



Practical Considerations When Pursuing Federal Funding

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Imagine ...

- Your organization's head of business development / sales approaches the executive team with a great new customer lead for top-line growth ...

The U.S. government

- They tell them that the government
 - is the single largest purchaser of goods, property and services;
 - is the biggest landlord; and
 - spends more money on scientific research and financial assistance than any other entity, public or private, in the world

Imagine ...

The U.S. Government obligated \$10.1 Trillion in FY2021

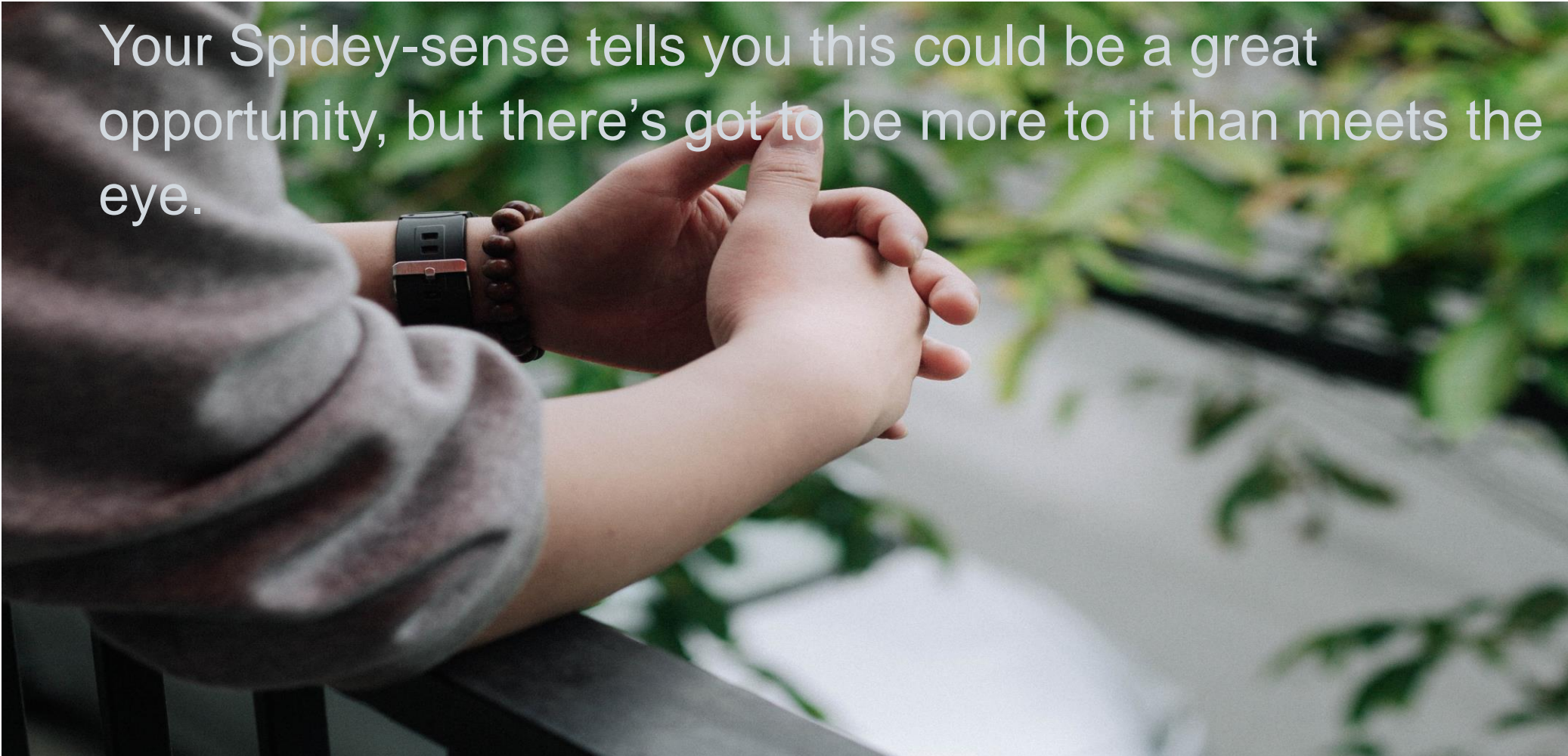
- Contracts: \$1.1 Trillion
- Grants: \$1.4 Trillion
- Asset acquisition: \$215.1 Billion

Source: [USASpending.gov](https://www.usaspending.gov)



Imagine ...

Your Spidey-sense tells you this could be a great opportunity, but there's got to be more to it than meets the eye.



You Ask Yourself

What do I need to know to advise my team?

How do federally funded agreements differ from commercial agreements?

What factors affect my organization's obligations and risks?

What are some of the common compliance obligations and potential landmines I should be aware of?

Is it really worth all of this effort to do business with the government?

“

How do federally funded agreements differ from commercial agreements?

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Government vs. Commercial Contracts

- Contracting with the federal government presents special rules and risks
 - What is okay in the commercial marketplace may be disallowed (or even illegal!) in government deals and interactions
 - Risks to both companies and individuals involved
- These differences arise from important governmental policies
 - Assuring award decisions are made on the merits
 - Promoting competition and fair treatment
 - Ensuring transparency and truthful dealing
 - Maintaining the industrial base and supporting small businesses
 - Good stewardship of taxpayer dollars

Government vs. Commercial Contracts

High public scrutiny and significant customer oversight

- Employment practices
- Information security / cybersecurity
- Supply chain integrity, sourcing requirements, and subcontractor oversight
- Accounting requirement and audit rights

Some commercial sales practices can be *illegal*:

- Obtaining competitive information from customer during acquisition
- Meals or gifts to the customer
- Hiring the customer (or even talking about it)
- Puffery in proposals
- Free goods or services

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What factors affect my organization's obligations and risks?

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Risk Variables

Award Type

Agreement
Structure

Awarding
Agency

Work Scope/
Dollars
Involved

Position in
the Supply
Chain

Award Type

- **Procurement Vehicles**

- *Principal purpose:* purchase property or services for the direct benefit or use of the U.S. govt
- *Governed by:* Federal Acquisition Regulations (FAR), CFR Title 48
- *Includes:* Contracts, purchase orders, P-card purchases

- **Financial Assistance Agreements**

- *Principal purpose:* provide assistance money in support of a public purpose
- *Governed by:* Uniform Guidance, 2 CFR § § 200 et seq.
- *Includes:* Grants, cooperative agreements, Technology Investment Agreements (TIAs), Cooperative Research and Development Agreements (CRADAs)

- **Other Transactions**

- *Principal purpose:* acquire R&D and prototypes to evaluate govt utility of new/existing technology
- *Governed by:* Applicable federal laws (no cohesive governing laws/regulations)

Agreement Structure

Procurement Contracts

Pricing Structure

- Fixed Price
- Time & Materials/ Labor Hour
- Cost Type
- Indefinite Delivery/ Indefinite Quantity

Incentive Structure

- Firm (i.e. none)
- Incentive Fee
- Award Fee
- Fixed Fee

Completion Structure

- Completion vs. Term

Assistance Agreements

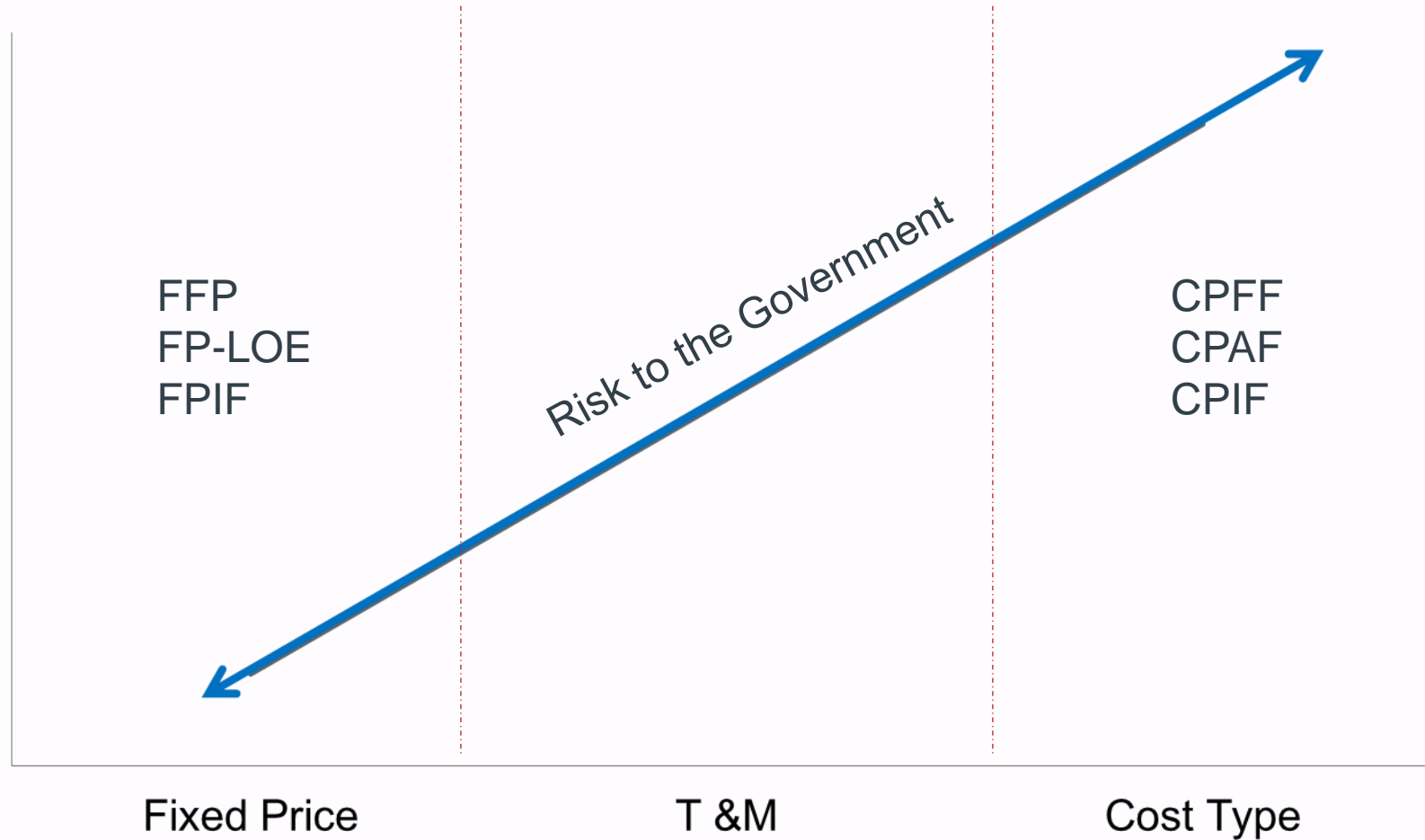
Pricing Structure

- Fixed
- Cost-incurred

Payment Structure

- Milestone/performance based
- Reimbursement of actual costs

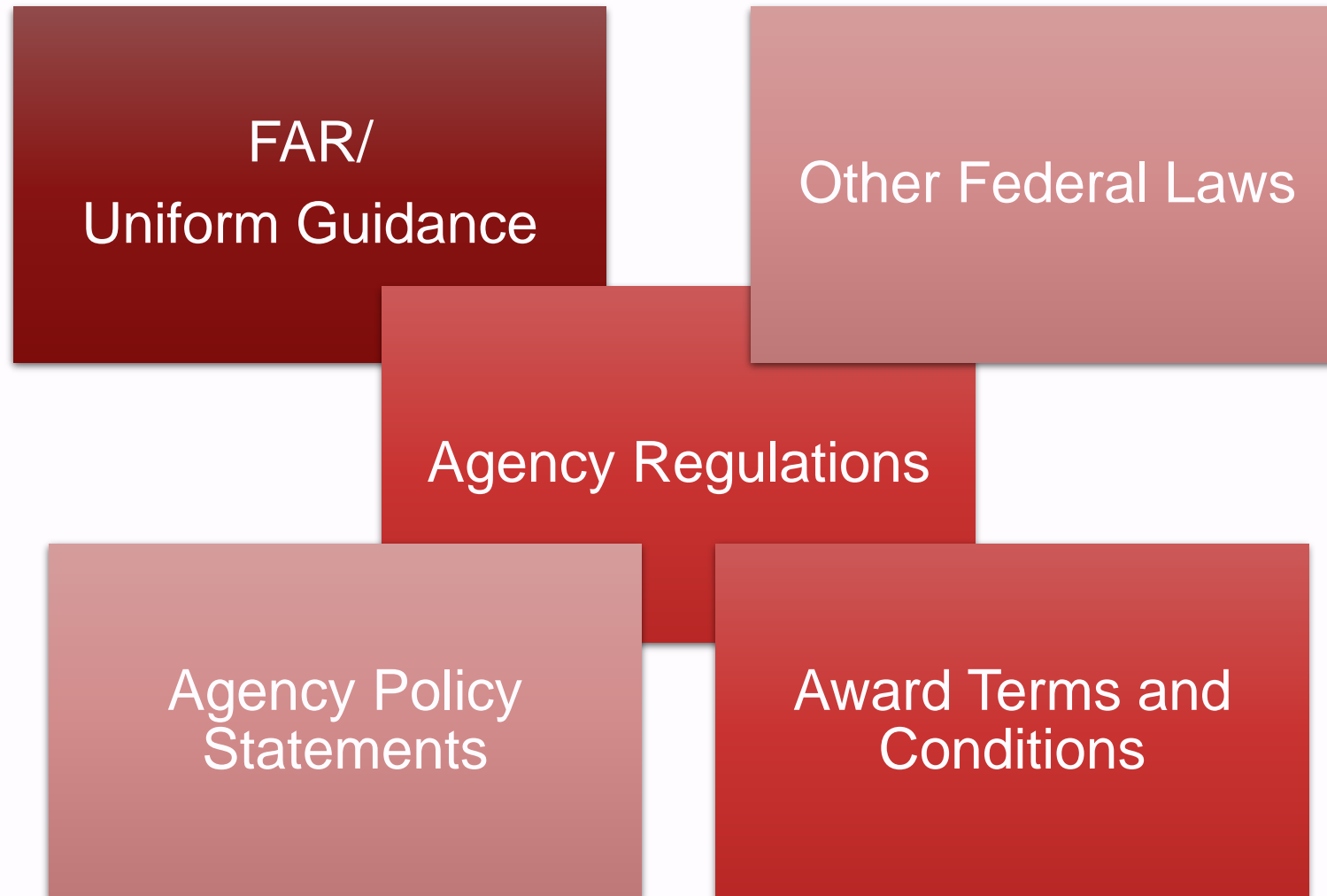
Contracting Vehicles: The “Risk Continuum”



Awarding Agency

- Each agency has its own supplemental regulations under the FAR and Uniform Guidelines
 - Found in regulatory supplements under 48 CFR (contracts) and 2 C.F.R. (grants, but see 45 CFR for HHS)
 - May impose additional requirements or deviations from the 'baseline' regs
- Agreements often include agency-specific clauses that reflect laws, regulations, or agency policy positions
- Different government agencies (and even offices within the same agency) also often have differing:
 - Informal policies, procedures, directives
 - Internal cultures, politics, and contractor expectations

Overlapping Levels of Requirements



Work Scope/ Dollars Involved

- The provisions incorporated into an agreement are determined based on the nature of the work to be performed
 - Complex R&D for a new therapeutic
 - Commercially available off-the-shelf products
 - IT and management services
 - Major weapons systems development
- Many compliance requirements also have triggering dollar thresholds
 - *“Mo money, mo regs”*

Position in the Supply Chain

- 2 basic ways to do business with the government
 - Direct awardee (i.e., prime contractor/ recipient/ performer)
 - Supply products and services as a subcontractor/ recipient/ vendor to a prime
- Higher-tier contractors/recipients have substantial oversight responsibilities for compliance with federal requirements
 - Regulatory and agreement-specific flowdowns
 - Pre-award diligence and post-award audits
- Being a lower-tier sub can help shield the organization from certain compliance obligations, BUT
- Subs lack privity with the government and can be subject to buyer overreach

“

What are some of the common compliance obligations and potential landmines I should be aware of?

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INTELLECTUAL
PROPERTY
PROTECTION



INFORMATION
SECURITY /
CYBERSECURITY



SUPPLY CHAIN
INTEGRITY AND
PROCUREMENT



LABOR AND
EMPLOYMENT
OBLIGATIONS



ACCOUNTING
AND AUDITS



OTHER UNIQUE
SOVEREIGN
RIGHTS

Intellectual Property Protection

- The U.S. government generally* does not acquire **title** to a contractor's intellectual property
- The government typically receives license rights to use, reproduce, modify, release, and disclose the information
 - Typical issues relate to the scope of the government's license rights to developed intellectual property ("data rights")
- The scope of the USG's license depends on a variety of factors
 - agency-specific supplemental laws and regulations
 - source of funding for development of the technology
 - whether the information relates to a commercial item
 - the parties' negotiations for specialized license terms or restrictions

Patentable Inventions

- 1980: Bayh-Dole Act
35 U.S.C. §200
 - Granted small businesses and nonprofit organizations a right to elect to keep ownership of “**subject inventions**” in exchange for granting broad license rights to the government
 - Later extended to large and for-profit businesses (Executive Order 12591)

“Subject Invention”

Any invention of the contractor

- conceived or first actually reduced to practice; *or*
- at least tentative determination that the plant variety has been reproduced with recognized characteristics.

in the performance of work under a government contract

“Invention”

Any invention or discovery that is or may be patentable or otherwise protectable under title 35 of the U.S. Code, or any variety of plant that is or may be protectable under the Plant Variety Protection Act

Where the contractor retains title, the government “shall have” *at least a:*

nonexclusive,

nontransferable,

irrevocable,

paid-up

license to practice, or have practiced for or on behalf of the United States, any Subject Invention throughout the world

Patentable Inventions – What to Know

Except in very narrow circumstances, granting rights to the “government” means granting rights to the *entire* government, not just the contracting agency or office

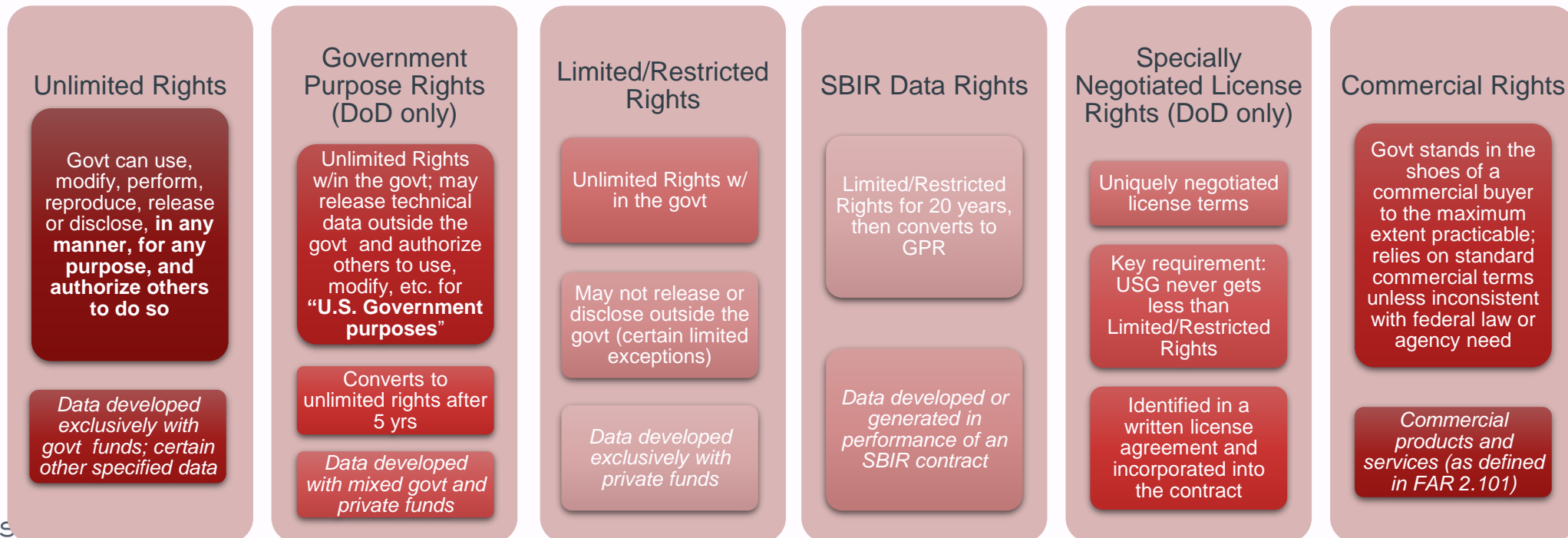
Election (and retention) of title requires timely notifying the government of Subject Inventions and diligently pursuing and maintaining patent applications – *this requires a defined process and is a team sport with your scientists and engineers*

The government retains “march in rights” to ensure the IP is being used. In certain circumstances, the government may require a contractor to assign title to the government or grant licenses to third parties:

- When the contractor is not located in the U.S. or is subject to the control of a foreign government;
- In “exceptional circumstances,” when an agency determines that doing so will better promote the policy and objectives of U.S. patent policy;
- When deemed necessary for security reasons by an authorized government foreign intelligence or counterintelligence authority;
- Contracts for operation of a Government-owned facility of the Department of Energy primarily dedicated to naval nuclear propulsion or weapons related programs; or
- Pursuant to statute or in accordance with agency regulations.

Technical Data and Computer Software

- Contractors grant the government **royalty-free, world-wide, nonexclusive, irrevocable license rights** to use, reproduce, modify, release, and disclose technical data and computer software developed, generated, or delivered under a federal contract
- Multiple data rights categories (listed in descending order of government rights)



Technical Data and Computer Software – What to Know

Except in very narrow circumstances, granting rights to the “government” means granting rights to the *entire* government, not just the contracting agency or office (same as patents)

Once the government has obtained a level of rights in technical data or computer software, those rights are in perpetuity – you cannot further restrict them under other government contracts

These rights are only vis-à-vis the entity and the government. Subcontractors are not required to grant the same rights to higher-tier contractor customers (though many customers will try!)

Protection does not happen automatically – you must be intentional and consistent

- Identify, disclose, and incorporate into the contract deliverable IP that qualifies for protection prior to award or as soon as possible upon awareness
- AND
- **Consistently** mark data subject to protection in every transmittal to the customer
- AND
- Be prepared with records to support the validity of your assertions if questioned

Information Security/ Cybersecurity

- Ever-increasing concerns about contractor protection of sensitive government data
 - National security/ infrastructure data, PII/ HIPAA, Federal information assets, IP
- No universal government approach – each agency applying its own rules and standards, but many common threads
- Requirements include
 - Federal Risk and Authorization Management Program (FedRAMP) authorization/ equivalence for cloud offerings
 - Rapid reporting of “cyber incidents” (e.g., 72 hours from discovery)
 - Contractually imposed compliance with published federal standards (e.g., NIST SP 800-171) for information systems handling “Controlled Unclassified Information”

Supply Chain Integrity

- Heightened focus on supply chain integrity as a national security concern
- Prohibitions on purchasing certain products/services from designated companies
 - Kaspersky Lab (and affiliate) products/services cannot be used or delivered in performance of a government contract
 - Telecommunications and video surveillance equipment and services from Huawei, ZTE, and other Chinese entities (and affiliates) cannot be used or delivered under a government contract
 - For direct/prime entities, prohibition extends to *any* internal use of such equipment and services as an essential component of the organization's systems
 - Suspended, debarred, or otherwise “denied” parties
- Supply chain risk and compliance requirements still predominantly agency specific and consistently evolving (i.e., a compliance moving target):
 - DoD: Supply chain risk management, counterfeit parts/sourcing, software bill of material
 - Commerce Department: Supply Chain Risk Assessment
 - Informal agency policies/procedures (NASA, intelligence community, USPS).

Procurement

- Contractor/Recipient is ultimately responsible for performance
- Must exercise sufficient oversight of sub-tiers and generally act as if it is the government:
 - Conduct risk assessments
 - Perform audits (or ensure that audit requirements are met)
 - Flow down relevant regulatory requirements and perform diligence to confirm compliance

Key differences from typical commercial practices:

- *Competition*: general requirement to use open and competitive procedures in accordance with written processes (certain exceptions)
- *Price reasonableness obligations*: must perform a cost/price analysis in each procurement to determine that the price paid is “fair and reasonable”
- *Utilization, tracking, and reporting of small businesses*: federal policy requires contractors to take proactive steps to maximize awards to small business and certain socioeconomic business categories
- *Country of origin requirements*: federal Buy America(n) statutes, Trade Agreements Act preference/mandate to purchase domestic or designated country products and services

Labor and Employment Obligations

- Equal Opportunity tracking and reporting
 - 3 mandates (applies to both contracts and assistance agreements)
 - Executive Order 11246, as amended;
 - Section 503 of the Rehabilitation Act of 1973; and
 - Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212
 - Prohibit federal contractors and subcontractors from discriminating on the basis of race, color, religion, sex, national origin, disability, or veteran status and require sub/contractors to take affirmative steps to ensure equal opportunity in their employment processes
 - Require annual filing/certification of EEO-1 and VETS-4212 reports and written Affirmative Action Plans
 - *Regularly* audited and heavily enforced by the Dept. of Labor Office of Federal Contractor Compliance Programs (OFCCP)

Other Labor and Employment Considerations



Wage rate requirements

- Service Contract Labor Standards
- Davis-Bacon Act (Construction)



Heightened diligence when hiring former government/military personnel



Whistleblower rights



Govt ethics (Gift policies, anti-bribery, anti-kickback)



U.S. persons/ U.S. citizenship requirements

Accounting for Assistance Agreements

2 CFR § § 200.400-476, Cost Principles

- Cost principles vary by recipient type
- Non-federal entity must administer the federal award through the application of sound management practices
- Responsible for administering federal funds in a manner consistent with underlying agreements, program objectives, and the terms and conditions of the federal award
- Cost principles must be used in determining the allowable costs of work performed by the non-federal entity under federal awards:

(a) Necessary and reasonable for the performance of the Federal award

(b) Conform to any limitations or exclusions in the principles or in the Federal award as to types or amount of cost items.

(c) Be consistent with policies and procedures that apply uniformly to both federally-financed and other activities of the non-Federal entity.

(d) A cost may not be assigned to a Federal award as a direct cost if any other cost incurred for the same purpose in like circumstances has been allocated to the Federal award as an indirect cost.

(e) Be determined in accordance with GAAP

(f) Not be included as a cost or used to meet cost sharing or matching requirements of any other federally-financed program in either the current or a prior period.

(g) Be adequately documented.

Reasonable.

Allowable.

Allocable.

Accounting for Contracts

FAR Part 31, Contract Cost Principles and Procedures

- Cost principles generally grouped by organizational type (e.g., commercial concerns, educational institutions)
- Level of complexity and govt involvement depends on nature and size of contract(or)
- Prescribes specific treatment of certain cost categories
- *Reasonable, Allowable, Allocable*

FAR Part 30, Cost Accounting Standards

- Certain types of contracts and award values will trigger additional obligations, including audit/approval of rates and filing a disclosure of accounting practices

Audits

Assistance Agreements

- Recipients that expend \$750,000 per year are required to obtain an audit
- Audit may be either –
 - Single audit: entity-wide (required unless eligible for program-specific)
 - Program-specific: permitted when entity expends funds under only one federal program
- Audit services should be obtained in accordance with procurement rules
- Federal agencies can (and will!) still conduct audits of non-financial compliance as needed
- OMB provides Compliance Supplement for audit guidance

Contracts

- Government generally retains broad oversight and audit rights of contractors
- Specific audit frequency and scope will vary depending on the contract(or), but can include:
 - *Business Systems*: how well do systems implement and support ongoing compliance
 - Accounting
 - Estimating
 - Purchasing
 - Property Management
 - *Financial*: incurred costs, billing alignment with rates/timecards, proposal pricing
 - *Regulatory*: compliance with regulatory obligations contained in contract flowdowns
 - *Contract-specific*: quality/performance

Other Unique Sovereign Rights

Performance required
(even during major
disputes)

Fiscal restrictions can affect
revenue recognition and
liability/indemnity protections
(e.g., no open-ended
indemnification by the
government)

Certain sovereign rights that cannot be
negotiated away

- Termination for Convenience
- Performance and resources must be prioritized over other existing work in certain instances
- Assignment of agreements generally prohibited (novation only)
- Defined disputes process
- Federal governing law
- “The Christian Doctrine”

No apparent
authority with
respect to
government
personnel

Remedies for Noncompliance

- Negative past performance ratings, affecting ability to win future contracts
- Contract termination
- Breach of contract claims
- Suspension and debarment
- Civil/criminal False Claims Act actions

“

Is it really worth all this effort to do business with the government?

”

Why Would Anyone Want to Transact with the Government?

- **The U.S. government is the single largest purchaser of goods, property and services and funder of scientific research and financial assistance in the world**
- Government agreements can be a strategic funding source to accelerate your product roadmap
- There are barriers to entry, but you don't have to dive straight into the deep end
 - Start as a subcontractor/subrecipient
 - Be selective about opportunities you pursue: customers, scope, dollars, agreement types
 - Commercial products and services
 - Agreements subject to fewer regulations
- The chasm can shrink if you qualify for a statutory/regulatory preference
 - Qualified small business
 - “Nontraditional contractor”
 - Sole or limited source for specific offerings
- Once you have conquered the barriers, the federal government can be a reliable source of revenue, especially if you are a first or early mover among your competitors

Are you ready?

A photograph of a man with dark, wavy hair and a serious expression, wearing a dark blue shirt. He is pointing his right index finger directly at the camera. The background is a plain, light-colored wall. The text "YOU make the call!" is overlaid in a bold, red, sans-serif font across the upper portion of the image.

YOU make the call!

Thanks!

Reach out with Questions!

Erin L. Felix is a shareholder in the Government Contracts practice at Polsinelli PC. Erin managed complex contracts and subcontracts for 15 years before practicing law and draws upon her deep business experience to provide practical solutions for clients in all facets of government contracting.

She advises on a wide array of compliance and acquisition issues, including IP/data rights licensing, supply chain and cyber security, and TINA, with a focus on the commercial technology and aerospace and defense industries. Erin also represents clients in protests, disputes, and other public contracting dispute resolution.

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The background of the slide is a dense, repeating pattern of three-dimensional cubes. The cubes are rendered in a dark red color with a slight gradient, giving them a 3D appearance as if they are floating or stacked in a grid. The lighting is soft, creating subtle shadows and highlights on the faces of the cubes.

Backup Slides

Key Considerations – IP Protection

- USG's rights are not self-executing
- Pre- & post-award identification are required
- Data must be marked as prescribed
- Be prepared to substantiate assertions if subject to a USG challenge
 - Sufficient accounting and engineering records to support funding sources for development of item/computer software

What Does “Inconsistent with Federal Procurement Law” Mean?

Commonly Cited Laws

- Anti-Deficiency Act
- Contract Disputes Act
- Prompt Payment Act
- Competition in Contracting Act

Typical Issues

- Automatic renewal
- “Kill switch” provisions
- Choice of Law/Choice of Forum
- Remedies
 - Injunctive Relief
 - Termination
- Warranties
- Open-ended indemnification
- Evolving License Terms

OMB Compliance Supplement

- 12 Compliance Requirements (for audit):
 - Activities Allowed or Unallowed
 - Allowable Costs/Cost Principles
 - Cash Management
 - Eligibility
 - Equipment and Real Property Management
 - Matching, Level of Effort, Earmarking
 - Period of Performance

OMB Compliance Supplement (cont)

- Procurement and Suspension or Debarment
- Program Income
- Reporting
- Subrecipient Monitoring
- Special Tests and Provisions

Remedies for Noncompliance — Termination for Default

- Similar to commercial termination/default contract provisions
 - Failure to perform
 - Failure to comply with contract requirements
- Most default or “for cause” termination provisions require the government to first issue a cure notice to the contractor, and provide a reasonable opportunity to cure
- Upon default, the contractor’s financial recovery is limited
 - Offset by government mitigation damages
 - Limits on profit
 - Reprocurement costs

Remedies for Noncompliance — Suspension and Debarment

- Present responsibility determination, *not* punishment. But...
- Broad agency discretion rarely overturned by courts
 - No practical appeals process
- Federal government-wide, *not* just the affected agency
 - One agency can debar for all
- Typically company-wide, *not* just offending business unit
- Collateral consequences: debarment from state and local procurements
- Often resolved through administrative agreements between the company and the government

Remedies for Noncompliance — False Claims Actions

- What is a “False Claims” Action?
 - Cause of action brought against a person or company for knowingly making false claims or statements to the U.S. Government that result in overpayments of government funds
 - Broad scope definition
 - A “claim” includes invoices for payment, certifications related to invoices, and statements in proposals related to invoices, socio-economic status, quality, specifications, etc.
 - Actual knowledge not required – “reckless disregard” or deliberate ignorance is sufficient
- Both civil and criminal liability are available in False Claims actions

Remedies for Noncompliance — False Claims Actions

- Government enforcement tool of choice – the mere threat of a False Claims action can influence behavior
- Low burden of proof: preponderance of the evidence
- Double or treble damages plus penalties per false claim
 - \$11,803 to \$23,607 per invoice
 - Whistleblower bounty up to 30%
- Mandatory Disclosure obligations
 - Government contractors are required to disclose credible evidence of overpayments or fraud (criminal or civil)
 - Definition of “credible evidence” and “fraud” varies in different jurisdictions

Frequent Issues and Practical Tips

- Higher-tier Customers
 - Review and negotiate appropriate level data rights for the procurement
 - Customer may attempt to obtain same rights as USG – push back!
- Disclosure
 - Early and detailed disclosure is critical to avoid risk of waiver
 - Must be consistent when claiming data rights restrictions across multiple contracts – once broader rights are granted, they cannot be withheld on other contracts
- Data Marking and Legends
 - Each type of data rights has required document markings – failure to properly mark documents results in granting of unlimited rights
- Lower-tier Subcontractors
 - Assess and flow down appropriate data rights clauses