

Types of cost-reimbursement contracts include:

- **Cost-plus-fixed-fee.** A cost-plus-fixed-fee contract provides for payment to the contractor of a negotiated fee that is fixed at the inception of the contract and does not vary with actual cost. The fee can be adjusted if the government changes the work to be performed under the contract (FAR 16.306).
- **Cost-plus-incentive-fee.** A cost-plus-incentive-fee contract provides for an initial negotiated fee that is later adjusted based on a formula calculating the total allowable costs to the total target costs. This type of contract aims to incentivize a contractor to reduce costs (FAR 16.304).
- **Cost-plus-award-fee.** A cost-plus-award-fee contract has a fee that consists of a base amount at the start of the contract and an

award amount based on the government's determination that the contractor has satisfied specified criteria in the contract. This type of contract rewards excellence in contract performance (FAR 16.305).

- **Time and materials.** A time-and-materials contract permits the government to acquire supplies or services on the basis of direct labor hours at specified hourly rates (inclusive of wages, overhead, general and administrative expenses and profit) and actual costs for materials (FAR 16.601).
- **Labor hour.** A labor-hour contract is a variation of a time-and-materials contract. The only difference is that materials are not supplied by the contractor (FAR 16.602).

### SPECIFIC REQUIREMENTS FOR GOVERNMENT CONTRACTS

Federal government contracting is a political process with applicable laws and regulations, and resulting solicitation and contract clauses, being heavily influenced by the political agenda of the president and Congress. As a result, existing laws and regulations applicable to federal government contracts often change, and contractors must constantly watch for new legal and contractual requirements. Federal government contractors should carefully review each government solicitation and contract to understand their obligations to the government and the risks they are assuming.

Government contractors should be particularly aware of the following requirements, which are unique to federal government contracting:

- Labor requirements (see Labor Requirements).
- Protection of intellectual property (see Protection of Intellectual Property).
- Truthful Cost or Pricing Data Statute (formerly known as the Truth in Negotiations Act (TINA)) requirements (see The Truthful Cost or Pricing Data Statute).
- Cost Accounting Standards (see Cost Accounting Standards).
- Foreign acquisition (see Foreign Acquisition).
- US export controls and sanctions (see US Export Controls and Sanctions).
- Contract changes (see Contract Changes).
- Contract terminations (see Contract Terminations).
- Bid protests (see Bid Protests).
- Contract disputes (see Contract Disputes).
- Fraud enforcement mechanisms (see Fraud Enforcement Mechanisms).

### LABOR REQUIREMENTS

The government requires contractors at all tiers to comply with various equal employment opportunity (EEO) and affirmative action requirements. The following legal requirements are enforced by the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP):

- Executive Order 11246, Equal Employment Opportunity (30 Fed. Reg. 12319 (Sept. 24, 1965)).
- Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) (38 U.S.C. § 4212).
- Section 503 of the Rehabilitation Act of 1973 (29 U.S.C. § 701).

The executive order and statutes and their implementation regulations require federal government prime contractors and subcontractors to:

- Post notices.
- File annual compliance reports.
- If applicable, prepare and keep on file an affirmative action plan.
- Include EEO clauses in subcontracts and purchase orders.

For contracts involving the performance of services, depending on the type of services to be provided (construction or other services), contractors may also need to comply with the following wage and hour laws:

- Service Contract Labor Standards (41 U.S.C. §§ 6701-6707).
- Walsh-Healey Public Contracts Act (41 U.S.C. §§ 6501-6511).
- Davis-Bacon Act (40 U.S.C. §§ 3141-3148).

### PROTECTION OF INTELLECTUAL PROPERTY

Contractors providing or developing intellectual property (IP) under a government contract must comply with unique rules and requirements that may result in the government receiving certain rights in the IP.

Although contractors retain title to technical data and software developed under a government-funded contract, the government usually obtains specific license rights. Except for commercial item contracts where the government receives the contractor's standard commercial license (FAR 12.211 and 12.212), the scope of the government's license depends on who paid for the development of the IP, as follows:

- **Government funded: unlimited rights.** The government can do nearly anything with the data and software, including disclosing to competitors in response to a FOIA request (FAR 52.227-14).
- **Privately funded: limited rights.** The government may use technical data only for certain specified purposes under the applicable regulations (FAR 52.227-14).
- **Privately funded: restricted rights.** Restricted rights are similar to limited rights, but apply to computer software (FAR 52.227-14).
- **Mixed funding (Department of Defense only): government purpose rights.** The government can use the IP for "government purposes," while the contractor retains exclusive commercial rights to the technology for a specified period of time (DFARS 252.227-7013 and 252.227-7014).

Domestic contractors can retain title in inventions and file for domestic and international patents, but the government secures a license to an invention that is "made" during the performance of a government contract. "Made" means first conceived or actually reduced to practice. The government receives:

"A nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced for or on its behalf, the subject invention throughout the world."

(FAR 52.227-11.)

Contractors should carefully protect their IP. They must ensure that they are strictly complying with the required notice, disclosure, reporting and marking obligations in the FAR and any applicable agency supplements to the FAR.

### THE TRUTHFUL COST OR PRICING DATA STATUTE

The Truthful Cost or Pricing Data Statute (formerly known as the Truth in Negotiations Act (TINA)) requires a contractor to:

- Disclose to the government all of its cost or pricing data as of the date of the price agreement.
- Certify that its disclosure is current, accurate and complete. (10 U.S.C § 2306a and 41 U.S.C. § 3901.)

Cost or pricing data is defined broadly as all facts that, as of the date of price agreement, prudent buyers and sellers would reasonably expect to significantly affect price negotiations (FAR 2.101). This data enables the government to determine whether the proposed cost or pricing is fair and reasonable and, if not, negotiate a lower price or cost.

If the government later determines that the cost or pricing data disclosed was not current, accurate and complete (defective pricing), it is entitled to a price reduction to exclude the amount by which the price was increased, plus interest. There is also the possibility of double recovery by the government if the contractor knowingly submitted defective data or omitted data. The contractor could face False Claims Act liability or criminal false statement allegations for a fraudulent or false certification in extreme cases. Commercial item prime contracts and subcontracts are exempt from TINA.

### COST ACCOUNTING STANDARDS

The Cost Accounting Standards (CAS) govern the measurement, timing and allocability of costs charged to certain negotiated government contracts. The CAS rules and regulations:

- Impose major accounting requirements on government contractors.
- Require the negotiation of impacts of changes to the contractor's cost accounting practices.

Violations of these accounting principles or the contractor's disclosed cost accounting practices can result in:

- Repricing of contracts.
- False Claims Act liability.
- Criminal charges.

Firm fixed-price, fixed-price with economic price adjustment (provided that price adjustment is not based on actual costs incurred), time-and-materials, and labor-hour prime contracts and subcontracts for the acquisition of commercial items are exempt from CAS (48 C.F.R. § 9903.201-1(b)(6)).

### FOREIGN ACQUISITION

Certain laws and regulations have made it difficult for contractors to acquire materials, products and services from certain foreign sources for use under a government contract. Examples include:

- The Buy American Act (see Practice Note, [Buying American: Country of Origin Requirements in US Government Contracts: Buy American Act \(7-573-3545\)](#)).
- The Trade Agreements Act (see Practice Note, [Buying American: Country of Origin Requirements in US Government Contracts: Trade Agreements Act \(7-573-3545\)](#)).
- Specialty metals restrictions (DFARS 252.225-7009).

- Domestic commodity restrictions (for example, food, clothing, tents, canvas, cotton, silk and wool) (DFARS 252.225-7012).

Some restrictions apply at all tiers of contractors, while others only apply to prime contractors. Further, some restrictions apply to procurements from all agencies, while others only apply to Department of Defense procurements. This raises many cost and pricing issues and compliance concerns, as governmental scrutiny has increased exponentially over the past several years.

### US EXPORT CONTROLS AND SANCTIONS

Government contractors in the supply chain for sales to agencies within the Department of Defense, and potentially other agencies, must be aware of and comply with US export control laws and regulations. This is true even if the goods the contractor is providing to the government never leave the US. All government contractors must also comply with the prohibitions on doing business with sanctioned entities.

The most commonly seen export control- and sanctions-related legal references in federal government contracts are:

- International Traffic in Arms Regulations (ITAR): Controls on munitions items.
- Export Administration Regulations (EAR): Controls on dual-use goods and technology (items with a commercial and military utility) and purely commercial items.
- Foreign Assets Control Regulations: US economic embargoes and prohibitions on dealing with terrorists and drug traffickers.

Export control laws and regulations reach:

- All direct exports of products, technology, software or services from the US.
- Any release of technology to foreign nationals in the US (as technology is deemed to be exported when provided to non-US nationals within the US).
- Foreign manufactured products containing US origin raw materials, components, software or technology.
- Re-exports of US items from any location, as jurisdiction follows the items.

For more information on export controls and sanctions, see Practice Note, Export Regulations: EAR, ITAR, and FTR ([1-521-6990](#)).

### CONTRACT CHANGES

The government may unilaterally change a contract and obligate the contractor to continue performance under the revised terms and conditions, so long as the change is within the general scope of the contract. The notable exception is commercial item contracting, where changes must be mutually agreed by the contractor and the government (see Practice Note, Government Contracts: Reduced Risk Through Commercial Item Contracting ([5-532-3257](#))).

When the government directs a unilateral change, the contractor is entitled to submit a request for an equitable adjustment (REA). In an REA, the contractor can request an increase in the contract price, delivery schedule or both. REAs should be submitted in writing and in a timely manner to the CO, typically within 30 days of the applicable change, but sometimes sooner as stated in the applicable changes clause in the contract.

### CONTRACT TERMINATIONS

The government can terminate a government contract for:

- **Default.** If a contractor fails to perform or jeopardizes contract performance, the government can terminate for default. Except for defaults resulting from the contractor's failure to perform on time, a cure notice is provided and permits the contractor to correct the default within ten days to avoid termination. If the government terminates the contract for default, it is entitled to recover the excess costs of reprocurement and any other available damages.
- **Convenience.** The government has the unilateral right to terminate for its convenience. The only limitation is that the government cannot act in bad faith. If it does, the contractor is entitled to recover costs plus a reasonable profit for the work performed before the termination, including the costs of settling with subcontractors under terminated subcontracts. The contractor is not entitled to recover anticipated profit on the terminated work.

### BID PROTESTS

If a contractor is unsuccessful in winning a contract award it may file a formal protest in one of three bid protest forums:

- At the agency administering the contract (see Practice Note, Government Contracts: Agency-Level Bid Protests ([2-561-9585](#))).
- With the Government Accountability Office (see Practice Note, Government Contracts: GAO Bid Protests ([2-581-7651](#))).
- With the Court of Federal Claims (COFC) (see Practice Note, Government Contracts: COFC Bid Protests ([1-583-9427](#))).

A disappointed offeror may file a protest if it believes that the government either:

- Violated applicable procurement laws and regulations.
- Failed to follow the evaluation criteria in the solicitation.

On the timely filing of a protest, the agency generally stops or stays contract performance until its resolution, unless there are urgent and compelling reasons to proceed. The deciding agency renders a decision to either sustain, deny or dismiss the protest.

### CONTRACT DISPUTES

A contractor can file a formal claim against the government when it believes payment or some other equitable relief is due under an existing government contract. The claim must be submitted within six years of the date the claim arose and before final payment. The CO must make an initial decision on the claim within 60 days if the claim is under \$100,000. If the claim is over \$100,000, the CO must notify the contractor within 60 days of when the CO issues a final decision.

If the contractor disagrees with the CO's decision or does not receive one within the stated time period, the contractor may file an appeal at either:

- The applicable Board of Contract Appeals (Civilian or Armed Services), within 90 days after the CO's final decision.
- The COFC, within one year after the CO's final decision.

Further appeals are to the US Court of Appeals for the Federal Circuit and then by petition to the US Supreme Court for review.

## FRAUD ENFORCEMENT MECHANISMS

All government contractors are subject to the federal government's procurement fraud enforcement mechanisms, including:

- **The False Statements Statute.** The statute the government uses most frequently to address all categories of procurement fraud is the False Statements Statute, which prohibits knowingly and willfully making a false statement. A statement under the False Statements Statute may be oral, written, sworn or unsworn (18 U.S.C. § 1001).
- **The False Claims Act.** The False Claims Act:
  - provides for treble damages and penalties (generally up to an additional \$ 21,562.80 per claim) for the submission of false claims by either a prime contractor or subcontractor to any federal agency or entity using federal funds to pay such claims;
  - authorizes private citizens with evidence of fraud against the government to file lawsuits in their own name (on behalf of themselves and the government) and then keep a significant share of the government's recovery (a *qui tam* action) (31 U.S.C. § 3730). *Qui tam* actions are often brought by disgruntled current or former employees who are aware of the company's business practices in performing its government contracts (referred to as relators). Relators often are rewarded with 15% to 25% of the total recovery from the company (31 U.S.C. § 3730); and
  - protects employee whistleblowers from retaliation by their employers (see Practice Note, Understanding the False Claims Act (7-561-1346)).
- (31 U.S.C. §§ 3729-3733.)
- **Suspension and debarment.** One of the government's most significant enforcement mechanisms is its suspension and debarment capabilities, which prohibit a contractor from receiving future government prime contracts or subcontracts for a specified period of time. The suspension and debarment rules apply to both individuals and companies. FAR Subpart 9.4 includes as a basis for suspension and debarment a "knowing failure" by a principal to timely disclose a violation of federal criminal law involving:
  - fraud;
  - conflict of interest;
  - bribery or gratuity violations;
  - a violation of the False Claims Act; or
  - significant overpayment on the contract.
- The knowing failure occurs during contract performance or closeout, and the basis extends until three years after final payment on the contract. Contractors should have an effective compliance program to identify when mandatory disclosures are required.

## IMPLEMENTING AN EFFECTIVE COMPLIANCE PROGRAM

Government contractors can address all of these government-unique requirements by implementing an effective compliance program consisting of:

- **A code of business ethics and conduct.** If contractors do not already have a written code of business ethics and conduct, they must implement one within 30 days after contract award if the

contract exceeds \$5.5 million and has a period of performance of 120 days or more (FAR 52.203-13). However, all government contractors should have a written code containing policies reflecting the company's understanding of, and compliance with, applicable federal laws and regulations.

- **An awareness program.** Although FAR 52.203-13 only requires large business concerns with non-commercial item contracts to have an awareness program, all contractors should have an awareness program that:
  - includes training programs; and
  - provides for the dissemination of information applicable to employees' roles and responsibilities.
- **An internal control system.** Although FAR 52.203-13 only requires large businesses with non-commercial item contracts to have an internal control system, all contractors should have an internal control system designed to facilitate timely discovery of improper conduct in connection with government contracts and ensure corrective measures are promptly instituted and carried out. The internal control system should provide for:
  - periodic reviews of company business practices, procedures, policies and internal controls for compliance with the contractor's business ethics and conduct code;
  - an internal reporting mechanism such as an anonymous and confidential hotline for employees to report suspected improper conduct;
  - internal or external audits as appropriate; and
  - disciplinary action for improper conduct.

## SMALL BUSINESS CONCERN PARTICIPATION

The Small Business Act (SBA) requires federal agencies to:

- Foster the participation of small business concerns (SBCs) as prime contractors, subcontractors and suppliers.
- Take all reasonable steps to eliminate obstacles to their participation.
- Avoid bundling of contract requirements that inhibit small business participation in procurements as prime contractors. (15 U.S.C. §§ 631-657e.)

The most prominent SBA programs include the:

- 8(a) Business Development Program: for SBCs owned by socially and economically disadvantaged persons.
- Service-Disabled Veteran-Owned Small Business Program: for SBCs that are at least 51% unconditionally and directly owned by one or more service-disabled veterans.
- Women-Owned Small Business Program: for SBCs that are at least 51% unconditionally and directly owned by one or more women.
- Historically Underutilized Business Zone (HUBZone) Empowerment Contracting Program: for SBCs that are located in a HUBZone and that hire employees who live in a HUBZone.

SBCs can benefit from:

- Contracting preferences in unrestricted procurements.
- Set-aside contracts: restricted contracts for which only qualifying SBCs may submit offers.
- Sole-source contracts: contracts awarded to one SBC without conducting a competition.
- Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) Programs: research and development programs through which US owned and controlled businesses with 500 or fewer employees propose new concepts to federal agencies.

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