

# **ACC NCR FALL CONFERENCE**

## **In-House Primer**

# **Government Contracting: Key Legal Issues for Commercial Companies**

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# GOVERNMENT CONTRACTING: KEY LEGAL ISSUES FOR COMMERCIAL COMPANIES

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PRESENTED BY:

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# Speaker Bio

Full Bio Available at <http://www.perkinscoie.com/SLocke/>



## SETH LOCKE | PARTNER

Seth Locke is Co-Chair of Perkins Coie's Government Contracts Practice Group. In his counsel to government contractors, Seth protects clients' rights and interests in a range of matters, including bid protests, contract performance issues, cost accounting claims, and other disputes. He advocates before the Boards of Contract Appeals, the U.S. Court of Federal Claims, and the U.S. Government Accountability Office (GAO).

In addition, Seth counsels clients in transactions such as mergers and acquisitions, helping clients comply with the maze of government regulations and unique M&A issues, such as the novation process, surrounding these deals. Seth has extensive experience with the Federal Acquisition Regulation. Risk management and litigation prevention in the government contracting process are at the core of Seth's counsel to his clients, who include defense contractors, logistics contractors, global aerospace manufacturers, healthcare contractors, and several technology companies.

# Speaker Bio

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## ALEXANDER CANIZARES | PARTNER

Alexander Canizares is a Partner in Perkins Coie's Government Contracts Practice Group who represents government contractors and other companies in litigation, investigations, and regulatory matters involving federal departments and agencies. As a former trial attorney with the U.S. Department of Justice's (DOJ) Civil Division, Alex draws on his experience serving as lead counsel in complex cases involving the federal government to advise companies in the aerospace and defense, technology, healthcare, professional services, and other industries in a range of areas, including contract claims and disputes, False Claims Act (FCA) matters, bid protests, cybersecurity, and strategic counseling related to all phases of federal procurement.

Alex's practice includes representing clients ranging from early-stage companies to publicly traded Fortune 100 corporations in litigation, internal and government investigations, compliance issues and disputes arising under prime government contracts and subcontracts, mandatory or voluntary disclosures, intellectual property and government data rights, and government contracts diligence in mergers and acquisitions.

Alex writes and speaks frequently regarding government contracts matters and is an adjunct professor of Performance of Government Contracts at The George Washington University Law School. He serves as co-chair of the American Bar Association's Public Contract Law Section's (PCLS) Contract Claims and Disputes Resolution Committee and vice-chair of the Procurement Fraud and False Claims Committee.

# Speaker Bio

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## **BRENNA DUNCAN | ASSOCIATE**

Brenna Duncan is an experienced litigator specializing in a variety of government contracts matters. She is skilled in representing companies in every aspect of contracting with the federal government, from forming proposals and counseling on Federal Acquisition Regulation (FAR) to asserting bid protests and certified claims. Brenna's practice includes representing clients in bid protests at the agency level and before the Government Accountability Office, the U.S. Court of Federal Claims, and the U.S. Court of Appeals for the Federal Circuit. She also represents clients in Contract Disputes Act claims before the Armed Services Board of Contract Appeals (ASBCA), and in size determination appeals before the Small Business Administration (SBA) Office of Hearings and Appeals.

In addition, Brenna regularly counsels clients in mergers and acquisitions, helping clients comply with the maze of government regulations as it pertains to the unique transaction. She has also assisted in the defense of False Claims Act litigation before the U.S. Court of Federal Claims and counseled a client through a Civil Investigative Demand involving alleged SBA program eligibility falsification.

# Speaker Bio

## CAROLINE KELLER



Caroline Keller is a Managing Counsel for the Maritime and Agile Development Group Sectors within the Integrated Mission Systems Segment of L3Harris Technologies. In this role, Ms. Keller provides day-to-day legal and compliance advice to the functions and programs and resolves disputes. Ms. Keller joined Harris in 2016, prior to the company's merger with L3 Technologies, as Sector Counsel for its FAA-focused business and was promoted to a Managing Counsel role in 2019. Ms. Keller moved to her new role within the company in April 2022.

Prior to joining L3Harris, Ms. Keller worked as an Associate at two top 100 law firms in Washington, DC and New York, NY, in their Government Contracts and Labor & Employment Practice Groups. Ms. Keller focused on complex government contracts litigation including GAO and federal court bid protests, and advised clients on internal investigations and regulatory compliance. Ms. Keller also served as a law clerk to the Honorable Thomas J. Wheeler at the U.S. Court of Federal Claims.

Ms. Keller received her bachelor's degree in Government from Georgetown University and her Juris Doctor from The George Washington University law school where she focused on Government Procurement law. Ms. Keller is admitted to practice law in New York, New Jersey, the District of Columbia, and Virginia (Corporate Counsel).

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# Agenda



**PITFALLS IN  
PRIME/SUB  
RELATIONSHIPS**



**ETHICS/  
PROCUREMENT  
INTEGRITY**



**ORGANIZATIONAL  
CONFLICTS OF  
INTEREST**



**BID PROTESTS  
AND DISPUTES**



**COMMERCIAL  
ITEMS**



# PITFALLS IN PRIME/ SUB RELATIONSHIPS





# Prime/Sub Disputes

- Teaming agreements are useful but enforceability may be challenged
  - *Futrend Tech.* (Va. Cir. Ct. 2020) (agreements to negotiate future subcontracts are not enforceable under VA law)
  - Teaming agreements are a good opportunity to address IP rights/cybersecurity
- Key terms and issues:
  - Disputes clause including choice-of-law and arbitration vs. court
  - In today's national/global GoCo industry, consider **choice of venue** provision
  - Properly flowed-down FAR clauses
- Contract Disputes Act and pass-through claims
  - Subcontractor not in privity with the Government
  - Where Government conduct allegedly caused the dispute, subcontractor claim needs to be sponsored by the prime. Consider CDA good faith certification.
  - *Severin* doctrine – prime must be liable to the sub
- Touhy Regulations and Evidence – consider objectives and timing impact

# Subcontractor Flowdown Pitfalls To Avoid

- **Termination For Convenience Clauses**

- Prime Perspective: Ensure you can T4C your subcontracts, at least in situations where the agency T4Cs your prime contract. Subcontract T4C terms should be aligned with prime contract.
- Sub Perspective: Ensure you have the right to recover T4C costs under your subcontract

- **DFARS 252.204-7012 Safeguarding Covered Defense Information and Cyber Incident Reporting**

- Prime Perspective: Key challenge is identifying CUI (CDI); be vigilant in tracking the types of information in your control and only provide subs what is necessary for performance
  - If subcontracting out this work, have a plan in place for subcontractor to report cyber incidents (as it is still **your** responsibility)
  - DOJ Civil Cyber-Fraud Initiative invites False Claims Act cases with expanded whistleblower risks
- Sub Perspective: don't rely on Prime to incorporate clause; make sure you understand your portion of the SoW and confirm whether CDI is involved
- Both Sides: Remember you are required to (1) maintain "adequate security on all covered contractor information systems" and (2) rapidly report cyber incidents upon discovery

# Subcontractor Flowdown Pitfalls To Avoid – Cont...

- **Rated Order Flowdowns**

- Defense Production Act authorizes the President to require acceptance and preferential treatment of contracts and orders necessary to promote national defense.
- Increased importance remains even as we emerge from COVID-19 pandemic
- Prime Perspective: Make sure that you flowdown a rated order so your subcontractors are not the reason you fail to make on-time delivery
- Sub Perspective: Know what is expected by checking subcontract for [rating \(DX/DO\)](#)

- **Contracts for Commercial Products/Services**

- Prime Perspective: Don't forget about FAR 52.244-6, which has required flowdowns in commercial subcontracts, and notes additional flexibility for other clauses necessary "to satisfy [your] contractual obligations."
- Sub Perspective:
  - Know the actual clauses being flowed down to your subcontract; don't let Prime simply refer to the "Prime Contract flowdowns."
  - Know what ***should*** be flowed down as well—no need to increase compliance costs for commercial products/services subcontracts which are subject to less onerous obligations



# ETHICS/PROCUREMENT INTEGRITY



# Procurement Integrity Act

- **The Office of Federal Procurement Policy Act, 41 U.S.C. § 2102 (commonly known as the Procurement Integrity Act or PIA):** Prohibits knowingly disclosing or obtaining source selection and contractor bid or proposal information
  - If employees inadvertently receive source selection or proposal information prior to proposal submission
    - DO NOT OPEN OR REVIEW: Immediately segregate and report to superiors
  - Risk of government inadvertent disclosure of source selection information
- **41 U.S.C. § 2104:** Former government employee may not accept position with contractor within one year after the employee was involved in the award of a contract to the company, managed a contract with the company, or was involved in certain contractual or payment decisions involving the company.
  - Former government officials are also subject to post-government ethics restrictions.
  - Maintain procedures to interview former government employees for PIA compliance.
  - Consider protest implications of hiring former government employee.

# *Mitchco International, Inc. v. U.S.* (Fed. Cir. Mar. 2022)

## FACTS

- Protester alleged awardee obtained and used pricing data from the incumbent contract, in bidding on the follow-on contract
- Case turned on whether information regarding protester's incumbent performance was subject to the PIA

## KEY TAKEAWAYS

- The Federal Circuit found that the incumbent contract information was not subject to the PIA, because:
  - (1) The PIA is only concerned with information related to the contract subject to the procurement
  - (2) The awardee received the information from a former subcontractor of the protester under the incumbent contract, who had a legal right to possess that information



# Other Ethical Obligations/Issues for Government Contractors



- **FAR 52.203-13 Mandatory Code of Business Ethics & Conduct**
  - More than just a code of conduct!
  - Must
    - Have ongoing ethics and compliance program
    - Have internal control system that includes periodic reviews; internal reporting mechanism; and full cooperation for audits/investigations
    - Report when you have “credible evidence” of violation of federal fraud, conflicts of interest, bribery laws or FCA
  - Check if it applies (contract value >\$6mil and PoP >120 days) and flow down appropriately!
  - Attention to disclosing facts without risk of waiver of attorney-client privilege (*Flour*)



# ORGANIZATIONAL CONFLICTS OF INTEREST

# Organization Conflicts of Interest (OCIs)



- **The Basics of FAR Subpart 9.5**
  - Prohibits the award of a contract where prospective award has a significant conflict of interest that cannot be avoided or mitigated
    - Even appearance of a conflict can prevent an award
  - **Dual Purpose: Forward-Looking and Backward-Looking**
    - To ensure contractor is unbiased in performing work that may result in follow-on contract
    - To prevent an unfair competitive advantage because of contractor's prior work or access to competitively useful information
- **Three Types of OCIs:**
  - **Unequal Access to Information:** Contractor gains other's proprietary information in earlier contract, which it could use in later competition.
  - **Biased Ground Rules:** Contractor prepared specifications/work statements on earlier contract, creating opportunity to skew the competition in its favor.
  - **Impaired Objectivity:** Contractor evaluated its own offers for products/services, or those of a competitor, without proper safeguards
- **Different approaches to OCIs in GAO vs. COFC**



# Will Legislation Help or Hurt?

## PREVENTING ORGANIZATIONAL CONFLICTS OF INTEREST IN FEDERAL ACQUISITION ACT

- **Key Changes**
  - Heightened disclosure requirements in proposal submission
  - Updated definitions and OCI examples
  - Increased use of one mitigation option: clause in awardee contract that limits ability to compete for future contracts
- **Status**
  - **S.3905:** Passed the Senate
  - **H.R.7602:** Out of Committee
- **Why Should You Care?**
  - Increased scrutiny of OCIs = increased focus on OCI diligence upfront
  - Choose wisely: winning one contract may mean you cannot compete for others





# **BID PROTESTS AND DISPUTES**

# Choosing the Appropriate Forum – The Basics

## TWO VENUES TO BRING A BID PROTEST

- **Government Accountability Office (GAO)**
  - Administrative agency with jurisdiction to hear bid protests, both pre-award and post-award
  - Key features: GAO must rule within 100 days of protest filing + automatic stay
  - Limited jurisdiction over task orders (\$10M for civilian + \$25M for DoD)
  - Established body of procurement case law, GAO attorney expertise
- **U.S. Court of Federal Claims (COFC)**
  - Article I Federal Court with limited jurisdiction to hear protests "in connection with a procurement or a proposed procurement"
  - No jurisdiction over task orders
  - DOJ representing government
  - PI/TRO hearings can sometimes expedite resolution/corrective action



# Bid Protest Key Issues/Trends

- **Key Personnel – *Golden IT, LLC, v. U.S.*** (COFC Feb. 2022)
  - Protester argued awardee materially misrepresented KP, after seeing on LinkedIn that the individual proposed for the KP position left the company.
  - COFC denied protest, finding awardee was not required to inform agency of KP changes after submission of its final proposal; GAO rule: “without legal basis” and “unfair”
  - **Takeaways:**
    - Be mindful of statements on LinkedIn for key personnel + choose protest forum carefully
    - Letters of commitment from key personnel may be required by RFP
- **Hiring of a Former Government Employee**
  - **SAIC** (GAO Feb. 2022): Former USG employee lacked access to competitively useful information; standard is whether hiring of employee creates “unfair competitive advantage”
  - **Takeaways:**
    - Assess former USG employee’s access to competitively useful information prior to hiring
    - Ask employee if there are any restrictions on future employment (ask about ethics memo)
    - Anticipate potential agency investigation into employee’s access to pertinent information

# Bid Protest Key Issues/Trends

- **GAO Timeliness – *VERSA Integrated Solutions, Inc.* (GAO Apr. 2022)**
  - Versa submitted proposal on time via email, but the agency's server quarantined it due to malicious code in the email. The agency found proposal was late and GAO agreed
  - **Takeaway:**
    - Submit proposals ahead of time and always ask for confirmation of the **entire** proposal
    - Scrub proposal before submitting!
- **Other Transaction agreements – *Hydraulics Int'l, Inc. v. U.S.* (COFC Aug. 2022)**
  - Background:
    - COFC has consistently declined to exercise jurisdiction over protests of Other Transaction Authority (OTA) agreements because they are not "procurements" subject to the FAR
    - Army competed a prototype OTA noting in the solicitation that the project "may result in the award of a follow-on production contract" without competitive procedures
  - Judge Holte Bucks the Trend: Found jurisdiction concluding that "where an OTA can result in the exclusion of a bidder for consideration of a follow-on production contract, the OTA is in connection with a procurement or a proposed procurement."



# COMMERCIAL ITEMS

# Opportunities for Commercial Contractors

## COMMERCIAL PRODUCTS AND SERVICES

### Prior Commercial Item Determinations

- DoD COs can rely on prior commerciality determinations in the “Commercial Item Database,” a prior contract, or “other evidence” that DoD procured the item previously under FAR Part 12
  - Streamlining saves time and money for both the government and contractor
- New rule clarifies that commercial products/services determinations are not required below the SAT

### Are you a Non-Traditional Defense Contractor?

- DFARS permits Contracting Officers to treat supplies and services from non-traditional defense contractors as commercial services or products.
- Broadly applies to an entity not performing any contract or subcontract that is subject to full Cost Accounting Standards for at least one year.



# QUESTIONS?

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