

Government Contracts - Compliance Issues Impacting Bid and Proposal Activity

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Speaker Bios



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Litigator and adviser Alexander Canizares represents clients in complex disputes, investigations, and compliance matters involving government contracts.

A former trial lawyer with the U.S. Department of Justice's Civil Division, Alex draws on his more than 15 years of experience in private practice and government to assist government contractors and other companies in high-stakes litigation, internal and government investigations, enforcement actions, and counseling spanning all phases of federal procurement. His clients range from early-stage companies to *Fortune* 100 corporations in the aerospace and defense, information technology, healthcare, professional services, and other industries.



Seth Locke

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Seth Locke protects government contractors' rights and interests in a range of matters, including bid protests, contract performance issues, cost accounting claims, and other disputes.

Skilled in government contracts litigation, Seth advocates before the Armed Services and Civilian Boards of Contract Appeals, the U.S. Court of Federal Claims, and the U.S. Government Accountability Office. He also counsels clients in mergers and acquisitions, helping them comply with the government regulations and issues surrounding these deals. Seth has extensive experience with the Federal Acquisition Regulation, and he is adept at risk management and litigation prevention in the government contracting process.



Mike LaCorte

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Mike LaCorte has more than 20 years of experience in government contracts, accounting, auditing, and management consulting. Mike has led a variety of consulting engagements, including regulatory compliance and business system assessments, investigations and litigation support, cost and damage analyses, organizational restructurings, bid protests, due diligence related to mergers and acquisitions, management consulting, and other similar assignments. Mike has also provided expert deposition testimony on generally accepted accounting principles (GAAP) and government contracting issues.

Many of the matters Mike has worked on were before the Armed Services Board of Contract Appeals (ASBCA), the Civilian Board of Contract Appeals (CBCA), or the Court of Federal Claims (COFC).



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Patrick Jensen serves government contractors and other entities as an expert witness and consultant in a variety of sectors, including aerospace and defense, construction, software and IT, healthcare, energy, and primarily commercial enterprises. Since 2005, Patrick has assisted clients on risk management and compliance issues as well as disputes, including claims, bid protests, and forensic investigations. He has experience with matters in front of the U.S. Court of Federal Claims, the Armed Services Board of Contract Appeals, the Civilian Board of Contract Appeals, and the U.S. Government Accountability Office, as well as arbitration and mediation.

Patrick is a Certified Public Accountant, a Certified Valuation Analyst, a Certified Fraud Examiner, and a Master Analyst in Financial Forensics.



Elizabeth Gill, CACI

VP AND DEPUTY GENERAL COUNSEL, CACI INTERNATIONAL, INC.

Elizabeth Gill is a Vice President and Deputy General Counsel at CACI, International, Inc., a national security company headquartered in Reston, VA with over 23,000 employees worldwide. At CACI, she provides counseling and support for all aspects of the Federal procurement process with an emphasis on the intelligence community. Liz's practice also includes legal and regulatory compliance matters, government and internal investigations, and transactional drafting and negotiation. She has extensive experience litigating and managing protests, claims, and other business disputes, particularly trade secret misappropriation matters. Prior to joining CACI in 2015, Liz spent thirteen years in private practice at Holland & Knight, Patton Boggs, and Wickwire Gavin in the areas of government contract counseling and litigation, government investigations, and construction litigation.

Agenda

- **Key Personnel: Developments and Bid Protest Risks**
- **Hiring Former Government Employees**
- **Handling OCIs and Sensitive Information**
- **Cost/Price/System Considerations When Preparing Bids/Proposals**
- **Business Combination Issues**
- **Questions**

Key Personnel:
Developments and Bid
Protest Risks

Key Personnel Issues

U.S. Court of Federal Claims and the GAO split: must an offeror disclose the unavailability of key personnel after proposal submission? GAO imposes a duty to disclose, whereas at least some court decisions find no such duty exists.

- **Confirmation letters from key employees affirming availability.**
- **Anticipating “bait and switch” arguments alleging material misrepresentations.**

GAO Precedent	CFC Precedent
<i>Aerospace Design & Fabrication, Inc.</i> , B-278896, B-278896.2, 98-1 CPD ¶ 139 (Comp. Gen. May 4, 1998)	<i>Golden IT, LLC v. United States</i> , 157 Fed. Cl. 680 (2022)
<i>Patricio Enterprises Inc.</i> , B-412738, B-412738.2, 2016 CPD ¶ 145 (Comp. Gen. May 16, 2016)	<i>KPMG LLP v. United States</i> , 166 Fed. Cl. 588 (2023)

Hiring Former Government Employees

Source of Law

- FAR 3.101: Prohibits impartial/preferential treatment
- Restrictions on former officers, employees, and elected officials of the executive and legislative branches
 - **Lifetime Ban on Representational Matters**, 18 U.S.C. § 207(a)(1), 5 C.F.R. § 1304.4605(a)(1)
 - **Two-year ban on Representational Matters**, 18 U.S.C. § 207(a)(2), 5 C.F.R. § 1304.4605(a)(2)
 - **One-year ban on Aiding/Advising**, 18 U.S.C. § 207(b)
 - **One-year “Cooling-Off” Period**, 18 U.S.C. § 207(c)
- *Violations carry imprisonment or fines



Key Points

- Hiring Conflicts are commonly examined under FAR 3.101 versus FAR 9.5:
 - FAR 3.101 requires that government business be conducted in a manner above reproach with complete impartiality and with preferential treatment for none:

The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships. While many Federal laws and regulations place restrictions on the actions of Government personnel, their official conduct must, in addition, be such that they would have no reluctance to make a full public disclosure of their actions.

- “Appearance of a conflict”
- Unfair competitive advantage based on access to non-public, competitively sensitive information.
- No waiver
- See *Health Net Federal Services, LLC*, Comp. Gen. Dec. B-401652.3, 2009 CPD ¶ 220; *Northrop Grumman Systems Corp.*, Comp. Gen. Dec. B-412278.7, 2017 CPD ¶ 299, 2017.

Common Fact Patterns & Issues

- Revolving Door: Hiring Government Personnel
 - Heightened Restrictions for High-Level Officials (Executive Schedule; O-7+ officers; some White House staff)
- Teaming with Consulting Contractor & Vetting Subcontractors
- Attention to employee pages on LinkedIn and other social media

Best Practices

- During Negotiation: Work with employee's Designated Agency Ethics Official and engage ethics officials early on; follow agency regulations regarding statutory revolving-door restrictions; create plan to mitigate any OCI during negotiation period.
- Post-Hiring: Provide guidance and training; seek “ethics letter” from employee's agency and add to personnel file; create reasonable firewalls.
 - See Compensation ban under the PIA, 41 U.S.C. § 2104

Handling OCIs and Sensitive Procurement Information

OCIs

FAR 9.5

- FAR 9.503 allows the agency head or designee to waive any general rule or procedure of this subpart
- Outlines general rules and limitations, as well as provides common situations, but this list is non-exhaustive
- Duty imposed upon Contracting Officers to determine existence of an OCI

Types of OCIs

- 1. Unequal Access to Information:** May occur when a contractor obtains access to nonpublic information as apart of its contract performance which gives it an advantage in a later competition for a government contract.
- 2. Biased Ground Rules:** May occur when as part of its work under one procurement, the contractor has helped set the procurement's ground rules, such as writing the statement of work or developing specifications, for another procurement.
- 3. Impaired Objectivity:** May arise when a contractor's outside business relationships create an economic incentive to provide biased advice under a government contract.

Looking Ahead

- FAR Council revising FAR Part 9 to modernize OCI rules following mandate by congress, Preventing Organizational Conflicts of Interest in Federal Acquisition Act (Pub. L. 117-324).
- The Department of Defense issued a Proposed Rule on 9/26/2024 to amend DFARS to prohibit contracting officers from awarding contracts assigned NAICS code beginning with 5416 (management, scientific, and technical consulting services industry group) to offerors that hold contracts involving consulting services with certain foreign entities.
 - Certification Requirement
 - Comment period ends on 11/25/2024.
- GAO Report, Federal Contracting: Timely Actions Needed to Address Risks Posed by Consultants Working for China

Common Fact Patterns

1. **Providing systems engineering** (e.g., determining specifications, identifying and resolving interface problems, developing test requirements, evaluating test data, and supervising design) and technical direction (e.g., determining specifications, identifying and resolving interface problems, developing test requirements, evaluating test data, and supervising design), FAR 9.505-1
2. **Preparing specifications or work statements** for competitive acquisitions, FAR 9.505-2
3. **Providing evaluation services** of its own offers for products or services, or those of a competitor, without proper safeguards, FAR 9.505-3
4. **Obtaining access to proprietary information**, FAR 9.505-4
5. **FAR 9.508** Examples

Raising & Mitigating OCIs

- “Hard Facts” Standard
- *Michael Stapleton Associates v. United States*, No. 2023-1273, (Fed. Cir. May 20, 2024)
 - Federal Circuit found that the agency provided a coherent and reasonable exercise of discretion in choosing to keep an offeror that may have held an unfair advantage or unequal access to information.
 - **Takeaway:** Agencies are afforded a great degree of deference in determining whether a contractor sufficiently mitigated an OCI, and such decisions will be upheld so long as sufficiently documented; thus, it’s best practice to disclose all potential OCI’s for the CO to consider and include in the record.
- *Kropp Holdings, Inc.*, B-420857.8, B-427857.9 (Comp. Gen. Aug. 28, 2024)
 - GAO sustained a protest in part after finding that the agency’s evaluation failed to consider how awardee’s mitigation plan impacted its technical proposal for it did not identify or explain the relationship, duties, and responsibilities of subcontractors used specifically to guard against conflicts.
 - **Takeaway:** Ensure proposals clearly explain the impact of a conflict mitigation plan on the proposed technical approach.

What is the Procurement Integrity Act?

Source of Law: 41 U.S.C. Chapter 21; FAR 3.104

- The Procurement Integrity Act (“PIA”) sets forth requirements for contractor and Government employees by regulating:
 - Disclosure or receipt of procurement information;
 - Contractor bid or proposal information; or
 - Source selection information
 - Employment contracts; and
 - Acceptance of compensation for former federal officials.
- The PIA carries criminal and civil penalties + other administrative actions
- The PIA imposes a reporting requirement, 41 U.S.C. § 2105
- The FAR requires the head of the contracting activity to take certain steps once informed of a potential PIA violation

Common Fact Patterns

- 1. Inadvertent Disclosure:** Government accidentally releases source selection information to offeror; inadvertently sends email about offeror A's proposal during clarifications to offeror B.
- 2. Teammates:** Subcontractor helps prepare a proposal with a prime contractor under a teaming agreement, but then submits its own proposal for follow-on contract using the prime's proprietary information
- 3. Employees:** Former employee of offeror A uses confidential information gleaned from tenure with A to curate competitive bid to submit on behalf of new employer offeror B

Cost/Price/System
Considerations When
Preparing Bids/Proposals

What are the Cost Accounting Standards (CAS)?

- There are 19 Cost Accounting Standards
- Complements FAR Part 31 - Contract Cost Principles and Procedures
 - FAR Part 31 governs cost allowability
 - CAS governs the measurement, assignment, and allocation of costs
 - FAR Part 31 incorporates aspects of the CAS by reference (e.g., see FAR 31.205-18, which incorporates substantially all of CAS 420)
- CAS is public law
 - Title 48: Federal Acquisition Regulations System
 - Part 9904: Cost Accounting Standards
- The administration regulations (48 CFR 9903, FAR Part 30) cover the following topics:
 - CAS Applicability
 - Disclosure Statements
 - Cost Accounting Practice Changes and Noncompliance with CAS
 - Subcontractor CAS Administration

CAS Considerations in B&P Activity

- Award of a CAS covered contract or subcontract of \$50M or more requires submission of a Disclosure Statement prior to award (see 48 CFR 9903.202-1(b)(1))
- Examples of significant business system implications:
 - The estimating system will need to accommodate the pricing of contracts in a CAS compliant manner
 - The accounting system will need to accumulate costs in a CAS compliant manner
 - With regards to purchasing, appropriate clauses will need to be flowed down and subcontractors contemplated for a CAS covered subcontract will need to be evaluated to ensure they can compliantly administer such an award
- Based on our experience, it is not uncommon for it to take months to update business systems to facilitate CAS compliance and consideration should be given to the timeline required to get business systems into compliance when preparing a bid or proposal

Truth in Negotiations Act (TINA)

What is TINA?

- Truth in Negotiations Act (“TINA”), see 10 U.S.C. 2306a
- Now renamed “Truthful Cost or Pricing Data”
- Defines when contractor is required to provide “certified cost or pricing data” (i.e., satisfy a disclosure requirement) and exceptions
- Defines “certified cost or pricing data”
- Establishes the right of Government to examine contractor records for data that were not submitted
- Defines the “certification” made by offeror
- Defines “Defective Pricing”
- Resulted in numerous FAR clauses

Definition of Certified Cost or Pricing Data

- FAR 2.101(b)
 - Cost or pricing data: 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. Cost or pricing data are factual, not judgmental; and 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. They also include, but are not limited to, such as factors as –
 - Vendor quotations;
 - Nonrecurring costs;
 - Information on changes in production methods and in production or purchasing volume;
 - Data supporting projections of business prospects and objectives and related operations costs;
 - Unit-cost trends such as those associated with labor efficiency;
 - Make-or-buy decisions
 - Estimated resources to attain business goals; and
 - Information on management decisions that could have a significant bearing on costs

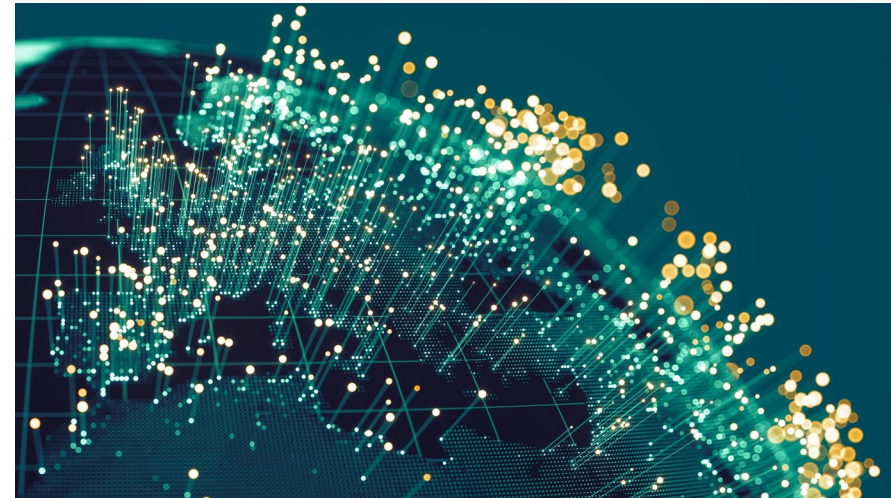
Requirement to Submit Certified Cost or Pricing Data

When is Certified Cost or Pricing Data required?

- Any federal procurement in excess of the TINA threshold (currently \$2 million) where no exceptions apply

Exceptions:

- Prices are based on adequate price competition
- Prices are set by law or regulation
- Commercial product or service is being acquired
- Modifying a contract or subcontract for commercial product or service
- When a waiver has been granted



Requirement to Submit Certified Cost or Pricing Data (Cont.)

- The contractor must meaningfully disclose all reasonably available cost or pricing data
 - Format specified by solicitation (for example, FAR Table 15-2)
 - Actual delivery or specific (not generic) identification
- Submission to the Contracting Officer or an authorized representative
- Disclosure obligation is also fulfilled “if the Government obtains the data in question in some other manner or had knowledge...[It] must be meaningful...”

Appeals of Alliant Techsystems, Inc., ASBCA Nos. 51280, et al., 00-2 BCA ¶ 31,042 at 153,298.

Defective Pricing

What is Defective Pricing?

- Defective Pricing = failure to provide current, accurate, and complete data, when required by FAR clauses
- May occur regardless of whether the data was or was not used in costing or pricing
- May occur even without an actual “certification”
- May result in unilateral contract price reduction
- May result in civil and criminal penalties, suspension, and/or debarment
- Example: U.S. ex rel. Bartczak, et al. v. CyTerra Corp. Case No. 06-CA-10550) (False Claims)
 - Had Government received certified cost or pricing data, it would have negotiated lower prices



DFARS 252.215-7002 Cost Estimating System

- DFARS clause 252.215-7002, Cost Estimating System Requirements, is included in all DoD solicitations and contracts awarded on the basis of certified cost or pricing data (DFARS 215.408(1))
- Key definitions (DFARS 252.215-7002(a))
 - Estimating System: Contractor's policies, procedures, and practices for budgeting and planning controls, and generating estimates of costs and other data included in proposals submitted to customers in the expectation of receiving contract awards, and includes:
 - Organizational structure;
 - Established lines of authority, duties, and responsibilities;
 - Internal controls and managerial reviews;
 - Flow of work, coordination, and communication; and
 - Budgeting, planning, estimating methods, techniques, accumulation of historical costs, and other analyses used to generate cost estimates.

DFARS 252.215-7002 Cost Estimating System (Cont.)

- Key definitions (DFARS 252.215-7002(a)) (cont.)
 - Acceptable Estimating System: Complies with the 17 criteria stipulated in DFARS 252.215-7002 and provides for a system that:
 - Is maintained, reliable, and consistently applied;
 - Produces verifiable, supportable, documented, and timely cost estimates that are an acceptable basis for negotiation of fair and reasonable prices;
 - Is consistent with and integrated with the Contractor's related management systems; and
 - Is subject to applicable financial control systems.
- When developing bids and proposals, consideration should be given to the criteria identified in DFARS 252.215-7002.

DCAA Estimating System Audits

- DCAA has cognizance over contractor estimating systems.
- Audit steps are outlined in DCAA's Estimating System audit program (Activity Code 24010).
- As part of its audit, DCAA will attempt to gain an understanding of:
 - The control environment;
 - A contractor's risk assessment process;
 - How a contractor monitors its estimating system;
 - The processes by which a contractor initiates, processes, authorizes, controls, reports, and communicates information related to each type of significant estimate; and
 - A contractor's control activities to ensure compliance with criteria stipulated in DFARS 252.215-7002.
- During actual testing of the estimating system, DCAA will evaluate a contractor's compliance with DFARS 252.215-7002 and will evaluate how major elements of cost (e.g., direct labor, subcontractors) are developed.
- It is a best practice to create robust proposal files contemporaneously to when the proposal is being developed that explain how the proposal was developed (e.g., bases of estimate); fulsome documentation of this nature will be helpful during an estimating system audit

Cost Estimating/Systems Issues

1. Outdated pricing information
2. Changed market conditions
3. Extra work by contractor
4. Materially different quantities
5. Change in supplier
6. Unreliable suppliers
7. Labor costs from truncated time periods



Business Combination Issues

Business Combination or Divestiture

- Combinations or divestitures intended to add to business competitiveness through *change*
- Need to ask:
 - “How does this change impact fundamental definitions of the company doing business with the US government?”
- Particularly relevant to commercial entities aiming to do more business with the government or those that already have some government contracts
- May give rise to disclosure obligations



Business Combination or Divestiture

Examples of Changes on which to Focus

- Business entities/reporting structures
- Business system integration
- Size determination
- Set-aside contracts
- Indirect Rates (e.g., pools/bases, forward pricing rates)
- Contract types (fixed vs. cost-type)
- CAS coverage



Questions?