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ACC NCR BACK TO SCHOOL: GOVERNMENT CONTRACTS 101

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Introduction

- Today we'll be giving a 30,000 foot snapshot of the history, principles, and practices underlying the federal procurement and assistance systems
- We'll cover:
 - How we got here (and why)
 - What major laws govern this system today
 - Who the key players are
 - How to manage the risks and benefits in this system in the post-COVID-19 era

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Agenda

- Overview
- A Brief History of Government Contracting and Assistance Programs
- Government Objectives and Legal Framework
- Role of the Contracting Officer
- Public Policies
- Dispute Resolution
- Key Statutes and Regulations
- Managing Risk: Cornerstones of Federal Contract Compliance
- Grants and Cooperative Agreements
- Current and Emerging Issues
- Resources

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Key Basic Terms

- **Procurement transactions**

- The process the U.S. Government (“USG”) uses to obtain goods and services **for its own use** from private parties that it does not make for itself

- **Non-procurement (assistance) transactions**

- Payments (or things or value) provided to non-federal entities (states and localities, universities, businesses, etc.) intended to advance public policies and stimulate the economy
- Illustrations: health care, transportation, education, social and community development, environmental protection, pandemic relief (e.g., CARES Act – PPP loans, Section 3610, etc.)
- Many forms: We’ll focus briefly on grants and cooperative agreements today

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A Snapshot: Government vs. Commercial Contracting

- **Heavily regulated process**
 - Market Research, Solicitation, Bidding, Negotiation, Award, Administration
 - More structure than commercial contracting
- **Public policy requirements**
 - Equal Opportunity/Affirmative Action
 - Domestic preferences
 - Supplier diversity (i.e., small and disadvantaged businesses – 23% goal)
 - National security
- **Oversight**
 - Strong audit and enforcement functions

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Why Go Through With It?

- **Scale, stability, and diversity of the marketplace**
 - \$1 trillion+ a year across procurement and assistance transactions
- **Flexible acquisition methods**
 - Commercial e-commerce portals (for micro-purchases of \$10,000 or less)
 - Commercial Item preference
 - General Services Administration Schedule Contracts
 - Government-Wide Acquisition Contracts
 - “Other transactions”
- **Opportunities for small and disadvantaged businesses**
 - System includes strong support for new market entrants and small businesses

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A History Lesson

*“If someone were asked to devise a contracting system for the federal government, it is **inconceivable** that one reasonable person or a committee of reasonable people could come up with our current system.”*

James F. Nagle

Epilogue; A History of Government Contracting



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The Revolutionary War Period

- Commissariat System:
 - Run by Commissary and Quartermaster Generals
 - Government assumed broad range of contractor roles by buying, storing, transporting, and distributing goods
 - Merchants dominated these roles
- Commission-based payments (leading to high prices)
- Conflicts of interest, nepotism and favoritism rampant
- Early procurement marked by profiteering, failed price controls, supply shortages, and poor quality

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The Revolutionary War Period



Contracting is “the cheapest, most certain, and consequently the best mode of obtaining those articles which are necessary for the subsistence, covering, clothing, and moving of an Army.”

Robert Morris
Superintendent of Finance

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An Early Procurement...

- **July 2, 1781:** food solicitation for troops
- **July 7, 1781:** six proposals received on due date
- **Wager, Serrel, and Dering selected**
 - Offered “terms most reasonable as to Price and equally convenient [sic] as to Time”
- **Formation and administration issues:**
 - Government could not agree to contract terms with Wager
 - Serrel replaced



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Influence Lives On Today

- Public advertisement
- Sealed bids
- “Best” proposal selected
- Qualification requirements:
 - Offeror must possess “substance and talents” (precursor to responsibility)
 - “Best terms” include consideration of extended payment period
- Sole source/direct awards allowed in emergencies

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Continued Challenges...



Attracting vendors (Hamilton advocates advance payments)

Performance problems

Cost overruns

Conflicts of interest

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Late 18th – 19th Century

- **1791:** St. Clair's defeat – first Congressional investigation of executive branch involved government contracting
- **1808:** "Official Not to Benefit" statute
- **1809:** First government-wide procurement statute
 - Limited contracting powers to authorized agents
 - Established preference for contracting by public advertisement
 - Early draft required POTUS to approve all purchases
- **1863:** False Claims Act passed

Early 20th Century

- **1905:** First government contracting executive order (prohibition on conflict labor)
- **1909:** General Schedule of Supplies (GSA precursor)
- **WWI:** Termination for convenience; labor standards
- **Interwar period:** Socioeconomic programs (Buy American Act, Works Progress Administration)
- **WWII and beyond:** Cost-plus contracts, Defense Production Act, expansion of contractor workforce

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Modern Statutory Framework

- Armed Services Procurement Act (1947)
- Federal Property and Administrative Services Act (1949)
- Truth in Negotiations Act (1962)
- Contract Disputes Act (1978)
- Federal Acquisition Regulation (1984)
- Competition in Contracting Act (1984)
- Federal Acquisition Streamlining Act (1994)
- Clinger-Cohen Act (1996)

History of Assistance Programs

- Very limited federal assistance in early U.S. history
- Land grants dominate (e.g., Homestead and Morrill Acts)
- Hatch Act (1887) expands assistance to research
- Weeks Act (1911) introduces assistance conditions
- New Deal (first major expansion)
- Great Society (second major expansion)
- Late 20th Century sees more oversight/reform
- American Recovery and Reinvestment Act/CARES Act



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Government Objectives and Legal Framework

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Government Objectives (FAR 1.102)

- **Vision:** To deliver on a timely basis the best value product or service to the customer, while maintaining the public's trust and fulfilling public policy objectives. *Participants in the acquisition process should work together as a team* and should be empowered to make decisions within their area of responsibility.
- **Four goals:**
 - Customer satisfaction for cost, quality, and timeliness
 - Efficiency (i.e., administrative costs)
 - Conduct business with integrity, fairness, and openness
 - Fulfill public policy objectives

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Legal Framework and Competition Rules

- **Key statutory and regulatory framework:**

- Chapters 10 (Defense) and 41 (Civilian) of U.S. Code
- Title 48 of the Code of Federal Regulations – (the “FAR”) (4400+ pages long with supplements)
- Agency guidance, Executive Orders, etc.

- **Full and Open Competition (CICA) – FAR Part 6**

- **Exceptions (limited):**

1. Only One Source (Sole Source)
2. Unusual Urgency
3. Industrial Mobilization, Etc.
4. International Agreement
5. Required By Law
6. National Security
7. Public Interest (Agency Head, Congressional Notice)

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Contract Types and Methods

- **Acquisition Methods**
 - Negotiation
 - Simplified acquisitions
 - Sealed bids
- **Fixed-Price, Cost-Type, and Time & Materials**
 - Varies based on type of goods and services (and allocation of risks)
 - Fixed-Price = more risk to contractor
 - Cost-Type = more risk to the Government
- **Solicitations set ground rules – read the RFP!**

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Contract Type and Risk



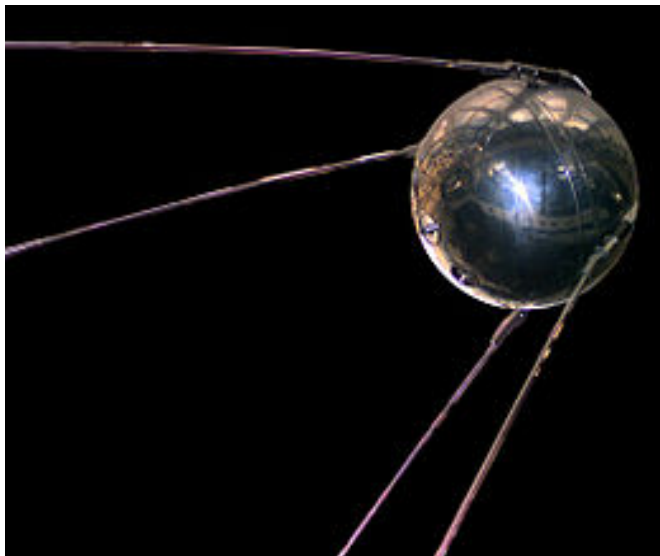
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Commercial Item Contracting

- **Mid-1990s efforts to simplify USG buying and expand the market**
- **“Commercial item” defined as:**
 - “Any item . . . that is of a type customarily used by the general public or by non-governmental entities” and has been sold or offered for sale to the public
 - Services “of a type” offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices
- **Simplified rules apply**
 - Limited audit rights and flow-down clauses
 - Use of contractor’s commercial terms

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Expansion of “Other Transactions” (“OTs”)



- Binding agreements (exempt from federal procurement law)
- Engage “non-traditional” contractors (e.g., consortia)
- Key features: Flexibility and speed
- 11 agencies now authorized to use OTs
- Common subjects:
 - **Research** (10 U.S.C. § 2371);
 - **Prototype** (10 U.S.C. § 2371b);
 - **Production** (10 U.S.C. § 2371b(f))

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Role of the Contracting Officer

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Role of Contracting Officer (“CO”)

- Central figure in contract administration
- Contract authority (FAR 1.602)
- Only COs authorized to enter into, administer, change, or terminate contracts
- COs may bind the Government only to the extent of the authority delegated to them (via warrant)
- COs ensure compliance with all laws, executive orders, regulations, and procedures

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Best Practices for Communication with CO

- Remember – only the CO can bind the Government contractually
- Get it in writing
- Confirmation letters/memos
- Watch conflict between customer satisfaction and contract/legal/payment Issues
- Speak with one voice

Public Policies

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Public Policies

- “Responsibility”
- Procurement Integrity: Anti-Bribery, Gifts/Gratuities
- Labor Laws: EEO, Affirmative Action
- Supplier Diversity (i.e., small and disadvantaged businesses)
- Domestic Preferences: Buy American and Trade Agreements
- National Security

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Dispute Resolution

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Bid Protests

Mechanism to resolve disputes in solicitation and award of government contracts

- **2 Types:**
 - Pre-Award
 - Solicitation defects
 - Post-Award
 - Award deficiencies
- **Forums:** (1) Agency-level, (2) GAO, (3) U.S. Court of Federal Claims
- **Considerable agency discretion** (focus on process)
- **@ 2,500 GAO protests a year** (small percentage of awards)

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Requests for Equitable Adjustment and Claims

- USG has broad ability to change and terminate contracts – including for the “convenience” of the Government
- Contractors may be entitled to reasonable compensation
- Disputes governed by Contract Disputes Act, 41 U.S.C. § 7101
- Written demand requesting adjustment of contract price/time, interpretation of a contract term, or other relief
- Appeal within 6 years of claim accrual to Boards of Contract Appeals (90 Days) or COFC (1 Year)

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Enforcement and Oversight: Key Players

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Enforcement and Oversight – Key Players

- **Congress**

- Government Accountability Office (“GAO”)

- **Executive Branch**

- Audit Agencies (Defense Contract Audit Agency, Defense Contract Management Agency)
 - Offices of Inspectors General
 - Department of Justice (criminal and civil)
 - Suspension and Debarment Officials

- **Third Parties**

- Whistleblowers
 - The Press

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Enforcement and Oversight: Statutes and Regulations

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Key Compliance/Enforcement Statutes and Regulations

- False Claims and Statements
- Mandatory Disclosure
- Suspension & Debarment
- Procurement Integrity Act
- Organizational Conflicts of Interest
- Truthful Cost or Pricing Data Act

False Claims and Statements

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False Claims Act, 31 U.S.C. §§ 3729-3733 (“FCA”)

- FCA penalizes any person who “knowingly presents or causes to be presented, a false or fraudulent claim for payment or approval . . . ,” including making a false record or statement in order to facilitate the payment of a false claim by the Federal Government
 - Liability can also attach for reckless disregard of the law
- FCA also permits private citizens to bring a “*qui tam*” (whistleblower) suit in the name of the United States
 - Relator shares in the proceeds of any recovery
 - DoJ may choose to intervene as of right in any *qui tam* suit
- Violators of the FCA are liable for treble damages plus a civil penalty of @ \$11,000 to \$22,000 *per claim*

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False Claims Act

- **Two types of False Claims:**
 1. Factually False Claims (billing for work not performed)
 2. Legally False Claims (noncompliance with contract or regulatory condition)
- **Express vs. Implied Certification:** Under the “implied certification” theory, liability can arise for submitting a claim that fails to comply with all prerequisites for payment, even if the contract does not contain an express requirement for certification with the underlying law or regulation
 - Where is the line between a contract breach and fraud?

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False Claims Act – Example

- Contract states the employees must hold special licenses to perform work
- Contractor submits an invoice for work performed by 25 employees, 1 of whom does not hold the required license
- CO is very happy with the work performed

Question: Is this a false claim?

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False Statements, 18 U.S.C. § 1001

- **Elements:**

- Company submitted a statement to an agency
- Statement was false
- Statement was material
- Statement was made knowingly and willfully

- **Penalties:** Up to 5 years in prison and fines

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Mandatory Disclosures

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Mandatory Disclosure Rule

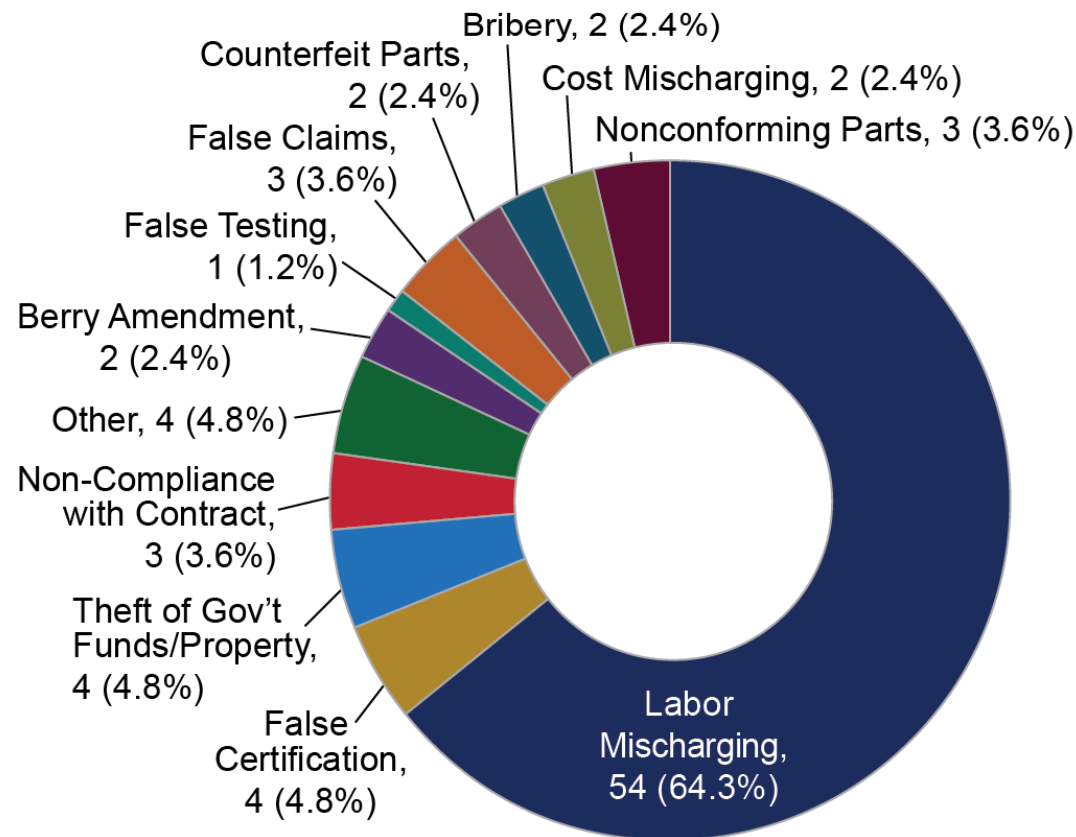
- **Requires contractors to “timely” disclose “credible evidence” of:**
 - Violations of federal criminal law involving fraud, conflicts of interest, bribery, or gratuity violations relating to award, performance, and close-out of government contracts
 - Violation of the civil False Claims Act
 - “Significant overpayments” on the contract
- **“Timely disclose,” “credible evidence,” and “significant overpayments” are not defined by the regulations**
 - Significant overpayment “implies more than just dollar value and depends on the circumstances of the overpayment as well as the amount”

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Mandatory Disclosure Rule, Cont'd.

- Covered contractors also must establish internal control systems
- The Rule also amends the grounds for suspension and debarment to include a failure to timely disclose these violations by “principals” (i.e., senior-level employees and management) within 3 years after final payment

Contractor Disclosures by Type (October 1, 2018–March 31, 2019)



Source:
<https://www.DoDig.mil/reports.html/Article/1862502/semiannual-report-to-the-congress-october-1-2018-through-march-31-2019/>

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Mandatory Disclosure Rule – Examples

Example 1:

The company discovers that it submitted and the Government paid a duplicate invoice (\$75) on a project that closed out 2 years ago

Question: Is the firm obligated to disclose?

Example 2:

A warehouse employee is aware that certain products being supplied under the contract do not comply with an important specification. The employee sends an e-mail regarding this issue to a supervisor on the project, but no disclosure is made. The Government, on its own, later discovers the products are noncompliant

Question: Is this a violation of the mandatory disclosure rule?

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Suspension & Debarment

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Suspension & Debarment (“S&D”)

- Central to contracting eligibility
- FAR 9.406-2 and 9.407-2 set forth grounds for suspension and debarment
 - Convictions and civil judgments relating to Government contracts and other laws (e.g., antitrust)
 - Serious violations of terms of government contract or subcontract (i.e., willful failure to perform in accordance with terms; a history of failure to perform)
 - Catch-all: Commission of any other offense “indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a government contractor
- Major expansion in S&D programs and actions in last 10 years

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Procurement Integrity Act

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Procurement Integrity Act

Two Rules:

- 1. Don't solicit or obtain proprietary or Source Selection Information regarding a procurement (industrial spying)**
 - **Source Selection Information:** non-public information used to evaluate proposals (prices, technical evaluations, source selection plans, rankings)
 - **Proprietary Information:** information from a competitor that is not customarily released to the public and would cause competitive harm if released (technical, business or pricing strategies, trade secrets, cost or pricing data)
- 2. Cannot offer future employment to covered officials without strict compliance with law**

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Procurement Integrity Act – Example

- Company A was a competitor for a GSA contract
- Two other vendors submitted proposals, and gave presentations that were transcribed
- Employees of Company A obtained copies of the transcripts of its competitors' presentations and gave them to Company A's Program Management
- The Program Manager immediately notified Company A's CEO of what had transpired
- The CEO immediately told the GSA CO. Company A won the contract

Question: Should Company A keep the contract?

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Organizational Conflicts of Interest

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Organizational Conflicts of Interest (“OCIs”)

- **FAR 2.101**

- “Organizational conflict of interest” means that “because of other activities or relationships with other persons, a person is ***unable*** or ***potentially unable to render impartial assistance*** or advice to the Government, or the person’s ***objectivity in performing the contract work is or might be otherwise impaired***, or a person has an ***unfair competitive advantage***.”

- **Types:**

- Biased ground rules
- Unequal access to information
- Impaired objectivity

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Organizational Conflicts of Interest, Cont'd.

- Address OCIs through avoidance, limitations on future contracting, mitigation, or government assessment that risk of conflict is acceptable
- OCI distinguished from PIA violation
 - In an OCI situation, a contractor may be accused of having access to or knowledge of information giving it a competitive advantage. In contrast, a PIA violation requires an ***affirmative act*** by the offeror to obtain source selection information – simply having knowledge is not enough. *Jacobs Tech. Inc. v. United States*, 100 Fed. Cl. 198, 214 (2011)

Truthful Cost or Pricing Data Act

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Truthful Cost or Pricing Data Act

- Formerly known as Truth In Negotiations Act (“TINA”)
- Where applicable, TINA requires offerors to:
 1. Submit cost or pricing data “along with data other than certified cost or pricing data as necessary to establish a fair and reasonable price”; and
 2. Certify cost or pricing data is accurate, complete, and current
- Cost or Pricing Data = vendor quotations, data supporting projections, cost trends, make-or-buy decisions, etc. Must be verifiable, factual information, not judgments
- For Contracts entered into after June 20, 2018: threshold for triggering TINA requirements is \$2M (otherwise, subject to \$750,000 threshold)

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Managing Risk: The Cornerstones of Federal Contracts Compliance

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Cornerstones of Federal Contracts Compliance – Overview

- 1. Acquisition Integrity**
- 2. Fair Competition**
- 3. Contract and Supply Chain Management**
- 4. Communication**

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Cornerstone One: Acquisition Integrity

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Integrity in Dealing with Acquisition Officials

- Fundamental Principle: Fair competition based on the law and merits
- Offering, promising, or giving anything of value to a Government Official is prohibited (gifts and gratuities, bribes, etc.)
- Anything of Value Means:
 - Entertainment
 - Meals
 - Gifts
 - Money
 - Stocks
 - Sporting events
 - Theater events
 - Forbearance of debt
- Limited exceptions . . . coffee and refreshments, inexpensive promotional items, greeting cards, certificates, etc. (“20/50 rule”)

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Cornerstone Two: Fair Competition

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Anti-Kickback Act of 1986, 41 U.S.C. § 8701-8707

Anti-Kickback Act criminalizes the practice of paying or receiving money to improperly obtain or reward special treatment

- **Kickback:** anything of value “for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract”
- **Penalty:** Felony punishable by fines up to \$100K and imprisonment up to 10 years
- **Violations may also result in civil penalties, program exclusion, and liability under FCA**

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Third-Party Relationships

- Implement policies and procedures to avoid liability relating to third-party relationships
- Prohibition against bid rigging (FAR 52.203-2)
- Restrictions on use of contingent fee arrangements (FAR 52.203-5)
- Maintain commercially standard practices for pursuing government contracts (e.g., teaming agreements, purchasing policies)

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Cornerstone Three: Contract and Supply Chain Management

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Contract and Supply Chain Management

- **Prime contractor is responsible for performance**
 - Note: Subcontractors not in privity with the Government
- **Government may require consent to subcontract**
 - Don't assume you can subcontract!
- **Flow-down mandatory clauses**
 - If prime is required to make certifications, obtain comparable certifications from subcontractors
- **Revisit subcontract terms to account for changing business and legal risks**

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Cornerstone Four: Communication

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Communication

- Heavily regulated and complex area
- Contracting representatives (both Government and contractor/subcontractor) play central role in award and administration – act accordingly
- Keep comprehensive and accurate records
- Know points-of-contact in organization
- Ask questions!

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Grants and Cooperative Agreements

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A Word on Grants and Cooperative Agreements...

- Key authorities:
 - Federal Grant and Cooperative Agreement Act (1977)
 - Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2014) (“Uniform Guidance”)
- Purpose to transfer value from USG to states/localities and private business
- Considerable flexibility
- Cooperative agreements feature “substantial” USG involvement
- Less structure and case law requires special attention

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Current and Emerging Issues

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Current and Emerging Issues

- **Presidential Election Year!**
 - Administration change could lead to:
 - More diplomacy/soft power + less defense spending
 - Expansion (3x) of small disadvantaged business contracting goals
- **In any case, expect:**
 - More “Buy American” initiatives
 - Strong focus on cybersecurity and supply chain protection
 - Space, technology, and health care program investments

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Continued Strong Enforcement

- **Statistics (FY 2019):**
 - **782** new matters
 - **\$3 billion** in settlements and judgments
 - **\$2.1 billion** in *qui tam* recoveries
- **Enforcement Highlights (2020):**
 - **\$32 million jury verdict:** Fraudulent compensation costs under Medicare
 - **\$145 million settlement:** Kickbacks for use of electronic health records software
 - **\$29 million settlement:** Bid rigging in auction for DOE loan
 - **\$1.3 million settlement:** Overcharging time and effort on NIH grant
- **CARES Act oversight/enforcement**

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Information Security

Broad expansion of Cybersecurity Regulations

- **FAR 52.204-21 (Basic Safeguarding of Covered Contractor Information Systems):**
 - Applies to systems that process, store or transmit “federal contract information”
 - Contains basic safeguarding requirements (i.e., limiting system access to authorized users, updating malicious code protection mechanisms, verifying/controlling connections to external systems, etc.)

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Information Security, Cont'd.

Broad expansion of Cybersecurity Regulations, Cont'd.

- **DFARS 252.204-7012 (Safeguarding Covered Defense Information and Cyber Incident Reporting):**
 - *Must report cyber incident within 72 hours*
 - Comply with NIST SP 800-171
- **New Supply Chain Rules:**
 - FY 2019 NDAA Section 889 - prohibitions on the delivery and use of certain covered telecommunications equipment (e.g., Huawei, Hytera, ZTE, etc.)
 - FAR 52.204-23 (Kaspersky Lab Ban)

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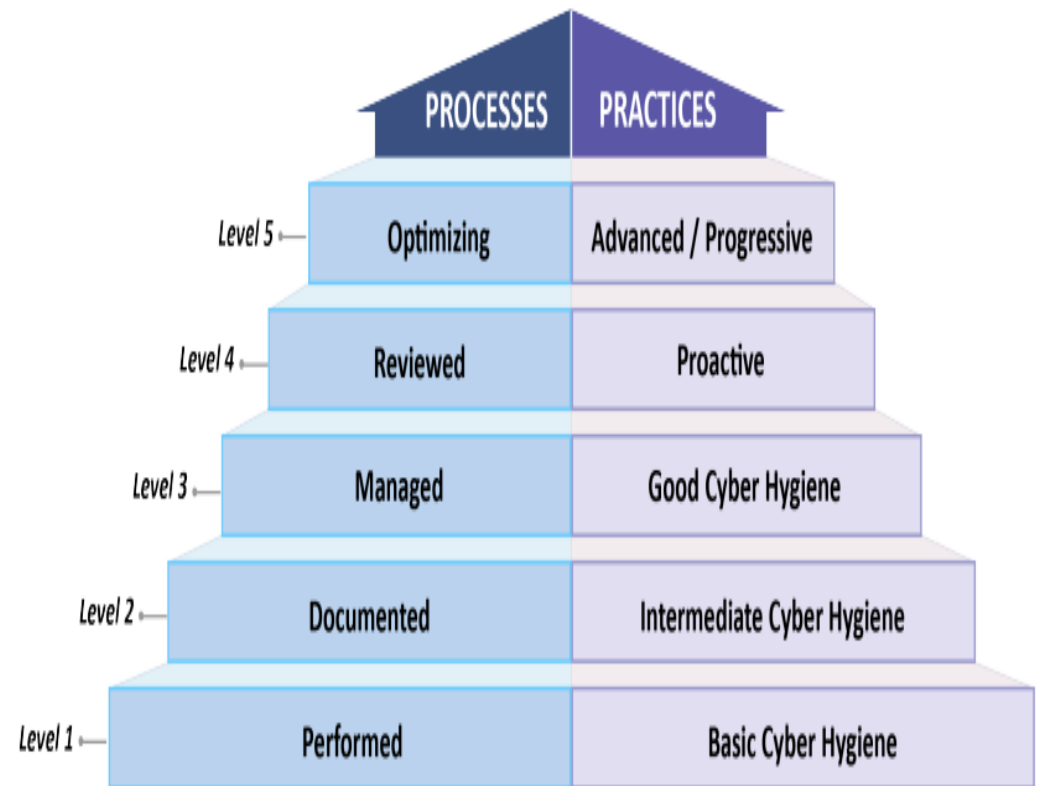
Department of Defense (“DoD”) Cybersecurity Maturity Model Certification (“CMMC”)

- New framework for defense contractors to become cyber certified
- Program to use third-party auditors to review contractor systems
- All DoD contractors (including subs) must be certified (with COTS exception)
- Certification level affects type of procurements contractor can pursue
- **Rolling out this fall; complete by 2026**

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CMMC Levels

- **Level 1:** Protect FCI
- **Level 2:** Transition to CUI
- **Level 3:** Protect CUI
- **Level 4:** Protect CUI and reduce risk of Advanced Persistent Threats (“APTs”)
- **Level 5:** Enhanced cybersecurity capabilities against APTs



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Cybersecurity Enforcement Landscape

- Cybersecurity as increase factor in source selection
- Heightened cyber enforcement environment
 - *U.S. ex rel. Markus v. Aerojet Rocketdyne Holdings, Inc.*, No. 15-cv-2245 (E.D. Cal. May 2019)
 - FCA claim for alleged NIST compliance misrepresentation
 - Contractor did not fully disclose extent of its noncompliance
- Interagency Suspension and Debarment Committee
 - Creation of cybersecurity subcommittee

Resources

- **USA.gov**
 - <https://www.usa.gov/become-government-contractor>
- **Small Business Administration**
 - <https://www.sba.gov/funding-programs>
 - <https://www.sba.gov/federal-contracting>
- **GSA Vendor Support Center**
 - <https://vsc.gsa.gov/>
- **Grants.gov**
 - <https://www.grants.gov/>
- **Beta.sam.gov**
 - <https://beta.sam.gov/>

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Questions?

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Justin's experience extends to the full range of issues contractors encounter in the public sector marketplace, including bid protests, government investigations, contract claims and disputes, cost accounting and audit matters, regulatory compliance, mergers and acquisitions, suspension and debarment, and the False Claims Act.

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