

Government Contracts Attorneys



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POST-AWARD DEBRIEFING — FAR 15.506

- Offeror, upon written request received by agency w/in 3 days after offeror received contract award notice, shall be debriefed. (a)(1)
- To max. extent practicable, debriefing should occur w/in 5 days after receipt of request. (a)(2)
- At a minimum, the debriefing shall include:
 - Evaluation of significant weaknesses or deficiencies in the offeror's proposal; (d)(1)
 - Overall evaluated cost/price, technical rating if applicable, of successful/debriefed offeror, past performance on debriefed offeror; (d)(2)
 - Offerors' overall rankings, if developed; (d)(3)
 - Summary of the rationale for award; (d)(4)
 - Responses to relevant questions about whether procedures were followed. (d)(6)

POST-AWARD GAO PROTEST

4 CFR 21 as implemented in FAR 33.1

- Calendar day unless otherwise stated. 33.101
- Day of act, event, or default from which designated period begins to run is not included. 33.101(f)
- When agency receives notice of protest from GAO w/in 10 days after award or w/in 5 days after debriefing, whichever is later, contracting officer shall immediately suspend performance or terminate award, unless performance authorized by head of contracting activity. 33.104(c)
- GAO may hold hearing upon request. 33.104(e)
- GAO issues its recommendation w/in 100 days from date of filing of the protest with the GAO, or w/in 65 days under express option. 33.104(f)

COST OR PRICING DATA (COPD)

10 USC § 2306a as implemented in FAR 2 & 15

- COPD: "all facts that, as of the date of price agreement or, if applicable, an earlier date agreed upon between the parties...prudent buyers and sellers would reasonably expect to affect price negotiations significantly." 2.101
- Contracting officer must obtain COPD only if they conclude no 15.403-1(b) exception applies. 15.403-4(a)(1)
- Threshold for obtaining COPD is \$650k. *Id.*
- Certification required in accordance w/15.406-2.
- Certificate does not constitute representation as to accuracy of contractor's judgment on estimate of future costs or projections. It applies to data upon which judgment or estimate was based. *Id.*(b)

COMMERCIAL ITEM

FAR 2.101

- Any item, other than real property, customarily used by the general public or by non-gov'tal entities for purposes other than gov'tal purposes, and that (i) has been sold, leased, or licensed to the general public; or (ii) has been offered for sale, lease, or license to the general public; (1)
- Any item that evolved from an item described in paragraph (1) through advances in technology or performance and that is not yet available in the comm'l marketplace, but will be available in comm'l marketplace in time to satisfy delivery requirements under a gov't solicitation; (2)
- See (3) – (8) for add'l comm'l item descriptions.

BUY AMERICAN ACT

41 USC § 101a et seq. as implemented in FAR 25

- Requires acquisition of domestic end products for public use inside U.S. unless exception applies:
 - It is inconsistent with public interest; 25.103(a)
 - Items are not "mined, produced, or manufactured in the [U.S.] in sufficient and reasonably available commercial quantities...of satisfactory quality;" (b)
 - Cost of domestic end product is unreasonable; (c)
 - Information technology that is comm'l item. (e)
 - Requires, for manufactured end products, two-part test to define domestic end product: 25.101(a)
 - Article must be manufactured in the U.S.; and
 - Cost of domestic components must exceed 50 percent of the cost of all the components. (1), (2)
- Trade Agreements Act:** See 19 USC § 2501 et seq.

FOREIGN CORRUPT PRACTICES ACT (FCPA)

15 USC §§ 78dd-1 et seq.

- FCPA has two principal parts:
 - 1) **Anti-Bribery Provisions:** prohibit corrupt payments, or giving or offering anything of value, to foreign officials, directly or indirectly, for the purpose of obtaining or keeping business or to advance a business objective.
 - 2) **Accounting/Record-Keeping Provisions:** require companies registered w/the Securities & Exchange Commission and listed on US stock exchanges:
 - a) to make and maintain accurate books & records;
 - and b) to implement internal controls to prevent and detect FCPA violations.
- **Exception:** Payment to expedite or secure "performance of routine governmental actions."

INTERNAT'L TRAFFIC IN ARMS REGULATIONS

22 CFR 120 et seq.

- Determine if desired item to export or manufacture (i.e., hardware, technical data, and/or services) is covered in U.S. Munitions List (USML). ITAR 121
- If not sure if desired export is covered by USML, file Commodity Jurisdiction request. ITAR 120.4
- If item to export or manufacture is on USML, register w/Dir. of Def. Trade Controls. ITAR 122
- After registration, you may apply for export license.
- D-Trade2 online is used for most licensing.
- Department of State-issued license or approval is required prior to export of defense article, technical data or defense service or entry into certain agreements. ITAR 123, 124, & 125

TECH DATA RIGHTS — NONCOMM'L ITEMS

DFARS 252.227-7013

- **Unlimited:** "rights to use, modify, reproduce, perform, display, release, or disclose...in whole or in part, in any manner, and for any purpose...and to have or authorize others to do so." (a)(15)
- **Gov't Purpose:** "include[s] competitive procurement, but does not include the rights to use, modify, reproduce, release, perform, display, or disclose...for commercial purposes." (a)(11)
- **Limited:** "rights to use, modify, reproduce, release, perform, display, or disclose technical data...within the government." (a)(13)
- **Specifically Negotiated License Rights:** "such rights as the parties consider appropriate," but not less than limited rights for gov't. (b)(4)

CHANGE ORDERS

FAR 43.2

- Generally, gov't contracts contain a changes clause that permits the contracting officer to make unilateral changes, in designated areas, w/in the general scope of the contract. 43.201(a)
- Contractor must continue performance of the contract as changed, except that in cost-reimbursement or incrementally funded contracts the contractor is not obligated to continue performance or incur costs beyond the limits established in the Limitation of Cost or Limitation of Funds clause. 43.201(b)
- Change orders shall be issued by the contracting officer except when authority is delegated to an administrative contracting officer. 43.202

IG SUBPOENAS

The Inspector General Act of 1978, 5 USC Appendix

IG Purpose: to conduct audits and investigations; recommend policies to promote economy, efficiency and effectiveness of programs and operations; and prevent and detect fraud and abuse. § 2

IG Authority: to access all relevant records, reports, audits, reviews, documents, papers, recommendations, or other available material; and require by subpoena the production of all information, documents, reports, answers, records, accounts, papers and other data and documentary evidence necessary in the performance of the functions assigned by this Act. § 6

Enforced: by appropriate US district court order. § 6

FALSE CLAIMS ACT

31 USC §§ 3729 et seq.

- **Action Constituting Bases for Liability:** seven enumerated acts including, but not limited to: "any person who knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval." (a)(1)
- **Knowing and Knowingly Defined:** "a person, with respect to information – (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud required." (b)

CONTRACT DISPUTES ACT

41 USC §§ 601 et seq.

- Claims must be submitted w/in 6 yrs of accrual. § 605(a)
- Claims >\$100,000: contractor shall certify claim made in good faith, supporting data are accurate and complete to the best of their knowledge and belief, amount requested accurately reflects contract adjustment for which contractor believes gov't liable and certifier duly authorized to certify claim on behalf of contractor. § 605(c)(1)
- Failure by contracting officer to issue decision w/in period required is a deemed denial. § 605(c)(5)
- May appeal to agency Board of Contract Appeals w/in 90 days, or to US Court of Federal Claims w/in 12 months, of receipt of gov't decision. §§ 606, 609

TERMINATIONS

FAR 49

For Default: "If contractor can establish...contractor was not in default or failure to perform is excusable; i.e., arose out of causes beyond the control and without the fault or negligence of the contractor, the default clauses...provide that termination for default will be considered to have been a termination for convenience...and the rights and obligations of the parties governed accordingly." 49.401(b)

For Convenience (Fixed-Price): "A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of contract, including a reasonable allowance for profit." 49.201(a)

SUSPENSION & DEBARMENT

FAR 9

- **Suspension:** "serious action to be imposed on the basis of adequate evidence, pending investigation or legal proceedings, when it has been determined immediate action is necessary to protect government interest." 9.407-1(b)(1)
- **Debarment – Factors Considered:** standards of conduct/internal controls; timely self-disclosure; contractor's investigation/results made available; cooperation; restitution; disciplinary action taken; remedial measures; revised review and control procedures and ethics training; time to eliminate circumstances that led to cause for debarment; whether mgmt. recognizes and understands seriousness of misconduct. 9.406-1(a)

GOVERNMENT ETHICS

- **1-Year Compensation Ban:** Former gov't officer/employee who served in 1 of several enumerated positions (e.g., Source Selection Authority), or made 1 of several enumerated decisions (e.g., award), on a contract >\$10M, is prohibited from accepting compensation from that contractor (unless separate division/affiliate not producing same/similar product/service). 41 USC § 423(d)
- **Lifetime Ban:** Former gov't officer/employee may not knowingly, w/intent to influence, communicate, or appear before gov't on matters they participated in personally/substantially. 18 USC § 207(a)(1)
- **2-Year Representation Ban:** Applies to matters pending under officer/employee's responsibility 1 year before gov't service ended. 18 USC § 207(a)(2)