

TOP 5 COMPLIANCE RISKS WHEN CONTRACTING WITH THE FEDERAL GOVERNMENT

Stephen D. Knight
Member
Smith Pachter McWhorter, PLC

Erica J. R. Geibel
Corporate Legal Counsel, Ethics & Compliance
Perspecta Inc.

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SPEAKER



Stephen D. Knight
Member
Smith Pachter McWhorter PLC
sknight@smithpachter.com

Stephen D. Knight is a member in the Vienna, VA law offices of Smith Pachter McWhorter, PLC. Mr. Knight specializes in a variety of government contracts issues and has substantial expertise in the area of claims and disputes, including defective specifications, delay and disruption, changes, and contract interpretation. He also handles matters involving complex questions of government contract cost accounting, cost allocability, cost allowability, material accounting, labor accounting, contract payment, and defective pricing. He has advised clients on sensitive issues of government contract compliance, disclosure, and the government's right of access to records. Mr. Knight has substantial experience in the area of procurement fraud, including the representation of clients during grand jury and Inspector General criminal investigations, as well as civil investigations, and litigation pursuant to the Civil False Claims Act and its Qui Tam provisions.

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SPEAKER



Erica J. R. Geibel
Corporate Legal Counsel,
Ethics and Investigations
Perspecta Inc.

Erica J. R. Geibel is Corporate Legal Counsel for Perspecta Inc., serving in the Ethics and Compliance Office as Head of Investigations. Ms. Geibel is a Certified Compliance & Ethics Professional having received her CCEP in 2017. Previously in private practice, Ms. Geibel represented clients in the government contracts, white collar, and construction practice areas. Her practice included extensive work on independent monitor engagements, contractor responsibility and integrity issues, internal investigations, Anti-Kickback Act issues, Foreign Corrupt Practices Act compliance counseling, and civil False Claims Act issues, as well as all aspects of government contracts including small business issues, contract claims and disputes, bid protests, contract negotiations, contract review and contract drafting, and costing and pricing issues involving cost allocability and allowability.

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AGENDA

- ▶ Overview: Why is the USG Different From Any Other Customer?
- ▶ Personnel
- ▶ Proposals
- ▶ Pricing
- ▶ Performance
- ▶ Prosecution

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WHY IS THE US GOVERNMENT DIFFERENT FROM ANY OTHER CUSTOMER?

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THE SIGNIFICANCE OF DOING BUSINESS ON U.S. FEDERAL MONEY

- ▶ Article I Section 8 of the Constitution empowers U.S. Government to set taxes, tariffs and other means of raising federal revenue; authorizes appropriation of all federal funds, including Government contracts
- ▶ Congress frequently sets conditions for appropriation of federal funds; examples include:
 - Davis-Bacon Act
 - Service Contract Act
 - Cost Accounting Standards
 - Truth in Negotiations Act, renamed Truthful Cost or Pricing Data Act
 - Combating Trafficking in Persons
 - Clean Air Act and Clean Water Act
 - Buy American Act
 - Drug Free Workplace Act

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OVERVIEW OF THE FEDERAL ACQUISITION REGULATION (FAR)

- ▶ Federal Acquisition Regulation (FAR): Title 48 of the Code of Federal Regulations
- ▶ Contains uniform policies and procedures federal agencies use for acquisitions
- ▶ Implements/addresses procurement-related statutes and executive policies
- ▶ Updated to account for changes in government contracting
- ▶ Each Government agency may issue an agency acquisition supplement to the FAR.

Examples:

- Defense Federal Acquisition Regulation Supplement (DFARS)
- General Services Acquisition Regulation Supplement (GSARS)
- National Aeronautics Space Administration FAR Supplement (NASFARS)

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OVERVIEW OF THE FEDERAL ACQUISITION REGULATION (FAR)

- ▶ *Christian Doctrine*
 - Applicable FAR provisions incorporated into every federal procurement contract
 - Have the same effect as if written in the contract itself
 - Contractor must comply with **all** applicable FAR clauses whether clauses actually included in contract or not. *See G.L. Christian and Associates v. United States*, 312 F.2d 418 (Cl. Ct. 1963)

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CONTRACTING OFFICER

“Contracting officer means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer. ‘Administrative contracting officer (ACO)’ refers to a contracting officer who is administering contracts. ‘Termination contracting officer (TCO)’ refers to a contracting officer who is settling terminated contracts. A single contracting officer may be responsible for duties in any or all of these areas...”

FAR § 2.101

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ROLE OF THE CONTRACTING OFFICER

- ▶ Apparent authority does not bind the Government!
- ▶ Contractor must ensure party is dealing with a Government representative—the CO—with actual authority. *See e.g., Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947)
- ▶ Actual authority may be implied from specific circumstances.
 - For example, if implied authority would be an “integral part of the specific duties” assigned to an employee, then possibly that employee could bind Government by having implied actual authority.
 - Fact specific inquiry. *See, e.g., H. Landau & Co. v. United States*, 886 F.2d 322, 324 (Fed. Cir. 1989); *DOT Systems, Inc.*, DOTCAB No. 1208, 82-2 BCA ¶ 15,816

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ROLE OF THE CONTRACTING OFFICER

- ▶ Contract administration office (CAO): performs assigned postaward functions related to administration of contracts and to assigned preaward functions.
- ▶ PCO normally delegates specified contract administration functions in FAR 42.302(a) to a CAO. Regulation lists 71 functions, including:
 - Review the contractor's compensation structure
 - Determine allowability of costs suspended or disapproved; direct the suspension or disapproval of costs when there is reason to believe they should be suspended or disapproved
 - Approve final vouchers
 - Issue Notices of Intent to Disallow or not Recognize Costs
 - Perform production support, surveillance, and status reporting, including timely reporting of potential and actual slippages in contract delivery schedules
 - Ensure that the contractor has implemented the requirements of 52.203–13, Contractor Code of Business Ethics and Conduct

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ROLE OF THE CONTRACTING OFFICER

- ▶ PCO may retain any of these functions, but **must** delegate the following functions to the CAO:
 - Negotiate forward pricing rate agreements
 - Establish final indirect cost rates and billing rates for those contractors meeting criteria for CO determination in subpart 42.7
 - Certain administration responsibilities in connection with CAS
 - Determine adequacy of contractor's accounting system
- ▶ Contract administration functions not listed in FAR 42.302(a) or (b), or not otherwise delegated, remain PCO's responsibility. FAR 42.302(c)

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COMPLIANCE RISK NO. 1: PERSONNEL

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PROCUREMENT INTEGRITY ACT

► PIA Employment/Compensation Restrictions:

- Restrictions on offering employment, or responding to an employment inquiry, by an agency official participating personally and substantially in a Federal agency procurement during the conduct of a procurement.
- Penalties apply to both:
 - (1) An official who knowingly fails to comply with the requirement; **AND**
 - (2) A bidder or offeror that engages in employment discussions with an official who is subject to the restrictions of this section, knowing that the official has not complied.

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PROCUREMENT INTEGRITY ACT

- ▶ Former federal officials may not accept compensation from an awardee for one year after:
 - served as the: (i) PCO, (ii) source selection authority, (iii) member of the SSEB, or (iv) chief of a financial or technical evaluation team on a procurement exceeding \$10 million awarded to that contractor; OR
 - Served as the program manager, deputy program manager, or administrative contracting officer for a contract in excess of \$10 million awarded to that contractor
- ▶ Former federal officials may not accept compensation from a contractor for one year if:
 - personally made the decision to: (i) award a contract, subcontract, or modification or task order or delivery order exceeding \$10 million to the contractor, (ii) establish or approve overhead rates for contracts for that contractor in excess of \$10 million, (iii) approve contract payments exceeding \$10 million to that contractor, or (iv) pay or settle a claim exceeding \$10 million with that contractor.

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CONFLICTS OF INTEREST

- ▶ 18 U.S.C. 207 - Restrictions on former officers, employees, and elected officials of the executive and legislative branches
 - Primary source of restrictions that may limit the activities of individuals after they leave Government service (or after they leave certain high-level positions)
 - None of the statute's seven restrictions bar any individual from accepting employment with any private or public employer. Instead, they prohibit individuals from engaging in certain activities on behalf of persons or entities.
 - Lifetime Ban - May never represent a third party back to the government on a contract for which the employee was personally and substantially involved for the life of the “particular matter”
 - Two Year Ban – Applies to matters pending under the employee's official responsibility during the employee's last year of Government service

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CONFLICTS OF INTEREST

- ▶ 18 U.S.C. 207 - Restrictions on former officers, employees, and elected officials of the executive and legislative branches
 - Cooling-off Period - One year and two year bans apply to former senior and very senior government employees representation back to their former agency
 - Prohibits communication with the former agency or appearing before the agency to seek official action on any matter.
 - Former senior and very senior employees are prohibited for one year from representing, aiding, or advising a foreign government or foreign political party with the intent to influence certain Government officials.
 - Additional restrictions applicable to individuals who performed specified duties for the Government:
 - Participated personally and substantially in an ongoing trade or treaty negotiation covered by the statute during his or her last year of Government service
 - A former assignee under the Information Technology Exchange Program
 - Behind the Scenes participation allowed
 - Appearance of Impropriety

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CONFLICTS OF INTEREST

- ▶ 18 U.S.C. § 208
 - Basic criminal conflict of interest statute
 - Prohibits an executive branch employee from participating *personally and substantially* in a particular Government matter that will affect his own financial interests, as well as the financial interests of:
 - His spouse or minor child;
 - His general partner;
 - An organization in which he serves as an officer, director, trustee, general partner or employee; and
 - A person with whom he is negotiating for or has an arrangement concerning prospective employment.

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CONFLICTS OF INTEREST

- ▶ 18 U.S.C. § 203
 - Prohibits an officer or employee of the United States from receiving any legal fees, partnership share, bonuses, or any other form of compensation derived from representational services of others in matters before the executive branch or the courts (when the United States is a party or has a direct and substantial interest).
 - Applies to representations while the person is an executive branch employee, regardless of whether he or she receives the funds during or after Government service.
- ▶ 18 U.S.C. § 205
 - Prohibits an officer or employee of the United States from representing anyone other than themselves on any matter before the executive branch or any court, if the United States is a party or has an interest.

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CONFLICTS OF INTEREST

- ▶ DOD Standards of Conduct
 - “For military officers working on terminal leave, this means you may not interact or appear on behalf of your post-military employer before Federal employees – whether or not in a Federal workplace. Being present in Government offices on behalf of a contractor inherently is a representation. Military officers on terminal leave may work for the contractor, but only "behind the scenes" at a contractor office or otherwise away from the Federal workplace. Enlisted members are not subject to 18 U.S.C. §§ 203 or 205.”

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CONFLICTS OF INTEREST

- ▶ DFARS 252.203-7000 - Requirements Relating To Compensation Of Former DOD Officials
 - Applies to DOD officials who participated personally and substantially in a DOD acquisitions exceeding \$10M or who held a key acquisition position regardless of involvement with any specific contractor.
 - Must obtain a written opinion from a DOD ethics counselor before accepting compensation from a DOD contractor within 2 years after leaving DOD service
 - Prohibits the contractor from compensating DOD official without first knowing the official received a post-employment ethics opinion (or has not received after 30 days of seeking).

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52.203-13 - CONTRACTOR CODE OF BUSINESS ETHICS AND CONDUCT

- ▶ FAR 52.203-13
 - Contractor's internal control system shall provide for the following:
 - (B) Reasonable efforts not to include an individual as a principal, 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.
 - Principal means 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).*

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GRATUITIES TO GOVERNMENT PERSONNEL

► Gifts and Gratuities

- FAR prohibits the offer or acceptance of a gift of a gratuity to government officials with the intent to obtain a contract or favorable treatment under a contract. FAR 3.101-2, 3.204, 52.203-3.
- Gratuity includes any gift, favor, entertainment, loan or anything of monetary value. It also may include hospitality, transportation, any other tangible item, or intangible benefits, such as discounts, passes, or promotional vendor training, given or extended to government personnel, their immediate families, or households, for which fair market value is not paid by the recipient or the U.S. Government.
- If the government determines that a gratuity has been made or offered, it is authorized to terminate the contract, initiate debarment or suspension proceedings, and assess damages. FAR 3.204, 52.203-3.

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WHISTLEBLOWER PROTECTION

- Whistleblower Protections (FAR 52.203-17; FAR 3.908; 41 U.S.C. 4712)
- Whistle Blower Pilot Program
 - FAR being amended to make permanent the whistleblower "pilot program" (2013). *See* 83 Fed. Reg. 66223-01 (Dec. 26, 2018).
 - Allows contractor or subcontractor employees to file complaint with IG if they believe they have been discharged, demoted, or discriminated against for making a covered disclosure.
 - Three year time period to file.
 - The initial whistleblower protection regulations had encompassed only disclosures to a Member of Congress, an authorized agency official, or the Department of Justice of information "relating to a substantial violation of law related to a contract."
 - Requires contractors to inform their employees in writing in the predominant language of the workforce of employee whistleblower rights and protections under 41 U.S.C. 4712
 - Applies to all contracts exceeding simplified acquisition threshold

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WHISTLEBLOWER PROTECTION

- ▶ Whistleblower Protections (FAR 52.203-17; FAR 3.908; 41 U.S.C. 4712):
 - Prohibits reprisal for disclosing information that the employee reasonably believes is:
 - Evidence of gross mismanagement of a Federal contract;
 - A gross waste of Federal funds;
 - An abuse of authority relating to a Federal contract;
 - A substantial and specific danger to public health or safety; or
 - A violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract).
 - Reprisal is prohibited even if it is undertaken at the request of an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.

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WHISTLEBLOWER PROTECTION

- ▶ Whistleblower Protections (FAR 52.203-17; FAR 3.908; 41 U.S.C. 4712):
 - Entities to whom disclosure may be made
 - (1) A Member of Congress or a representative of a committee of Congress
 - (2) An Inspector General.
 - (3) The Government Accountability Office.
 - (4) A Federal employee responsible for contract oversight or management at the relevant agency.
 - (5) An authorized official of the Department of Justice or other law enforcement agency.
 - (6) A court or grand jury.
 - (7) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.

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COMPLIANCE RISK NO. 2: PROPOSALS

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PRESENT RESPONSIBILITY

- ▶ FAR 9.103: Present Responsibility of Contractor
 - No contract award made unless CO “makes an affirmative determination of responsibility”
- ▶ FAR 9.104-1: To be determined responsible, a contractor must-
 - Have adequate financial resources to perform contract, or ability to obtain them
 - Comply with required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments
 - Have a satisfactory performance record
 - Have a satisfactory record of integrity and business ethics
 - Have necessary organization, experience, accounting and operational controls, and technical skills, or ability to obtain them (including production control procedures, property control systems, quality assurance measures)
 - Have necessary production, construction, and technical equipment and facilities, or ability to obtain them
 - Be otherwise qualified and eligible to receive an award under applicable laws and regulations

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PRESENT RESPONSIBILITY

- ▶ Suspension and debarment are per se determinations of non-responsibility
 - Debarment: contractor excluded for specific period generally not exceeding three years
 - Suspension: temporary disqualification pending resolution of an investigation, indictment or civil trial. May not exceed 18 months unless legal proceedings initiated within this period
- ▶ Causes for suspension/debarment (listed in FAR 9.406-2, 9.407-2) include:
 - Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public contract or subcontract
 - Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion violating federal criminal tax laws, or receiving stolen property
 - Commission of any other offense indicating a lack of business integrity or honesty that seriously and directly affects the contractor's present responsibility

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FAR 52.203-13 - CODE OF BUSINESS ETHICS AND CONDUCT

- ▶ Code of Business Ethics and Conduct Clause
 - FAR 52.203-13 requires code of business ethics and conduct upon award of contract or subcontract >\$5.5 million with performance period of at least 120 days
 - Requires that contractors:
 - Have a written code of business ethics and conduct;
 - Provide a copy of the code to each employee engaged in performance of the contract;
 - Promote compliance with its code of business ethics and conduct;
 - Establish “an ongoing business ethics and business conduct awareness program,” and an internal control system (within 90 days after contract award).

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ORGANIZATIONAL CONFLICTS OF INTEREST

► Organizational Conflicts of Interest

- FAR: requires COs to avoid, neutralize, or mitigate conflicts of interest that present an unfair competitive advantage or might impair a contractor's objectivity. *See* FAR 9.501; FAR 9.504(a)(2); FAR 9.505. Determine if offeror:
 - Prepared specifications or work statements
 - Provided systems engineering and technical direction for a system
 - Gained access to proprietary information of other companies
 - Evaluated its own offers for products or services, or those of a competitor, without proper safeguards to ensure objectivity

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PROCUREMENT INTEGRITY ACT

► Procurement Integrity Act

- Prohibits soliciting or disclosing proprietary or source selection information; soliciting or even discussing post-government employment. 41 U.S.C. 424; FAR 3.104 implements the Procurement Integrity Statute.
- The restrictions extend to solicitation, offer, or acceptance, and apply to both contractor personnel and Government officials
- Each time a contract is awarded or modified the contractor must certify that no violations have occurred or disclose any violations
- The PIA applies to businesses and individuals (even if uninvolved in procurement)

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PROCUREMENT INTEGRITY ACT

► Prohibits disclosure or receipt of:

- Source Selection Information:
 - Technical evaluation plans
 - Results of technical evaluations
 - Results of cost or price evaluations
 - Rankings of bids or proposals
 - Reports of source selection panels or boards
- Bid or Proposal Information:
 - Cost or pricing data
 - Indirect costs and labor rates
 - Proprietary information
 - If marked as “contractor bid or proposal information”

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PROCUREMENT INTEGRITY ACT

► Penalties/Effect of Non Compliance

- Civil and Criminal Penalties
- Result in protest (within 14 days of discovery)
- Cancellation/Rescission of contract
- Suspension/Debarment

► Compliance Efforts

- Training re handling proprietary data
- Contractual Agreements, i.e. Non-Disclosure, Confidentiality Agreements, Non-Compete

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CONTRACTS WITH GOVERNMENT EMPLOYEES OR ORGANIZATION OWNED BY THEM

- ▶ Government contracts generally may not be awarded to an employee of the federal government, or to a business or other organization owned or substantially owned or controlled by a federal government employee.
- ▶ An agency head or appropriate designee may authorize an exception to this prohibition under compelling circumstances, such as when the government's requirements cannot be otherwise satisfied. FAR 3.601, 3.602.

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ANTITRUST VIOLATIONS

- ▶ Federal procurement laws and regulations:
 - Require government contracting officers and agencies to watch for potential antitrust violations by companies bidding on government contracts and to report collusive activity to the U.S. Attorney General and the agency responsible for contractor suspension and debarment. FAR 3.303(b).
- ▶ The antitrust laws prohibit agreements or informal arrangements between competitors that limit competition.
- ▶ Examples of illegal, anti-competitive practices:
 - collusive bidding
 - follow-the-leader pricing
 - rotated low bids
 - collusive price estimating systems, and
 - sharing the business or market division. FAR 3.301(a).

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ANTITRUST VIOLATIONS

► FAR 3.303

- Practices or events that may evidence violations of the antitrust laws include --
 - (1) An “industry price list” or “price agreement” to which contractors refer in formulating their offers;
 - (2) A sudden change from competitive bidding to identical bidding;
 - (3) Simultaneous price increases or follow-the-leader pricing;
 - (4) Rotation of bids or proposals, so that each competitor takes a turn in sequence as low bidder, or certain competitors bid low only on some sizes of contracts and high on other sizes;
 - (5) Division of the market, so that certain competitors bid low only for contracts awarded by certain agencies, or for contracts in certain geographical areas, or on certain products, and bid high on all other jobs;
 - (6) Establishment by competitors of a collusive price estimating system;
 - (7) The filing of a joint bid by two or more competitors when at least one of the competitors has sufficient technical capability and productive capacity for contract performance;
 - (8) Any incidents suggesting direct collusion among competitors, such as the appearance of identical calculation or spelling errors in two or more competitive offers or the submission by one firm of offers for other firms; and
 - (9) Assertions by the employees, former employees, or competitors of offerors, that an agreement to restrain trade exists.

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CONTINGENT FEES

► Policy:

- The use of a contingent fee to compensate persons who successfully obtain government contracts for their clients is considered to be against public policy because such arrangements may lead to the exercise of improper influence. FAR 3.402. A fee is contingent if paid in the form of a commission, percentage, brokerage, or other fee that is contingent upon successfully obtaining a government contract. FAR 3.401.

► Bona fide Employee or Agency

- Exception to prohibition permits payment of contingent fees to bona fide employees of the contractor or to a bona fide agency employed by the contractor to obtain business of all types. FAR 3.402(b).
 - A bona fide employee is a person regularly employed by the contractor and subject to the contractor’s control who neither exerts nor proposes to exert improper influence to obtain government contracts.
 - A bona fide agency is an established commercial selling agency, retained by the contractor to obtain business, which neither exerts nor proposes to exert improper influence to obtain government contracts.

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CONTINGENT FEES

- ▶ Factors to consider:
 - Representation of contractor in both government and commercial sales.
 - Proportionality of the fee to the services performed.
 - Agent's knowledge of the contractor's business.
 - Relationship between the contractor and agent.
 - Legitimacy and business history of the agent.
- ▶ "Improper influence" is any influence "that induces or tends to induce a government employee or officer to give consideration or to act regarding a government contract on any basis other than the merits of the matter." FAR 3.401.

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BUYING-IN

- ▶ Contractor submits an offer so low that it would result in a loss to the contractor, but the contractor expects to increase the contract amount after award through unnecessary or overly priced change orders, or the contractor expects to receive follow-on contracts at artificially inflated prices. FAR 3.501-1.
- ▶ FAR cautions contracting officers against accepting buy-in bids, which, according to the FAR, may "decrease competition or result in poor contract performance." FAR 3.501-2(a).

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CERTIFICATION AND REPRESENTATIONS

- ▶ Contractors must complete all requisite certifications and representations in their proposal submissions. Certifications vary according to the type and contract type. Some usual certifications include, but are not limited to, the following:
 - Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions FAR 52.203-11;
 - Certification Regarding Debarment, Suspension, Proposed Debarment FAR 52.209-5;
 - Small Business Program Representation, FAR 52.219-1;
 - Affirmative Action Compliance, FAR 52.222-25;
 - Cost Accounting Standards Notices and Certification, FAR 52.230-1.
 - Certificate of Independent Price Determination FAR 52.203-2.

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SUBCONTRACTOR KICKBACKS

- ▶ Anti-Kickback Enforcement Act of 1986, 41 U.S.C. §§ 51-58, substantially amended the Anti-Kickback Act of 1946
 - Increases criminal and civil penalties for such wrongful conduct, requires that the industry police itself or risk breaching prime contracts, redefines kickbacks, and imposes an additional strict civil liability on prime contractors for misconduct by their employees or subcontractors.
- ▶ Requires contractors to scrutinize the activities and bids of their subcontractors.
 - Subcontractor due diligence to ensure that any subcontractor problems are discovered early and internally.
 - Following situations must be closely scrutinized:
 - History of non-competitive procurements from a single vendor;
 - Continuous procurements despite poor quality products;
 - Unusually large agents' commissions;
 - Subcontract awards to a subcontractor that does not submit competitive prices;
 - Pattern of rotating subcontract awards.

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COMPLIANCE RISK NO. 3: PRICING

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CONTRACT TYPE

- ▶ Two broad categories: fixed-price contracts, FAR subpart 16.2, and cost-reimbursement contracts, FAR subpart 16.3
- ▶ Contract types “range from firm-fixed-price, in which the contractor has full responsibility for the performance costs and resulting profit (or loss), to cost-plus-fixed-fee, in which the contractor has minimal responsibility for the performance costs and the negotiated fee (profit) is fixed.” FAR 16.101
- ▶ Incentive contracts, FAR subpart 16.4: used when exact times/quantities of future deliveries of supplies/services uncertain at the time of contract award

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PRIMARY CONTRACT TYPES

Fixed Price

- Firm-Fixed-Price
- Fixed-Price with Economic Price Adjustment
- Fixed-Price Incentive
- Fixed-Price with Prospective Price Redetermination
- Fixed-Ceiling-Price with Retroactive Price Redetermination
- Firm-Fixed-Price, Level-of-Effort

Cost Reimbursable

- Cost-Sharing
- Cost-Plus-Incentive-Fee
- Cost-Plus-Award-Fee
- Cost-Plus-Fixed-Fee

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FIRM-FIXED-PRICE

- FAR 16.202-1:
 - “A firm-fixed-price contract provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract. This contract type places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss. It provides maximum incentive for the contractor to control costs and perform effectively and imposes a minimum administrative burden upon the contracting parties...”
- *Am. Tel. & Tel. Co. v. United States*, 177 F.3d 1368, 1383–84 (Fed. Cir. 1999): “[O]ur precedents are unequivocal that full payment under a valid fixed price-type contract is all to which a contracting party is entitled. The risk of loss for misjudging what it takes to perform, or for deliberately underbidding, is on the contractor, not the Government.”
- *ITT Fed. Servs. Corp. v. Widnall*, 132 F.3d 1448 (Fed. Cir. 1997): ITT not entitled to recovery of normal severance costs because FFP means contractor assumes responsibility for all such costs that may be incurred

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FIRM-FIXED-PRICE: FACTORS

- ▶ FAR 16.202-2:
 - Firm-fixed-price: suitable for acquiring commercial items or for acquiring other supplies or services on the basis of reasonably definite functional or detailed specifications when the contracting officer can establish fair and reasonable prices at the outset, such as when—
 - (a) There is adequate price competition;
 - (b) There are reasonable price comparisons with prior purchases of the same or similar supplies or services made on a competitive basis or supported by valid certified cost or pricing data;
 - (c) Available cost or pricing information permits realistic estimates of the probable costs of performance; or
 - (d) Performance uncertainties can be identified and reasonable estimates of their cost impact can be made, and the contractor is willing to accept a firm fixed price representing assumption of the risks involved.

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COST REIMBURSEMENT CONTRACTS

- ▶ FAR 16.301-1:
 - “Cost-reimbursement types of contracts provide for payment of allowable incurred costs, to the extent prescribed in the contract. These contracts establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed (except at its own risk) without the approval of the contracting officer.”
- ▶ FAR 52.232-20, Limitation of Cost
- ▶ FAR 52.232-22, Limitation of Funds
- ▶ FAR 52.216-7, Allowable Cost and Payment
- ▶ *P.R. Contractors, Inc. v. United States*, 76 Fed. Cl. 621, 632 (2007), *aff'd*, 274 F. App'x 897 (Fed. Cir. 2008): “under cost-reimbursement contracts the Government accepts the risks of increased costs, delays, and nonperformance, while under firm-fixed-price contracts the contractor bears the majority of these risks.”

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COST REIMBURSEMENT CONTRACTS

- ▶ FAR 16.301-2:
 - CO “shall use cost-reimbursement contracts only when—
 - (1) Circumstances do not allow the agency to define its requirements sufficiently to allow for a fixed-price type contract...or
 - (2) Uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract”
 - Used only when contractor's accounting system is deemed adequate and there are sufficient Government resources, FAR 16.301-3
 - Prohibited for acquisition of commercial items, FAR 16.301-3

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SIGNIFICANCE OF CONTRACT TYPE

- ▶ FAR Part 31: provides rules for determining cost reasonableness, allowability, and Allocability
- ▶ Cost principles: commonly associated with cost-reimbursement contracts; often come into play in fixed-price contracts
 - For example: FAR Part 31 must be used in pricing fixed-price contracts whenever: (a) cost analysis is performed, or (b) a fixed-price contract clause required the determination or negotiation of costs.
- ▶ FAR 15.404-1(c): cost analysis not required where the procurement involves “adequate price competition.”
 - Adequate price competition: predicated on a competition between two or more offerors, competing independently, submitting priced offers, and “award will be made to the offeror whose proposal represents the best value where price is a substantial factor in source selection; and there is no finding that the price of the otherwise successful offeror is unreasonable.” FAR 31.102

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TINA: OVERVIEW

- ▶ Truthful Cost or Pricing Data Act
 - 10 USC 2306a
 - Formerly titled Truth in Negotiations Act (TINA)
- ▶ Implemented in FAR 15.4
- ▶ Purpose: to allow government to require contractors to submit certified cost or pricing data (COPD) in certain circumstances in order to ensure fair and reasonable prices

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TINA: OVERVIEW

- ▶ 15.402: Policy
- ▶ 15.403: Obtaining COPD
 - -1, -2: Exceptions to requirement to obtain
 - -3, -4: Procedures for obtaining
 - -5: Instructions for submitting
- ▶ 15.404: Proposal Analysis
- ▶ 15.405 and .406: Negotiation and Documentation
- ▶ 15.407: Special Considerations

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FAR 15.402, PRICING POLICY

- ▶ Contracting officers shall—
 - (a) Purchase supplies and services *from responsible sources at fair and reasonable prices*. In establishing the reasonableness of the offered prices, the contracting officer—
 - (1) Shall *obtain certified cost or pricing data* when required by 15.403-4, *along with data other than certified cost or pricing data* as necessary to establish a fair and reasonable price; or

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FAR 15.402, PRICING POLICY

- ▶ (2) When certified cost or pricing data are not required by 15.403-4, shall obtain *data other than certified cost or pricing data* as necessary to establish a fair and reasonable price, generally using the following *order of preference* in determining the type of data required:
 - (i) *No additional data from the offeror, if the price is based on adequate price competition, except* as provided by 15.403-3(b).
 - (ii) *Data other than certified cost or pricing data* such as—
 - (A) *Data related to prices* (e.g., established catalog or market prices, sales to non-governmental and governmental entities), *relying first on data available within the Government*; second, on data obtained from sources other than the offeror; and, if necessary, on data obtained from the offeror. When obtaining data from the offeror is necessary, unless an exception under 15.403-1(b)(1) or (2) applies, such data submitted by the offeror shall include, at a minimum, appropriate data on the prices at which the same or similar items have been sold previously, adequate for evaluating the reasonableness of the price.
 - (B) *Cost data* to the extent necessary for the contracting officer to determine a fair and reasonable price.

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FAR 2.101, “COST OR PRICING DATA” DEFINITION

All facts that,

As of the date of price agreement, or,

If applicable, an earlier date agreed upon between the parties
that is as close as practicable to the date of agreement on price,

Prudent buyers and sellers would reasonably expect to affect
price negotiations significantly.

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FAR 2.101, “COST OR PRICING DATA” DEFINITION

- ▶ Cost or pricing data are factual, not judgmental; and are verifiable.
- ▶ While they do not indicate the accuracy of the prospective contractor’s judgment about estimated future costs or projections, they do include the data forming the basis for that judgment.
- ▶ Cost or pricing data are more than historical accounting data;
- ▶ They are all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred.

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FAR 2.101, “COST OR PRICING DATA” DEFINITION

[COPD] also include, but are not limited to, such factors as—

- ▶ (1) Vendor quotations;
- ▶ (2) Nonrecurring costs;
- ▶ (3) Information on changes in production methods and in production or purchasing volume;
- ▶ (4) Data supporting projections of business prospects and objectives and related operations costs;
- ▶ (5) Unit-cost trends such as those associated with labor efficiency;
- ▶ (6) Make-or-buy decisions;
- ▶ (7) Estimated resources to attain business goals; and
- ▶ (8) Information on management decisions that could have a significant bearing on costs.

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FAR 15.403–4, REQUIRING CERTIFIED COST OR PRICING DATA

- ▶ Unless an exception applies, certified cost or pricing data are required before accomplishing any of the following actions expected to exceed the current threshold or, in the case of existing contracts, the threshold specified in the contract:
 - (i) The award of any negotiated contract (except for undefinitized actions such as letter contracts).
 - (ii) The award of a subcontract at any tier, if the contractor and each higher-tier subcontractor were required to furnish certified cost or pricing data (but see waivers at 15.403-1(c)(4)).
 - (iii) The modification of any sealed bid or negotiated contract (whether or not certified cost or pricing data were initially required) or any subcontract covered by paragraph (a)(1)(ii) of this subsection.

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TINA THRESHOLD

- The **threshold** for obtaining certified cost or pricing data was **\$750,000**
- 2018 NDAA TINA threshold change = **\$2M** for DoD contracts entered into **after July 1, 2018**
 - OUSD Memorandum, Class Deviation – Threshold for Obtaining Certified Cost or Pricing Data (April 13, 2018)
 - COs use \$2 million as the threshold for obtaining certified cost or pricing data for contracts entered into after July 1, 2018
 - CAAC Letter 2018-03 (May 3, 2018)
 - Civilian Agency Acquisition Council authorized civilian agencies to issue class deviations implementing the new \$2M threshold
 - As of May 2019, open FAR case (FAR Case 2018-005) to change to \$2M in the FAR

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FAR 15.403–4, REQUIRING CERTIFIED COST OR PRICING DATA

- When certified cost or pricing data are required, the contracting officer shall require the contractor or prospective contractor to submit to the contracting officer (and to have any subcontractor or prospective subcontractor submit to the prime contractor or appropriate subcontractor tier) the following in support of any proposal:
 - (1) The certified cost or pricing data and data other than certified cost or pricing data required by the contracting officer to determine that the price is fair and reasonable.
 - (2) A Certificate of Current Cost or Pricing Data, in the format specified in 15.406-2, certifying that to the best of its knowledge and belief, the cost or pricing data were accurate, complete, and current as of the date of agreement on price or, if applicable, an earlier date agreed upon between the parties that is as close as practicable to the date of agreement on price...

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FAR 15.406-2, CERTIFICATE OF CURRENT COPD

This is to certify that, to the best of my knowledge and belief, the cost or pricing data (as defined in section 2.101 of the Federal Acquisition Regulation (FAR) and required under FAR subsection 15.403-4) submitted, either actually or by specific identification in writing, to the Contracting Officer or to the Contracting Officer's representative in support of ____ ***are accurate, complete, and current as of ____.***

This certification includes the cost or pricing data supporting any advance agreements and forward pricing rate agreements between the offeror and the Government that are part of the proposal.

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FAR 15.403-2, PROHIBITION ON OBTAINING CERTIFIED COST OR PRICING DATA

Exceptions...

- ▶ When the CO determines that prices agreed upon are based on ***adequate price competition***(see standards in paragraph (c)(1) of this subsection);
- ▶ When the CO determines that prices agreed upon are based on ***prices set by law or regulation*** (see standards in paragraph (c)(2) of this subsection);
- ▶ When a ***commercial item*** is being acquired (see standards in paragraph (c)(3) of this subsection);
- ▶ When a ***waiver*** has been granted (see standards in paragraph (c)(4) of this subsection); or
- ▶ When ***modifying*** a contract or subcontract for ***commercial items*** (see standards in paragraph (c)(3) of this subsection)...

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EXCEPTIONS: CERTIFIED COPD

- ▶ Adequate price competition – FAR 15.403-1(c):
 - Two or more responsible offerors competing independently; price is substantial factor
 - Reasonable expectation of two or more offerors but only one offer (civilian agencies only)
 - “Price analysis clearly demonstrates” proposal price is reasonable compared to recent prices resulting from adequate price competition
 - *United Techs. Corp.*, ASBCA No. 51410, 04-1 B.C.A. ¶ 32,556 (CO’s discretion in determining whether adequate price competition exists)

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EXCEPTIONS: CERTIFIED COPD

- ▶ Commercial Item – FAR 2.101:
 - “*Any item...that is of a type* customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and –
 - Has been sold, leased or licensed to the general public; or
 - Has been offered for sale, lease or license to the general public”
 - “*Services of a type* offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks...or specific outcomes”
 - Installation, maintenance, repair, training services

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FAR 2.101. DATA OTHER THAN CERTIFIED COST OR PRICING DATA

- ▶ “Data other than certified cost or pricing data” means pricing data, cost data, and judgmental information necessary for the contracting officer to determine a fair and reasonable price or to determine cost realism.
- ▶ Such data may include the identical types of data as certified cost or pricing data, consistent with Table 15-2 of 15.408, but without the certification.
- ▶ The data may also include, for example, sales data and any information reasonably required to explain the offeror’s estimating process, including, but not limited to—
 - (1) The judgmental factors applied and the mathematical or other methods used in the estimate, including those used in projecting from known data; and
 - (2) The nature and amount of any contingencies included in the proposed price.

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FAR 15.403-5, INSTRUCTIONS FOR SUBMISSION OF COPD

- ▶ (a) Taking into consideration the policy at 15.402, the contracting officer shall specify in the solicitation
 - (1) Whether certified cost or pricing data are required;
 - (2) That, in lieu of submitting certified cost or pricing data, the offeror may submit a request for exception from the requirement to submit certified cost or pricing data;
 - (3) Any requirement for data other than certified cost or pricing data; and
 - (4) The requirement for necessary preaward or postaward access to offeror’s records.

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FAR 15.403-5, INSTRUCTIONS FOR SUBMISSION OF COPD

- ▶ (b)(1) Format for submission of certified cost or pricing data. When certification is required, the contracting officer may require submission of certified cost or pricing data in the format indicated in Table 15-2 of 15.408, specify an alternative format, or permit submission in the contractor's format (See 15.408(l)(1)), unless the data are required to be submitted on one of the termination forms specified in Subpart 49.6.
- ▶ (2) Format for submission of data other than certified cost or pricing data. When required by the contracting officer, data other than certified cost or pricing data may be submitted in the offeror's own format unless the contracting officer decides that use of a specific format is essential for evaluating and determining that the price is fair and reasonable and the format has been described in the solicitation.
- ▶ (3) Format for submission of data supporting forward pricing rate agreements. Data supporting forward pricing rate agreements or final indirect cost proposals shall be submitted in a form acceptable to the contracting officer.

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FAR 15.408, TABLE 15-2

Table 15-2, General Instructions:

- ▶ “(A) You must provide the following information on the first page of your pricing proposal:
 - (8) Whether your organization is subject to cost accounting standards; whether your organization has submitted a CASB Disclosure Statement, and if it has been determined adequate; whether you have been notified that you are or may be in noncompliance with your Disclosure Statement or CAS (other than a noncompliance that the cognizant Federal agency official has determined to have an immaterial cost impact), and, if yes, an explanation; whether any aspect of this proposal is inconsistent with your disclosed practices or applicable CAS, and, if so, an explanation; and whether the proposal is consistent with your established estimating and accounting principles and procedures and FAR Part 31, Cost Principles, and, if not, an explanation...”

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DEFECTIVE PRICING

- Occurs when a contractor does not submit / disclose certified cost or pricing data that is **accurate, complete, and current** prior to reaching a price agreement
- Generally discovered during post-award audits
- Penalties are assessed against payments made to Contractor to include offsets of higher costs by Contractor as long as the defective pricing is not considered intentional

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DEFECTIVE PRICING

- Government gets price reduction for relying, to its detriment, on defective cost or pricing data. Government may also:
 - Collect interest from the date of overpayment; and
 - Assess penalties for “knowing” submission of defective data
- Regulations apply to subcontractors, but no direct liability from subcontractors to Government
- Government may audit subcontractors and assess price reductions – but against primes
- Make sure prime contractor includes flowdowns / indemnities in subcontracts

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DEFECTIVE PRICING

- ▶ Government bears the burden of proof:
 - (1) Cost or pricing data. The information is COPD.
 - (2) Reasonable availability. COPD were reasonably available prior to price agreement (or an alternate date as agreed by the parties).
 - (3) Nondisclosure of data. Contractor did not disclose, and the Government did not know of, the COPD prior to price agreement.
 - (4) Reliance. Government reasonably relied upon defective COPD to its detriment.
 - (5) Causation. Government has rebuttable presumption that defective COPD caused an increase in the contract price.

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CONTRACTOR DEFENSES TO DEFECTIVE PRICING CLAIM

- ▶ Information at issue:
 - Not cost or pricing data
 - Not reasonably available before agreement on price
 - Disclosed to, or known by, the appropriate Government Representatives
 - Not relied upon by the Government
 - Not a cause of an increased price
- ▶ Offsets
- ▶ TINA exception existed
- ▶ Statute of Limitations

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FAR PART 31

- ▶ **FAR Part 31: Contract Cost Principles & Procedures**
 - Provides rules for determining cost reasonableness, allowability, and allocability
 - Based on agency policies, statutory requirements, and Cost Accounting Standards
- ▶ **FAR Part 31 applicability to a contract depends on several factors, including:**
 - Date of Contract or Agreement
 - Nature of entity
 - Type of activity

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SIGNIFICANCE OF CONTRACT TYPE: COST TYPE VS. FIXED PRICE TYPE

- ▶ **Cost principles:** commonly associated with cost-reimbursement contracts; often come into play in fixed-price contracts
- ▶ **Applicability by contract type:**
 - Cost reimbursable contracts and subcontracts
 - Time and materials (T&M) contracts
 - Fixed price contracts and subcontracts priced based on submission of certified cost or pricing data
 - Certain contract modifications

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APPLICABILITY TO FIXED-PRICE CONTRACTS

“The applicable subparts of part 31 shall be used in the pricing of fixed-price contracts, subcontracts, and modifications to contracts and subcontracts whenever (a) cost analysis is performed, or (b) a fixed-price contract clause requires the determination or negotiation of costs. However, application of cost principles to fixed-price contracts and subcontracts shall not be construed as a requirement to negotiate agreements on individual elements of cost in arriving at agreement on the total price. The final price accepted by the parties reflects agreement only on the total price. Further, notwithstanding the mandatory use of cost principles, the objective will continue to be to negotiate prices that are fair and reasonable, cost and other factors considered.”

FAR 31.102

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APPLICABILITY TO FIXED-PRICE CONTRACTS

► (a) Cost analysis is performed

- FAR 15.404-1: Cost analysis is the review and evaluation of any separate cost elements and profit or fee in an offeror's or contractor's proposal, as needed to determine a fair and reasonable price or to determine cost realism
- FAR 15.404-1(c): cost analysis not required where procurement involves “adequate price competition”
 - Adequate price competition: competition between two or more offerors, competing independently, submitting priced offers, and “award will be made to the offeror whose proposal represents the best value where price is a substantial factor in source selection; and there is no finding that the price of the otherwise successful offeror is unreasonable.” FAR 31.102
- Cost analysis must be used when Truthful Cost or Pricing Data Act (aka TINA) applies

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APPLICABILITY TO FIXED-PRICE CONTRACTS

► Or (b) a fixed-price contract clause required the determination or negotiation of costs

◦ Contract clause example:

- FAR 52.249-2, Termination for Convenience of the Government (Fixed-Priced): subpart (i) states that “[t]he cost principles and procedures of part 31 of the Federal Acquisition Regulation, in effect on the date of this contract, shall govern all costs claimed, agreed to, or determined under this clause.”

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CONTRACTS WITH COMMERCIAL ORGANIZATIONS: FAR 31.103

“(a) The cost principles and procedures in subpart 31.2 and agency supplements shall be used in pricing negotiated supply, service, experimental, developmental, and research contracts and contract modifications with commercial organizations whenever cost analysis is performed as required by 15.404–1(c).

(b) In addition, the contracting officer shall incorporate the cost principles and procedures in subpart 31.2 and agency supplements by reference in contracts with commercial organizations as the basis for—

- (1) Determining reimbursable costs under (i) cost-reimbursement contracts and cost-reimbursement subcontracts under these contracts performed by commercial organizations and (ii) the cost-reimbursement portion of time-and-materials contracts except when material is priced on a basis other than at cost (see 16.601(c)(3));
- (2) Negotiating indirect cost rates (see subpart 42.7);
- (3) Proposing, negotiating, or determining costs under terminated contracts (see 49.103 and 49.113);
- (4) Price revision of fixed-price incentive contracts (see 16.204 and 16.403);
- (5) Price redetermination of price redetermination contracts (see 16.205 and 16.206); and
- (6) Pricing changes and other contract modifications.”

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COST ALLOWABILITY

- ▶ “(a) A cost is allowable only when the cost complies with all of the following requirements:
 - (1) Reasonableness.
 - (2) Allocability.
 - (3) Standards promulgated by the CAS Board, if applicable, otherwise, generally accepted accounting principles and practices appropriate to the circumstances.
 - (4) Terms of the contract.
 - (5) Any limitations set forth in this subpart.”

FAR 31.201-2

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REASONABLENESS

“A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business. Reasonableness of specific costs must be examined with particular care in connection with firms or their separate divisions that may not be subject to effective competitive restraints. No presumption of reasonableness shall be attached to the incurrence of costs by a contractor. If an initial review of the facts results in a challenge of a specific cost by the contracting officer or the contracting officer's representative, the burden of proof shall be upon the contractor to establish that such cost is reasonable.”

FAR 31.201-3

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REASONABLENESS

Factors for Determining Reasonableness:

- ▶ Nature and amount incurred by a prudent person in the conduct of competitive business
- ▶ Generally recognized as ordinary and necessary in performing the contract
- ▶ Accepted sound business practices, arm's length bargaining and Federal and state laws and regulations
- ▶ Contractor's responsibilities to customers, owners and employees
- ▶ Significant deviations from Contractor's established practices

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REASONABLENESS

- ▶ Business Judgment - Courts and boards will consider whether contractor exercised
 - *Raytheon Co.*, ASBCA 32419, 88-3 BCA ¶ 20,899
 - Finding the purchase of land to be reasonable based on the contractor's forecast of activity performing Government contracts
- ▶ Standard is not perfection
 - *Morton-Thiokol, Inc.* ASBCA 3229, 90-3 BCA ¶ 23,207
 - Contractor's employees ordered wrong railroad ties
 - Board found it to be "careless mistake, at most" with nothing to suggest that the contractor was frequently careless in ordering

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REASONABLENESS

Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348 (Fed. Cir. 2013), opinion corrected on denial of reh'g, 563 F. App'x 769 (Fed. Cir. 2014) (KBR I)

- ▶ KBR's Logistics Civil Augmentation Program contract, a cost-plus-award-fee contract under which KBR provided dining services to the Army in Iraq
- ▶ KBR sought costs related to a KBR subcontract with Tamimi Global Co.; provided dining services at Camp Anaconda
- ▶ Holding: KBR failed to meet the FAR's arm's-length bargaining requirement for proving reasonableness
- ▶ KBR in “weak” position with subcontractor due to its failure to “negotiate prices prospectively” and KBR’s attempt to self-perform

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REASONABLENESS

Kellogg Brown & Root Servs., Inc. v. United States, 742 F.3d 967 (Fed. Cir. 2014) (KBR II)

- ▶ KBR engaged subcontractor (ABC International Group) to build and operate dining facility in northern Iraq
- ▶ ABC submitted its proposal for new work; proposal = roughly triple the monthly cost initially quoted originally
- ▶ KBR's subcontract administrator reviewed ABC's proposal but calculated erroneous benchmark for measuring the reasonableness of ABC's proposal.
- ▶ DCAA audited several years later and found cost submitted by KBR unreasonable – withheld 12.5M.
- ▶ HOLDING: Court found KBR should have “balked” at ABC’s original proposal and should have continued negotiation; “...business judgment must still be exercised in a rational manner, even in a war zone”

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REASONABLENESS

Kellogg Brown & Root Servs., Inc., ASBCA No. 58175, 18-1 B.C.A.
¶ 37,006

- ▶ February 2004: KBR awarded Gulf Catering Company (GCC) a subcontract to prepare and serve meals at Site H-3 for not-to-exceed prices based upon a 5,400 headcount.
- ▶ February and March 2004: the CO issued Letters of Technical Direction (LOTDs) to reduce the number of persons served at Site H-3 to 1,422
- ▶ KBR continued billing for subcontract dining facility services until May 2005 based upon the higher headcount.
- ▶ On Appeal, Board found the February LOTD was binding upon KBR and KBR did not exercise reasonable business judgment in failing to comply with it.
- ▶ The Board determined the costs KBR billed to the Government due to its failure to reduce the headcount in accordance with the LOTD were unreasonable.
- ▶ KBR did not exercise reasonable business judgement; “There is no contemporaneous written explanation of record for why KBR did not implement [the letter] . . . , which was binding upon it.”

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ALLOCABILITY

“A cost is allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship. Subject to the foregoing, a cost is allocable to a Government contract if it—

- (a) Is incurred specifically for the contract;
- (b) Benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or
- (c) Is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.”

FAR 31.201-4

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ALLOCABILITY

Contractor bears burden of proof

“[T]he burden will be on the contractor to show the benefit and a reasonable allocation among different government contracts and between government and commercial work generally.”

Lockheed Aircraft Corp. v. United States, 375 F.2d 786 (Ct. Cl. 1967)

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ALLOCABILITY

► Benefit

- *General Dynamics Corp., Electric Boat Division*, ASBCA No. 18503, 75-2 BCA ¶ 11,521
 - Finding bid and proposal costs for commercial business allocable
 - Indirect benefit of enhancing contractor's expertise in submarine building and reducing the fixed overhead expenses allocable to the government
- *Boeing North American, Inc. v. Roche*, 298 F.3d 1274 (Fed. Cir. 2002)
 - Rejected Government's theory that “benefit” meant a benefit to the government
 - “Benefit” is an “accounting concept”; not necessary to show that a cost directly benefits the government's interest to be allocable

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ALLOCABILITY

- ▶ Necessary to Overall Operation of Business
 - “[A] reasonable expenditure, normally acceptable, helpful, or appropriate in connection with the conduct of business.”
 - E.g. officer’s salaries, IR&D, bid and proposal costs, idle facilities
- ▶ *Tecknowledge Corp v United States*, 350 Fed. Appx. 452 (2009)
 - Claimed costs of developing a software package as indirect cost
 - Government argued costs did not benefit a contract or any other Governmental work, directly or indirectly; not necessary to the overall operation of business

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LIMITATIONS IN FAR 31.2

- ▶ Some costs are made completely unallowable by specific cost principles, other cost principles provide limitations to cost allowability
- ▶ FAR 31.204(d):
 - “Section FAR 31.205 does not cover every element of cost. Failure to include any item of cost does not imply that it is either allowable or unallowable. The determination of allowability shall be based on the principles and standards in this subpart and the treatment of similar or related selected items...”

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UNALLOWABLE COSTS: FAR 31.201-6

- ▶ FAR 31.201-6:
 - Requires that costs that are expressly unallowable or mutually agreed to be unallowable be identified and excluded from any billing, claim, or proposal applicable to a Government contract
 - Includes directly associated costs
- ▶ FAR 31.001: expressly unallowable cost defined as a particular item or type of cost which, under the express provisions of an applicable law, regulation, or contract, is specifically named and stated to be unallowable
- ▶ FAR 42.709: assessment of penalties against contractors for including unallowable indirect costs in final indirect cost rate proposals

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UNALLOWABLE COSTS: EXAMPLES

- ▶ FAR 31.205-1 to -52: “Unallowable” Cost Examples
 - Alcoholic beverages
 - Entertainment
 - Bad debts
 - Fines and penalties
 - Interest on borrowings
 - Lobbying
 - Losses on other contracts
 - Organization costs
 - Goodwill
 - Asset write-up resulting from business combination

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CASE EXAMPLES

Raytheon Co., ASBCA No. 57576, 15-1 B.C.A. ¶ 36,043:

- ▶ Facts:
 - The Government alleged Raytheon failed to identify and exclude from its cost submissions the costs of bonus and incentive compensation (“BAIC”)
- ▶ Holding:
 - Certain BAIC were not expressly unallowable under FAR 31.205-1, -22 and -27, because such costs are not "specifically named and stated as unallowable" under these cost principles. Where a cost is not expressly unallowable, there can be no noncompliance with CAS 405 and no penalties for the failure to exclude the costs pursuant to FAR 42.709
 - BAIC costs are expressly unallowable under FAR 31.205-47 as it is a type of cost (a "pay" cost) that is specifically named and stated to be unallowable under the express provisions of law and regulation

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CASE EXAMPLES

Raytheon Co., ASBCA No. 57743, 17-1 B.C.A. ¶ 36,724

- ▶ Penalties and Waivers:
 - Once the government meets its burden to show that costs were expressly unallowable, contractor bears the burden to prove that the CO's determination not to waive the penalty was an arbitrary and capricious abuse of discretion
- ▶ Aircraft costs:
 - Aircraft fractional lease costs not expressly unallowable under FAR 31.205-46
 - Lease costs not specifically named and stated to be unallowable under the parties' Advance Agreement
- ▶ Lobbying costs:
 - Unreasonable under the circumstances for Raytheon to conclude that the salary costs of its employees engaging in lobbying activities were allowable
- ▶ Consultant costs:
 - FAR 31.205-33 does not require documentation; merely requires evidence of the nature and scope of the service furnished, which can be in the form of oral testimony

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CASE EXAMPLES

Raytheon Co., ASBCA No. 57743, 18-1 B.C.A. ¶ 37,129

- ▶ Both parties moved for reconsideration; ASBCA affirmed prior decision.
- ▶ Salary costs of Raytheon's employees who engaged in proscribed lobbying activities
 - “Reading FAR 31.201-6(a), FAR 31.201-6(e)(2) and FAR 31.205-22(a) together, the salary costs . . . are named and stated to be unallowable.”
 - Salaries are distinguishable from bonuses and incentive compensation.

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CASE EXAMPLES

- ▶ *Tecom, Inc.*, ASBCA Nos. 53884, 54461, 07-2 BCA ¶ 33,674
 - Legal fees, settlement costs relating to defense of sexual harassment lawsuit
- ▶ *Geren v. Tecom, Inc.*, 566 F.3d 1037 (Fed. Cir. 2009)
 - Reversed ASBCA; court asserts Title VII violation would be contract breach
 - “We hold that under the contract the costs associated with an adverse judgment would not be allowable, and that under our decision in [Boeing] defense and settlement costs are allowable only if the contractor can show that the plaintiff in the Title VII suit had very little likelihood of success.”

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CAS – COST ACCOUNTING STANDARDS

▸ Background

The purpose of the Cost Accounting Standards ("CAS") is to achieve uniformity and consistency in cost accounting practices for large federal contracts. The Cost Accounting Standards Board, which is responsible for CAS, was initially established by Congress in 1970. The original CAS Board went out of existence in 1980, but the Board was re-instituted in 1988, and provided with new exclusive authority with respect to cost measurement, assignment and allocation. 41 U.S.C. § 422. The coverage of CAS was expanded to include civilian agency contracts in 1992.

FAR Clause 52.230-2, the CAS clause, provides that the contractor must:

- disclose its cost accounting practices;
- follow its disclosed cost accounting practices consistently for all federal contracts;
- comply with applicable CAS standards; and
- agree to price adjustments for the impact of any changes in cost accounting practices.

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CAS – COST ACCOUNTING STANDARDS

▸ Applicability

CAS applies to negotiated contracts and subcontracts in excess of \$ 2 million, unless exempt. Contractors subject to full CAS coverage must meet all of the CAS standards when either of the conditions set forth at 48 C.F.R. § 9903.201-2(a) applies:

- the contractor receives a single contract award valued in excess of \$50 million;
- the contractor received \$50 million or more in net CAS-covered contracts during its previous cost accounting period.

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CAS – COST ACCOUNTING STANDARDS

► Full and Modified CAS Coverage

A contract subject to full CAS coverage must meet all 19 current cost accounting standards, as set forth at 48 C.F.R. Part 9904 “Modified coverage” only requires compliance with CAS 401, 402, 405, and 406.

- Consistency in Estimating, Accumulating and Reporting Costs (CAS 401)
- Consistency in Allocating Costs Incurred for the Same Purpose (CAS 402)
- Allocation of Home Office Expenses to Segments (CAS 403)
- Capitalization of Tangible Assets (CAS 404)
- Accounting for Unallowable Costs (CAS 405)
- Cost Accounting Period (CAS 406)
- Use of Standard Costs for Direct Material and Direct Labor (CAS 407)
- Accounting for Costs of Compensated Personal Absence (CAS 408)
- Depreciation of Tangible Capital Assets (CAS 409)
- Allocation of Business Unit General and Administrative Expenses to Final Cost Objectives (CAS 410)
- Accounting for Acquisition Costs of Material (CAS 411)
- Cost Accounting Standard for Compensation and Measurement of Pension Cost (CAS 412)
- Adjustment and Allocation of Pension Cost (CAS 413)
- Cost of Money as an Element of the Cost of Facilities Capital (CAS 414)
- Accounting for the Cost of Deferred Compensation (CAS 415)
- Accounting for Insurance Costs (CAS 416)
- Cost of Money as an element of the Cost of Capital Assets under Construction (CAS 417)
- Allocation of Direct and Indirect Costs (CAS 418)
- Accounting for Independent Research and Development Costs and Bid and Proposal Costs (CAS 420)

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CAS – COST ACCOUNTING STANDARDS

► CAS Disclosure Statement

A contractor’s CAS Disclosure Statement is a representation of the cost accounting practices established and followed by the contractor in accumulating and reporting costs, and in estimating costs for the pricing of contract proposals. A “cost accounting practice” is any disclosed or established accounting method for the allocation of costs to cost objectives, the assignment of costs to cost accounting periods, or the measurement of costs. Examples of cost accounting practice involving the measurement of costs include the use of historical costs, market value or present value; the use of standard costs or actual costs; and the designation of costs that must be included or excluded from tangible assets. *See* 48 C.F.R. § 9903.302-1.

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CAS – COST ACCOUNTING STANDARDS

► Changes in Cost Accounting Practices

A “change in a cost accounting practice” is any alteration in a cost accounting practice regardless of whether the practice was covered by the contractor’s Disclosure Statement. 48 C.F.R. § 9903.302-2. The CAS Clause requires the contractor to agree to negotiate a decrease in the contract price to mitigate the impact of any changes in its disclosed or established cost accounting practices, any failure to follow its disclosed or established cost accounting practices consistently, or any failure to comply with an applicable CAS standard. FAR Clause 52.230-2(a)(4)-(5).

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COMPLIANCE RISK NO. 4: PERFORMANCE

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CHANGES CLAUSE

- FAR 52.243-1 Changes (Fixed-Price); 52.243-2 Changes (Cost-Reimbursement); 52.243-3 Changes (Time-and-Materials or Labor-Hours)
- Enables Government to unilaterally change contract for drawings, designs, specifications, method of shipment or packing, place of delivery
- Any other changes must be bilateral (e.g. terms and conditions)
- Contractor must assert right to an adjustment within 30 days
- Government required to compensate contractor through an equitable adjustment for the increased effort of performing changed work
- Contractor entitled to bilaterally negotiate the equitable adjustment in contract price
- CO is only authority
- Generally, two types of changes: change orders and constructive changes
 - Change orders: formal, written change issued by the CO;
 - Constructive change: Government effectively changes the terms of the contract without following the formal procedures of the Changes clause

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TERMINATION FOR CONVENIENCE

- FAR 52.249-2, Termination for Convenience (Fixed-Price); 52.249-4, Termination for Convenience of the Government (Services); 52.249-6, Termination (Cost-Reimbursement)
- Permits Government to terminate contract in whole, or in part, whenever CO determines that such termination is in Government's best interests
- Government agrees to reimburse contractor for all reasonable and allocable costs up to the point of its termination for convenience
- Contractor entitled to a reasonable profit on costs, costs of preparing termination settlement proposal
- No anticipated profits on uncompleted work
- Turns fixed price contract into cost-reimbursement except for deliveries made

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TERMINATION FOR DEFAULT

- ▶ FAR 52.249-8, Default (Fixed-Price Supply and Service); 52.249-9, Default (Fixed-Price Research and Development); 52.249-10, Default (Fixed-Price Construction), 52.249-6, Termination (Cost-Reimbursement)
- ▶ Government may terminate contract if contractor fails to perform contract requirements
- ▶ Drastic sanction only sustained on good grounds and solid evidence
- ▶ Government bears burden of proof
- ▶ Effect on Cost Reimbursement vs. Fixed Price Contracts
 - Cost-reimbursement: contractor may recover a portion of allowable costs incurred under the contract, including allowance for fees under certain circumstances
 - Fixed-price contracts: contractor is entitled to receive payment only for accepted work. Government owes contractor nothing for work not accepted, has no obligation to pay for costs incurred in producing partially completed work. Government generally entitled to the return of any progress, partial, advanced payments, and excess costs of reprourement

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AUDIT AND PRICING CLAUSES

- ▶ FAR 52.215-2, Audit and Records-Negotiation
 - Permits Government agencies to audit the costs incurred by a contractor when such costs relate to cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable contracts and any combinations of these contract types, or contracts for which contractor submitted certified cost or pricing data
 - Records = books, documents, accounting procedures and practices, and other data
- ▶ FAR 52.215-10, Price Reduction for Defective Certified Cost or Pricing Data
 - USG entitled to a price adjustment to recoup any significant increase in the price of a contract or modification that results from the submission of defective cost or pricing data
- ▶ FAR 52.215-11, Price Reduction for Defective Certified Cost or Pricing Data—Modifications

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AUDIT AND PRICING CLAUSES

- ▶ FAR 52.230-2, Cost Accounting Standards
 - Incorporates provisions of 48 CFR part 9903 (CAS) into the contract
 - Contractor shall “comply with all CAS, including any modifications and interpretations indicated thereto contained in 48 CFR part 9904 in effect on the date of award of this contract or, if the Contractor has submitted certified cost or pricing data, on the date of final agreement on price as shown on the Contractor's signed certificate of current cost or pricing data...”
- ▶ FAR 52.230-6, Administration of Cost Accounting Standards
 - Specifies rules for administering CAS requirements; procedures in cases of failure to comply

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CONTRACTOR BUSINESS SYSTEMS

- ▶ Contractor Business Systems - DFARS 252.242-7005
 - Requires contractors to maintain business systems responsibly
 - Authorizes CO after consultation with specialists and auditors, and written notice to the contractor, to withhold up to 5% of contract payments for significant deficiencies in a single business system, and up to 10% for significant deficiencies for multiple business systems
 - Contractor business systems: accounting systems, estimating systems, purchasing systems, earned value management systems (EVMS), material management and accounting systems (MMAS), and property management systems
 - Significant deficiency: shortcoming “that materially affects the ability of officials of the Department of Defense (DoD) to rely upon information produced by the system that is needed for management purposes”
 - Outlines system-specific criteria for which aspects of that system would materially affect the ability of the DoD to rely on information produced and constitute a significant deficiency
 - Applies to contracts subject to CAS; clause self-deleting if CAS does not apply
 - Designed to provide contractors an opportunity to address any significant deficiencies in advance of payment withholds

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PAYMENT CLAUSES

- ▶ Payment Clauses (FAR 52.212-4(i)(5), 52.232-25(d), 52.232-26(c), and 52.232-27(l))
 - Require that, if the contractor becomes aware that the Government has overpaid on a contract financing or invoice payment, the contractor shall remit the overpayment amount to the Government.
 - A contractor may be suspended and/or debarred for knowing failure by a principal to timely disclose credible evidence of a significant overpayment, other than overpayments resulting from contract financing payments as defined in 32.001 (see 9.406-2(b)(1)(vi) and 9.407-2(a)(8)).

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CLAIMS BY AND AGAINST THE GOVERNMENT

- ▶ Claims
 - FAR Disputes clause, FAR 52.233-1, provides the exclusive procedure for processing claim
 - Procedure is grounded in the Contract Disputes Act (“CDA”), 41 U.S.C. § 7101 *et seq.*
 - Claim: written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. FAR 52.233-1(c)
 - For claims of more than \$100,000, contractor shall certify: (41 U.S.C. § 7103)
 - (A) the claim is made in good faith;
 - (B) the supporting data are accurate and complete to the best of the contractor's knowledge and belief;
 - (C) the amount requested accurately reflects the contract adjustment for which the contractor believes the Federal Government is liable; and
 - (D) the certifier is authorized to certify the claim on behalf of the contractor.

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CLAIMS BY AND AGAINST THE GOVERNMENT

- ▶ 41 U.S.C. § 7103(a)(4)
 - (A) In general.--Each claim by a contractor against the Federal Government relating to a contract and each claim by the Federal Government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim
- ▶ FAR 33.201, Disputes and Appeals:
 - “Accrual of a claim means the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred”

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STATUTE OF LIMITATIONS

- ▶ *Sparton Deleon Springs, LLC*, ASBCA No. 60416, 17-1 B.C.A. ¶ 36,601
 - Final decision issued in October 2015, demanded the reimbursement of an alleged overpayment of certain direct costs
 - Holding: Government knew or should have known of the direct costs as early as 10 January 2007 when it paid Sparton’s interim vouchers
- ▶ *DRS Glob. Enter. Sols., Inc.*, ASBCA No. 61368, 18-1 B.C.A. ¶ 37,131
 - By Dec. 15, 2006: USG paid last invoice at issue in appeal
 - DRS moves for SJ, alleging claim accrued on three possible dates: 1) payment of invoices; 2) submission of ICPs; and 3) entrance conference
 - Board held that precedent does not provide “blanket rule that [SOL] begins to run when the government pays the invoice.”
 - Record did not include the subject invoices; and the ICPs did not mention the invoices.

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STATUTE OF LIMITATIONS

- ▶ *United Liquid Gas Co. d/b/a United Pac. Energy*, CBCA No. 5846, 18-1 B.C.A. ¶ 37,172
 - Contract = FP with economic price adjustment, IDIQ; USG could issue TOs for propane gas at a cost of \$1.32 per gallon.
 - November 2010: Ft. Irwin PCO issued TO 1 for FY 2011; order gas at a unit price of \$1.44 per gallon.
 - Holding: Claims began to accrue in January 2011 when the government overpaid the first TO 1 invoice – the terms of the contract clearly put GSA and Ft Irwin on notice that UPE was overbilling the government.
 - Rejected GSA's argument that wouldn't have known because invoices were paid by DFAS.
- ▶ *Green Valley Co.*, ASBCA No. 61275, 18-1 B.C.A. ¶ 36,977
 - Contractor's appeal for payment of invoices dismissed as untimely; contractor submitted disputed invoices in 2006, but waited until 2017 to convert to a claim.
 - Denied contractor's equitable tolling argument; contractor did not show that government's suit against it in district court, or its debarment, prevented it from submitting claim.
- ▶ *Khenj Logistics Grp.*, ASBCA No. 61178, 18-1 B.C.A. ¶ 36,982
 - Dispute arose from termination for convenience; CO denied contractor's claim for materials transported before stop-work order.
 - Claim dismissed as untimely; contractor "knew or should have known" of claim more than six years prior to submission of claim.

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CYBERSECURITY

- ▶ Final Rule, DFARS: 81 FR 72986, *Safeguarding Covered Defense Information and Cyber Incident Reporting* (Oct. 21, 2016)
 - Implemented at DFARS Clause 252.204-7012
 - Imposes security and cyber incident reporting requirements on DOD contractors who have access to covered defense information (CDI).
 - CDI is defined as "unclassified controlled technical information or other information" that requires safeguarding or dissemination controls as described in the National Archives and Records Administration's Controlled Unclassified Information (CUI) Registry. DFARS 252.204-7012(a).
 - Categories of CUI data include: critical infrastructure, defense, financial, procurement and acquisition, proprietary business information, and intelligence.
 - Requires DOD contractors to implement National Institute of Standards and Technology Special Publication (NIST SP) 800-171 by December 31, 2017
 - Report cybersecurity "incident" to DoD within 72 hours
 - Mandatory flowdowns to Subcontractors

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CYBERSECURITY

- ▶ DPAP Memo, *Mass Modifications to Implement DFARS 252.204-7012, Safeguarding Covered Defense Information and Cyber Incident Reporting* (Dec. 15, 2017)
 - Anticipated that contractors will request contract modifications to authorize the use of updated NIST SP 800-171 Rev. 1.
 - Memo requests that contract administration components respond “swiftly” to requests / issue mass modifications to DoD contracts in appropriate circumstances.
 - Accomplish this through bilateral modification that does not change contract price, obligated amount, or fee arrangement.
 - Mass modifications for contractors with more than one segment = signed by CACOs
 - Mass modifications for single site contractors: signed by ACO

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CYBERSECURITY

- ▶ DPAP Memo, *Guidance for Assessing Compliance and Enhancing Protections Required by DFARS Clause 252.204-7012, Safeguarding Covered Defense Information and Cyber Incident Reporting* (Nov. 6, 2018):
 - Incorporates two “Guidance” documents to assist DOD acquisition personnel in the development of effective cybersecurity evaluation techniques
 - Require contractors to deliver a system security plan and to track the flow down of cybersecurity requirements to lower-tier subcontractors and/or suppliers.
 - One of the documents includes evaluation criteria and encourages DOD officials to “conduct on-site Government assessment of contractor’s internal unclassified information system in accordance with NIST SP 800-171A” pre- and post-award.

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CYBERSECURITY

- ▶ DPAP Memo, *Strengthening Contract Requirements Language for Cybersecurity in the Defense Industrial Base* (Dec. 17, 2018):
 - Provides DOD program offices with a sample Statement of Work (SOW) to include in solicitations.
 - Requires contractors to deliver a system security plan (or extracts) demonstrating the contractor's compliance with the security requirements in DFARS 252.204-7012.
 - Security plan "must be in effect at the time the solicitation is issued or as authorized by the contracting officer" and "describe the contractor's unclassified information system(s)/network(s) where covered defense information associated with the execution and performance of this contract is processed, is stored, or transmits."

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CYBERSECURITY

- ▶ DPAP Memo, *Addressing Cybersecurity Oversight as Part of a Contractor's Purchasing System* (Jan. 21, 2019):
 - Directs DCMA to validate a contractor's compliance with the cybersecurity requirements in DFARS 252.204-7012 and NIST SP800-171. Specifically, DCMA is to "leverage its review of a contractor's purchasing system in accordance with DFARS Clause 252.244-7001, Contractor Purchasing System Administration," in order to:
 - Review contractor procedures to ensure contractual DOD requirements for marking and distribution statements on DOD CUI flow down appropriately to their Tier 1 Level Suppliers; and
 - Review contractor procedures to assess compliance of their Tier 1 Level Suppliers with DFARS 252.204-7012 and NIST SP 800-171.

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CYBERSECURITY

▶ DPAP Memo, *Strategically Implementing Cybersecurity Contract Clauses* (Feb. 5, 2019):

- Directs DCMA to develop a proposed path ahead using its administration authority under FAR Part 42 and 43 and DFARS 242.302 to modify contracts that are administered by DCMA to achieve the following:
 - Recommend a set of business strategies to obtain and assess contractor system security plans strategically (not contract-by-contract);
 - Propose a methodology to determine industry cybersecurity readiness; and
 - Engage industry to discuss methods to oversee the implementation of DFARS 252.204-7012 and NIST SP 800-171.
- Defense Pricing and Contracting (DPC) directed to develop a similar path forward for contracts not administered by DCMA.
- Any resulting contract modifications or changes to achieve the objectives outlined above "will be limited to bilateral modifications that do not result in a change to any contract price, obligated amount, or fee arrangement."

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CYBERSECURITY

▶ DCMA, *Contractor Purchasing System Review (CPSR) Guidebook* (Feb. 26, 2019):

- Supply Chain Management (SCM) Job Aid updated to emphasize the requirements of DFARS 252.204-7012.
- Auditors required to:
 - Review subcontracts/POs to determine if the contractor has flowed down DFARS 252.204-7012 in all applicable procurement files within a selected sample
 - Validate that CUI is properly marked in procurement files containing DFARS 252.204-7012
 - Request that the contractor provide prime contracts containing CUI which was transferred to a subcontractor
 - Request that the contractor's procurement staff describes their SCM Policy, with regards to safeguarding CUI, to the CPSR Team
 - Request sufficient examples of how CUI was transferred

▶ Cybersecurity Maturity Model Certification (CMMC) draft Version 4.0 (August 30, 2019)

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CYBERSECURITY

► *United States ex rel. Brian Markus v. Aerojet Rocketdyne Holdings Inc.*,
Case No. 2:15-cv-2245 (E.D. Cal. May 5, 2019)

- Relator alleges that Aerojet entered into multiple contracts with the Government, and as subcontractors on contracts with the Government, which required that Aerojet meet the cyber security standards set forth in the DFARS 252.704-7012 and NASA FAR 1852.204-76 “even though [Aerojet] knew their information systems did not meet these cyber security requirements.”
- February 22, 2019: Aerojet filed a Motion to Dismiss the Relator’s FCA Complaint, alleging that the court must dismiss the Relator’s claims because the Relator does not, and cannot, allege facts to satisfy the FCA’s “rigorous” and “demanding” standard for materiality.
- May 5, 2019: Court issued Order denying Motion to Dismiss; Relator plausibly pled that Aerojet’s alleged failure to fully disclose its noncompliance with the Government’s cybersecurity requirements was material to the Government’s decision to enter into and pay on the relevant contracts.

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COMPLIANCE RISK NO. 5: PROSECUTION

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GOVERNMENT AUDIT RIGHTS

- ▶ Q: Does the US Government have the right to audit contractors?
- ▶ A: YES
 - The following provisions are sources of the Government's Audit Rights:
 - FAR 15.408, Table 15-2:
 - "By submitting your proposal, you grant the Contracting Officer...the right to examine records that formed the basis for the pricing proposal. That examination can take place at any time before award. It may include those books, records, documents, and other types of factual data (regardless of form or whether the data are specifically referenced or included in the proposal as the basis for pricing) that will permit an adequate evaluation of the proposed price."

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GOVERNMENT AUDIT RIGHTS

- ▶ FAR 52.215-2, "Audit and Records – Negotiation"
 - (a): "Records" includes:
 - "...books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form."

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GOVERNMENT AUDIT RIGHTS

- ▶ FAR 52.215-2, “Audit and Records – Negotiation”
 - (b): For cost-reimbursement, incentive, T&M, labor-hour, or price redeterminable contracts: Contractor “shall maintain and the [CO], or an authorized representative of the [CO], shall have the right to examine and audit all records and other evidence sufficient to reflect properly all costs claimed to have been incurred or anticipated to be incurred directly or indirectly in performance of this contract...”

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GOVERNMENT AUDIT RIGHTS

- ▶ FAR 52.215-2, “Audit and Records – Negotiation”
 - (c): Certified COPD: if provided by contractor, the CO, or an authorized representative of the CO, “in order to evaluate the accuracy, completeness, and currency of the certified [COPD], shall have the right to examine and audit all of the Contractor's records, including computations and projections, related to—
 - (1) The proposal for the contract, subcontract, or modification;
 - (2) The discussions conducted on the proposal(s), including those related to negotiating;
 - (3) Pricing of the contract, subcontract, or modification; or
 - (4) Performance of the contract, subcontract or modification.

*****Applies to fixed price contracts and modifications*****

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GOVERNMENT AUDIT RIGHTS

- ▶ FAR 52.215-2, “Audit and Records – Negotiation”
 - (f): Availability. Contractor must make available at its office at all reasonable times the records, materials, and other evidence described in the Clause “until 3 years after final payment under this contract or for any shorter period specified in Subpart 4.7, Contractor Records Retention, of the [FAR], or for any longer period required by statute or by other clauses of this contract...”

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GOVERNMENT AUDIT RIGHTS

- ▶ FAR 52.216-7, “Allowable Cost and Payment”
 - (d): Submission of final annual indirect cost rate proposal in accordance with FAR 42.7
 - (g): CO may have invoices, vouchers, statements of cost audited, payments reduced for unallowable costs or adjustments for under/overpayments.
- ▶ FAR 52.230-2, Cost Accounting Standards:
 - (c): “The Contractor shall permit any authorized representatives of the Government to examine and make copies of any documents, papers, or records relating to compliance with the requirements of this clause.”

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MANDATORY DISCLOSURE REQUIREMENT

► FAR 52.203-13 and FAR 3.1003

- The Contractor shall timely disclose, in writing, to the agency Office of the Inspector General (OIG), with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed -
 - (A) A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or
 - (B) A violation of the civil False Claims Act (31 U.S.C. 3729-3733).

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CIVIL FALSE CLAIMS ACT

► Civil False Claims Act (FCA), 31 USC §§ 3729 et seq.

- Makes liable “[a]ny person who knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval,” or who, “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim” to the Government
- Requires defendant acted “knowingly”
 - Defined by FCA as: (1) having actual knowledge that a claim is false; (2) acting in deliberate ignorance of the truth or falsity of the information; or (3) acting in reckless disregard of the truth or falsity of the information. No specific intent to defraud is required
- Treble Damages and penalties

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CIVIL FALSE CLAIMS ACT

► Civil False Claims Act (FCA), 31 USC §§ 3729 et seq.

- Common Bases for Liability:
 - Prime contractor liability for pass-through claims
 - Contractor certifications:
 - FAR/Contract compliance
 - Cost or Pricing Data
 - Davis-Bacon Act
 - Service Contract Act
 - Buy American Act

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WHISTLEBLOWER PROTECTION

► Whistleblower Protection

- Civil FCA prohibits retaliatory discharge:
 - Entitled to relief to make whole if discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, or agent on behalf of the employee, contractor, or agent or associated others in furtherance of other efforts to stop 1 or more violations
- Relief:
 - Reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination;
 - Two times the amount of back pay;
 - Interest on the back pay; and
 - Compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees.

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CRIMINAL FALSE CLAIMS ACT – 18 USC § 287

► Criminal False Claims Act

- Presentation of a false, fictitious, or fraudulent claim to the Government can result in both a fine and imprisonment of up to five years
- Prosecution must prove three elements for each offense: (1) the contractor presented a claim to the government; (2) the claim was false, fictitious, or fraudulent; and (3) the contractor knew the claim was false, fictitious, or fraudulent and had specific intent to defraud

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DOJ: 2018 FCA LITIGATION

► DOJ Press Release, *Justice Department Recovers Over \$2.8 Billion from False Claims Act Cases in Fiscal Year 2018* (Dec. 2018)

- Major areas of recovery:
 - Health Care Fraud
 - Procurement Fraud: includes –
 - Toyobo Co. Ltd. paid \$66 million to resolve claims that they sold defective Zylon fiber used in bullet proof vests that the United States purchased for federal, state, local, and tribal law enforcement agencies.
 - Inchcape Shipping Services Holdings Ltd. paid \$20 million to resolve allegations that they overbilled the U.S. Navy under contracts to provide services to Navy ships at ports
 - TrellisWare Technologies Inc. paid over \$12 million to settle allegations that it was ineligible for multiple Small Business Innovation and Research (SBIR) contracts it had entered into with the Navy, Army, and Air Force

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Stephen D. Knight
SMITH PACTHER MCWHORTER PLC
8000 Towers Crescent, Suite 900
Vienna, Virginia 22182
sknight@smithpachter.com
www.smithpachter.com

Erica J. R. Geibel
Perspecta Inc.
15052 Conference Center Drive
Chantilly, VA 20151
erica.geibel@perspecta.com
www.perspecta.com

These materials are intended to provide a general overview of the issues presented. You should contact an attorney to obtain specific advice with respect to any particular issue or problem.

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