

# 2022 Government Contracts Year in Review

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# Outline

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## **I. Laws and Regulations**

**A. Executive Orders**

**B. Regulations**

**C. FY2023 NDAA**

**D. DOJ Procurement Collusion Strike Force**

**E. Other Developments**

## **II. Cases**

**A. Protests**

**B. Appeals**

**C. False Claims Act and  
Other Decisions**

# Laws and Regulations: Executive Orders

# E.O. 14069: Advancing Economy, Efficiency, and Effectiveness in Federal Contracting by Promoting Pay Equity and Transparency

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- Issued March 15, 2022
- Office of Personnel Management anticipates issuing a proposed rule to address the use of salary history in the hiring and pay-setting processes for Federal employees, consistent with Executive Order 14035 of June 25, 2021 (Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce)
- This EO implements parallel efforts in Federal procurements
- Directs FAR Council to consider
  - Issuing proposed rules enhancing pay equity and transparency for job applicants and employees of Federal contractors and subcontractors
  - Whether Federal contractors and subcontractors should be limited from seeking and considering information about individuals' prior compensation when making employment decisions.
  - Inclusion of appropriate accountability measures
- No FAR Case opened yet



What a law firm  
should be.<sup>SM</sup>

# E.O. 14063: Use of Project Labor Agreements for Federal Construction Projects

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Issued February 4, 2022

## 3 Key Prongs

FAR Proposed Rule published  
August 19, 2022 (87 FR 51044)

- *Mandates* Federal Government agencies to require the use of project labor agreements (PLAs) for large-scale Federal construction projects, where the total estimated cost to the Government is \$35 million or more
  - *Permits* agencies to require PLAs for Federal construction projects below the \$35 million threshold
  - Directs Office of Management and Budget to issue implementation guidance to agencies on exceptions and reporting
- 
- Implements the mandatory/permissive PLA requirements from the Executive Order
  - Permits agencies to require that every contractor and subcontractor (whether unionized or not) in construction on the project agree, for that project, to negotiate or become a party to a project labor agreement with one or more labor organizations

FAR Council currently reviewing comments to the proposed rule and drafting final rule



# E.O. 14028 OMB Guidance Memo: Enhancing the Security of the Software Supply Chain through Secure Software Development Practices

Issued September 14, 2022

Requires agencies to comply with the “NIST Guidance” when using third-party software on agency information systems or affecting agency information

- “Software” is broadly construed – includes firmware, operating systems, applications, application services (e.g., cloud), and products containing software

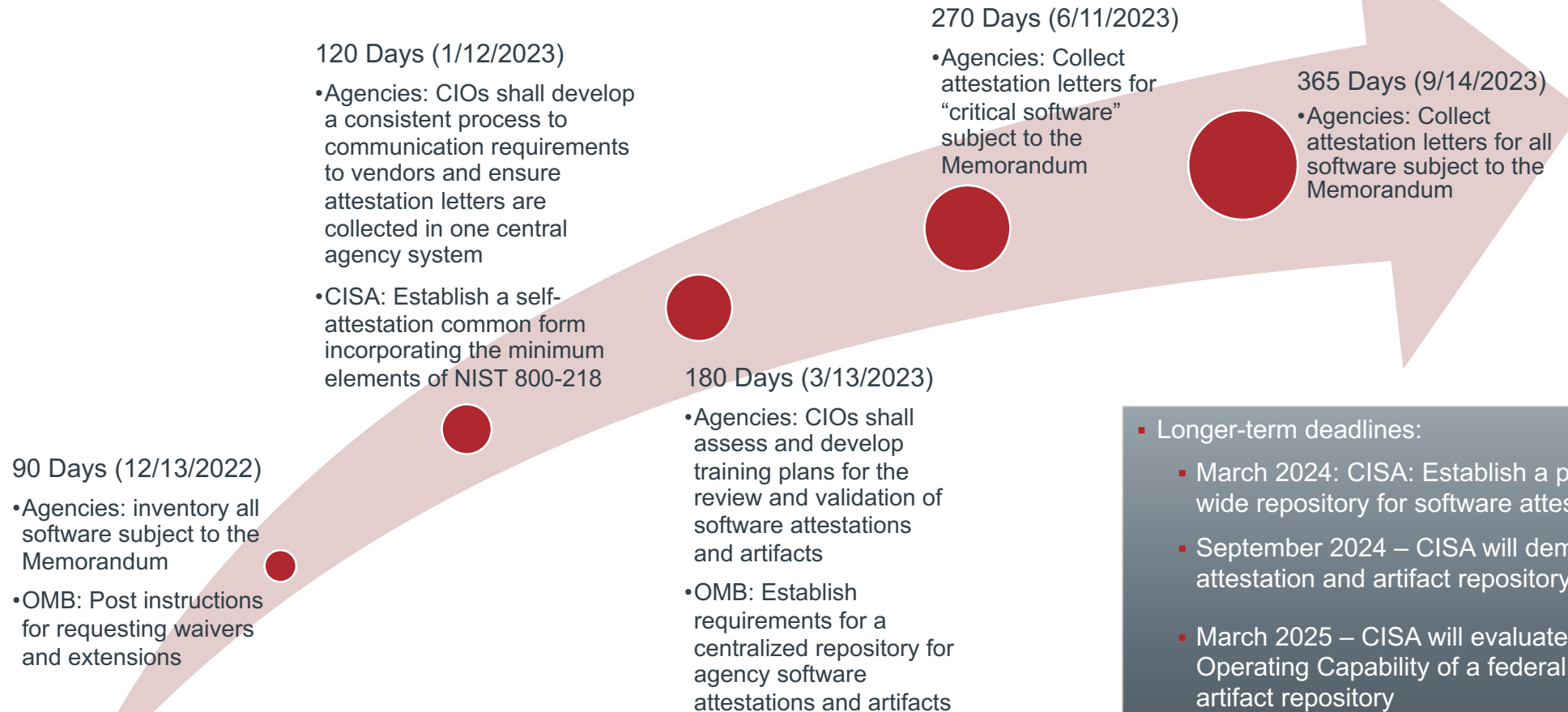
“NIST Guidance” is comprised of two documents published by NIST that create the foundation for developing secure software:

- NIST Secure Software Development Framework (SSDF), SP 800- 218
- NIST Software Supply Chain Security Guidance

Requires agencies to

- Obtain a self-attestation of conformance with the NIST Guidance from the software producer before using the software
  - includes software renewals and major version changes
- If the software producer cannot attest to full compliance, it must identify the gaps, document risk mitigations, and develop a Plan of Action & Milestones (POA&M)
  - Agency may still use the software if it find the software producer’s documentation acceptable
- Integrate the NIST Guidance into their software evaluation process. These could include
  - Software Bill of Materials (SBOM) with certain standardized elements
  - Other artifacts (e.g., automated tools and processes which validate the integrity of the source code and check for known or potential vulnerabilities)
- Evidence that the software producer participates in a Vulnerability Disclosure Program may be required by the agency

# E.O. 14028 OMB Guidance Memo: Enhancing the Security of the Software Supply Chain through Secure Software Development Practices (cont'd)



- Longer-term deadlines:
  - March 2024: CISA: Establish a plan for a Government-wide repository for software attestations and artifacts
  - September 2024 – CISA will demonstrate IOC of the attestation and artifact repository
  - March 2025 – CISA will evaluate requirements for Full Operating Capability of a federal interagency software artifact repository
- As appropriate:
  - CISA: Publish updated SBOM guidance
  - NIST: Update SSDF guidance

# Laws and Regulations: New Rules



# Small Business: Adjustment of Monetary-Based Size Standards, Disadvantage Thresholds, and 8(a) Eligibility Thresholds for Inflation

Effective:  
12/19/2022

SBA combined final rule and interim final rule with request for comments, November 17, 2022 (87 FR 69118)

Finalizes, without change, SBA's 2019 interim final rule adjusting monetary-based industry size standards for inflation

## 3 new interim final actions:

- Further increases the monetary small business size standards by an additional 13.65% to account for inflation since 2019
  - Size standards were multiplied by 1.1365, and then rounded to the nearest \$500,000 (nearest \$250,000 for agricultural industries)
- Adjusts three program-specific monetary size standards to account for inflation:
  - size standards for sales or leases of government property,
  - size standards for stockpile purchases, and
  - alternative size standard based on tangible net worth and net income for the Small Business Investment Company (SBIC) program
- Adjusts for inflation the economic disadvantage thresholds applicable to the 8(a) Business Development and Economically Disadvantaged Women-Owned Small Business (EDWOSB) programs, and the dollar limit for combined total 8(a) contracts

Interim Rule comment period closed January 17, 2023

# Veteran-Owned Small Business and Service-Disabled Veteran-Owned Small Business Certification

Effective:  
1/1/2023

SBA Final Rule, November 29, 2022 (97 FR 73400)

Amends small business regulations to implement section 862 of the National Defense Authorization Act for Fiscal Year 2021

- VOSB and SDVOSB firms previously had to be verified by VA's Center for Verification and Evaluation (CVE)  
SDVOSBs could self-certify for non-VA contracts
- NDAA transferred VOSB / SDVOSB certification responsibility to SBA  
Created a certification requirement for SDVOSBs
- NDAA also created a 1-year grace period for businesses to apply for SBA certification  
Self-certified SDVOSBs that apply within the one-year grace period will maintain eligibility until SBA makes a final eligibility decision.

SBA implement the Veteran Small Business Certification Program in a new 13 CFR part 128

- Firms verified by VA's CVE prior to Jan. 1, 2023 are deemed certified by SBA for the firm's remaining 3-year eligibility term
- For firms already verified by VA's CVE with an eligibility period that expires in the first year of the Program, SBA intends to extend the eligibility of those verified firms for a period up to one year.
- Firms must continue to meet the VOSB or SDVOSB requirements at all times while certified and remain subject to audit or a size status protest.
- To be recertified by SBA, verified firms must meet all conditions of eligibility as described in SBA's revised regulations.

Available exception for self-certified SDVOSBs to continue to serve as subcontractors

- Will continue to count toward agencies' contracting goals
- SBA anticipates sunsetting these forms of self-certification after five years, through a separate rulemaking

Certification requirements will stay largely similar between the VA and other SBA programs

- Differences include SBA removing a VA certification requirement that an owner of a VOSB or SDVOSB show "good character" by not being incarcerated, on parole or on probation
- Per SBA, VOSBs and SDVOSBs already certified under those programs will receive streamlined, expedited review

# Past Performance Ratings for Small Business First-Tier Subcontractors and JV Members

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- SBA Final Rule, July 22, 2022, implements Section 868 of the FY2021 NDAA (87 FR 43731)
- Codifies 2 new methods for small businesses to obtain qualifying past performance:
  1. Work performed as part of a joint venture; and
  2. Work performed as a first-tier subcontractor on a prime contract with a subcontracting plan.
- Requires that contracting officers *shall* consider the small business concern's experience and rating of past performance as a first-tier subcontractor.



# Past Performance Ratings for Small Business First-Tier Subcontractors and JV Members: Prime Contractor Obligations

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- Within 15 calendar days of receiving a small business' request, a prime contractor must evaluate the small business' past performance and provide the rating to the small business.
- Rating format mirrors prime contract CPARs:

Evaluation Factors
Technical (quality of product/service)
Cost control (N/A for FFP & FP-EPA)
Schedule/ timeliness
Management or business relations
Other (as applicable)

5-Scale Rating System
Exceptional
Very Good
Satisfactory
Marginal
Unsatisfactory

# Past Performance Ratings for Small Business First-Tier Subcontractors and JV Members: Qualifying Past Performance Request

All of the following criteria must be met to trigger a prime contractor's obligation:

Requester is a small business (including small business member of a JV);

Requester is a first-tier subcontractor;

Prime contract includes a small business plan;

Request is made within 30 calendar days of completion of the *prime contract* period of performance;

Any subcontract value (i.e., no minimum threshold).



Responding to subcontractor requests will be an element of the prime contractor's subcontracting plan compliance obligations.



Subcontractors are instructed to notify the contracting officer if the prime fails to provide the requested rating within the required timeframe.



# FAR Proposed Rule: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk

Comment Period  
Closes:  
2/13/2023

- FAR Proposed Rule, November 14, 2022, to reduce government financial risks from climate change-related supply chain disruptions
- Creates a new FAR subpart 23.XX, "Public Disclosure of Climate Information"
  - Expands climate-related representations already provided for at FAR 52.223-22 and FAR 52.212-3
  - Requires "Significant contractors" and "Major contractors" to publicly disclose greenhouse gas emissions and climate-related financial risks and set science-based emissions reduction targets
- New responsibility factors:
  - Presumption that a significant or major contractor is nonresponsible unless it has inventoried its annual GHG emissions and disclosed its total annual emissions in SAM
  - Presumption that a major contractors is also nonresponsible unless it has submitted an annual climate disclosure during its previous or current fiscal year using the CDP Climate Change Questionnaire *and* has developed and had validated "science-based targets" in the past 5 calendar years.

Federal Contractors		Federal Supplier Climate Risks and Resilience Proposed Rule Requirements		
Segment	Annual Federal Obligations	Scope 1, Scope 2, and relevant categories of Scope 3 emissions in alignment with the GHG Protocol Corporate Standard	Climate Risks assessed in alignment with the recommendations of the Task Force on Climate-Related Financial Disclosures (TCFD)	Emissions reduction target validated by the Science Based Targets Initiative (SBTi)
Major Contractors	>\$50M	Yes (through CDP)	Yes (through CDP)	Yes (through SBTi)
Significant Contractors	>\$7.5M-\$50M	Yes (Scope 1 and Scope 2 only)	No	No
Other Contractors	<\$7.5M	No	No	No

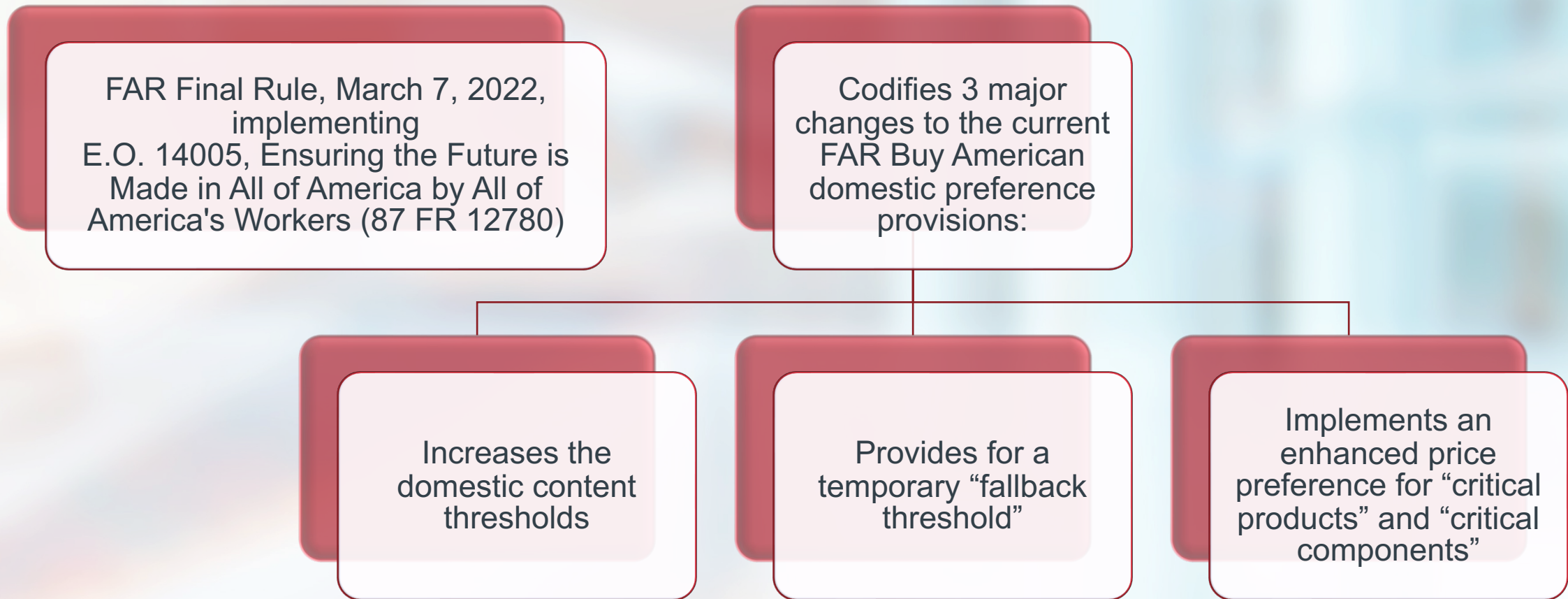
Source: <https://www.sustainability.gov/federalsustainabilityplan/fed-supplier-rule.html>

## Exceptions

- Alaska Native Corporation, Community Development Corporation, Indian tribe, Native Hawaiian Organization, or Tribally owned concern;
- A higher education institution;
- A nonprofit research entity;
- A state or local government; or
- An entity deriving 80 percent or more of its annual revenue from federal management and operating (M&O) contracts that are subject to agency annual site sustainability reporting requirements.

# FAR Buy American Act Developments

Effective:  
10/25/2022



# FAR Buy American Act Developments (cont'd)

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## Increased domestic content threshold for manufactured products and construction materials

- Incrementally increases from 55% (today) to 75% in 2029.

Domestic Content	Effective Date
60%	Oct. 2022
65%	2024
75%	2029

- Contractors will be required to comply with each increased threshold for contracts spanning multiple years unless otherwise approved by the agency's Senior Procurement Executive.



# FAR Buy American Act Developments (cont'd)

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## Enhanced price preference for “critical products” and “critical components”

- Rule includes a framework to apply increased price evaluation preferences for procurement of “critical products” and “critical components.”
  - Specific list of eligible products/components and their associated enhanced price preferences to be established through subsequent rulemaking.
- Existing price preferences unchanged for procurements of non-critical products/components
  - 30% for small business set aside procurements;
  - 20% for all others.

# Non-Displacement Under Service Contracts

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Executive Order 14055 (November 18, 2021) reinstated an Obama-era requirement that service contractors provide a right of first refusal to qualified incumbent employees under successor contracts “for performance of the same or similar work.”

Department of Labor proposed rule, July 15, 2022 (87 FR 42552)

- Comment period closed August 15, 2022

Some agencies are already including the non-displacement language in solicitations and contracts.

New FAR clause due within 60 days of the final rule

- FAR Case 2022-011 opened but on hold pending DoL regulations



# Other Department of Labor Notices

## Updated Minimum Wage for Federal Contractors

- Department of Labor notice, September 30, 2022 (87 FR 59464)
- Increases the minimum wage for federal contractors to \$16.20
- The revised minimum wage will apply to the following contracts for work within the United States and its territories:
  - Procurement contracts for construction covered by the Davis-Bacon Act;
  - Contracts for services covered by the Service Contract Act;
  - Contracts for concessions; and
  - Contracts in connection to federal property or lands and related to offering services for federal employees, their dependents, or the general public and with wages governed by the Fair Labor Standards Act, Service Contract Act, or Davis-Bacon Act.

Effective:  
1/1/2023



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should be.<sup>SM</sup>



## Updated EEO Poster

- EEOC released an updated “Know Your Rights” poster, October 19, 2022
- Federal contractors or subcontractors with 15 or more employees are required to update their Equal Employment Opportunity (EEO) posters
  - Posters should be placed in a conspicuous location in the workplace where notices to applicants and employees are customarily posted
  - In addition to physically posting, covered employers are encouraged to post a notice digitally on their websites in a conspicuous location
- This new “Know Your Rights” poster can be accessed through the [EEOC website](#) and through the [OFCCP's website](#).

# DoD Interim Rule: Employment Transparency Regarding Individuals Who Perform Work in the People's Republic of China

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DoD interim final rule, August 25, 2022 (87 FR 52339)

Effective:  
8/25/2022

Amends DFARS to require contractors and subcontractors to disclose when work will be performed in China and prohibits award of a covered contract unless the required disclosure is made

Interim rule implements Section 855 of the NDAA for FY 2022, which requires two-phases of disclosures from certain government contractors:

- DFARS 252.225-7057 – Initial (pre-award) disclosure when a contractor submits a bid or proposal for a covered contract
- DFARS 252.225-7058 – Post-award disclosure for fiscal years 2023 and 2024
- Annual disclosure for the government's fiscal year from any contractor that holds a covered contract during that fiscal year

“Covered contract”: any Department of Defense (DOD) prime contract or subcontract with an expected value in excess of \$5M

- Excludes contracts for commercial products or services

“Covered entity”: an entity, including a subsidiary, performing work on a covered contract in China, including by leasing or owning real property used in the performance of the covered contract in China

# DoD Commercial Item Determinations

Effective:  
4/28/2022

DFARS Final Rule, April 28, 2022, implements FY 2018 NDAA – allows a contract using FAR Part 12 procedures to serve as a prior commercial item determination (87 FR 25141)

- Section 848 of FY 2018 NDAA modified 10 U.S.C. 2380(b)
- Provides that a contract for an item using FAR part 12 procedures shall serve as a prior commercial item determination, unless the agency determines that the use of such procedures was improper or that it is no longer appropriate to acquire the item using commercial item acquisition procedures.

Implements/modifies the following provisions:

- “... if the Commercial Item Database contains a prior commerciality determination, or the contracting officer has other evidence that an item has previously been acquired by DoD using commercial item acquisition procedures under FAR part 12, then the prior contract shall serve as a prior determination that an item is a commercial item.”
- Once satisfied, the item may not be acquired using other than FAR part 12 procedures unless the head of the contracting activity issues a determination
- Also modifies DFARS 212.102(a)(iii) to specify that commercial item determinations are only required for acquisitions that exceed the Simplified Acquisition Threshold.

# Laws and Regulations: FY 2023 National Defense Authorization Act (NDAA)

# Funding Overview

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Total NDAA budget is  
\$857.9B

This constitutes an  
\$80B increase over  
FY 2022

Authorized funding was 5.6%  
higher than the President's  
budget request, which is the  
highest positive differential  
over the past decade

Procurement  
funding is \$163.15B  
– 13.1% higher  
than requested

Includes a pay raise for both  
servicemembers and DoD  
civilian personnel

Includes an additional \$800M  
in Security Assistance for  
Ukraine



# Inflation Relief

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- Section 822 gives contractors the ability to seek equitable adjustments to fixed-price defense contracts where the actual cost of performance exceeds prices *due solely to inflation*
- First-tier subcontractors may submit requests for relief either through prime contractors or directly to the contracting officer
- Inflation relief is discretionary, but contracting officers may not obtain consideration when granting the relief
- DoD has 90 days from enactment to provide guidance on implementation



# Artificial Intelligence (AI) Provisions

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Section 1554 establishes the requirement for a 5-year plan to adopt AI and data management in DoD cyber warfare operations. This work includes developing plans for acquisition of AI systems, strategies for countering threats from adversaries' using AI, and filling technology gaps relating to AI



Section 1513 requires the establishment of priority projects for AI and data management to increase efficiency and enhance warfighting capabilities



Section 7224 requires the Secretary of Homeland Security to issues policies for AI use and acquisition on government, including consideration of privacy, civil rights, civil liberties, and other risks.

# Cybersecurity Testing and FedRamp

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Sections 1553 and 1514 require DoD to establish a framework for testing the cybersecurity of:

Commercial cloud services providers that store classified DoD information; and  
Cybersecurity products used by DoD



DoD is required to issue new cybersecurity testing regulations by February 1, 2024



Section 5921 is the “FedRamp Authorization Act” – it codifies the FedRamp certification process for cloud services and establishes a FedRamp Board and a public/private advisory committee

# Prohibition on Chinese Semiconductors

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Section 5949 amends Section 889 of the FY 2019 NDAA to prohibit agencies from acquiring products or services that utilize “covered semiconductors”

Prohibited semiconductors are currently defined as those manufactured by: (1) Semiconductor Manufacturing International Corporation (SMIC); (2) ChangXin Memory Technologies (CXMT) or Yangtze Memory Technologies Corp (YMTC); or (3) any other entity designated as being owned or controlled by the government of a foreign country of concern

FAR Council regulations are required by December 2025

# Laws and Regulations: DOJ Procurement Collusion Strike Force



# DOJ Procurement Collusion Strike Force (“Strike Force”)

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- Composition and Charter
  - National response team to combat antitrust schemes (federal, state and local) in:
    - Government procurement
    - Grants, and
    - Program funding
  - 2021 Composition
    - Antitrust division of the DOJ
    - U.S. Attorneys General
    - FBI
    - Inspectors General for multiple federal agencies
  - Provides training to federal, state and local agency procurement and grant officers and auditors and investigators to identify the red flags of collusion

# Strike Force's 2022 Track Record

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- Multiple guilty pleas by contractors engaged in a bid rigging and bribery scheme involving California Department of Transportation (Caltrans) improvement and repair contracts.
- Axion Specialty Contracting LLC sentenced to a \$1,001,989 criminal fine and \$313,121 in restitution for its participation in a bid-rigging scheme targeting public and private entities in Connecticut.
- President of paving and asphalt contractor pleads guilty for attempting to monopolize the market of highway crack-sealing services in Montana and Wyoming.
- Co-owner of Connecticut insulation firm sentenced to one year and a day's imprisonment for participation in bid-rigging and fraud schemes targeting public and private entities in Connecticut. Company ordered to pay \$150,000 criminal fine and both defendants ordered to pay restitution to the victims.
- Military contractor pleads guilty to rigging bids on public military contracts in Texas and Michigan. Military contractor conspired with others to rig bids on certain government contracts in order to give the false impression of competition and to secure government payments in excess of \$17.5 million. The contractor also provided gifts of world series tickets, expense paid family vacations, 100 meals at restaurants (among other gratuities) to a government employee. The contractor faces a maximum penalty of 10 years in prison and a \$1 million criminal fine which may be increased to twice the gain derived from the crime or twice the loss suffered by the victims of the crime.



What a law firm  
should be.<sup>SM</sup>

# Takeaways for Government Contractors (Federal, State and Local)

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1

Establish a comprehensive antitrust compliance policy including confidential reporting

2

Provide regular antitrust training for employees

3

Establish a program to monitor your company's procurement, teaming and contracting activities

# Laws and Regulations: Other Developments

# SBIR/STTR Programs Extended Through 2025 (Public Law No. 117-183, Sept. 30, 2022)

The SBIR and STTR Extension Act of 2022 extends the Small Business Innovation Research (SBIR), Small Business Technology Transfer (STTR), and associated pilot programs through FY2025

**Additional agency reporting and oversight studies**

## **Prohibition Against Writing Solicitation Topics**

- Requires agencies to implement a multilevel review and approval process for solicitations
- Prohibits private entities from shaping solicitation eligibility requirement

## **Increased Minimum Performance Standards for Experienced Firms**

- The extension outlines higher performance standards for experienced firms regarding both Phase I and Phase II awards

## **Agency Recovery Authority**

- Agencies may recover SBIR and STTR award funds if a small business concern has made material application misstatements or made a change in ownership or company structure that poses a risk to national security

## **Foreign Risk Management**

- Agencies must establish a diligence program to assess the risk of foreign involvement with SBIR/STTR recipients
- Agencies shall not make an award if they determine improper business ties with foreign countries of concern
- Applicants will be required to disclose business relationships and financial arrangements before receiving an award

Phase	Criteria	Standard
Phase I-II	> than 20 Phase I awards	1 Phase II award for every 4 Phase I awards (existing standard)
Phase I – II	> than 50 Phase I awards during the previous 5 years	1 Phase II award for every 4 Phase I awards
Phase II-III [Tier 1]	> 50 phase II awards during the previous 10 years	\$250,000 in sales revenue or investment for every Phase II award during 10 year period
Phase II -III [Tier 2]	> 100 Phase II award during the previous 10 years	\$450,000 in sales revenue or investment for every Phase II award during 10 year period



# Preventing Organizational Conflicts of Interest in Federal Acquisition Act (Public Law No. 117-324, Dec. 27, 2022)

Addresses conflicts of interest in federal acquisitions and directs the FAR Council to revise the FAR to provide

- definitions related to specific types of organizational conflicts of interest;
- definitions, guidance, and illustrative examples related to relationships of contractors with public, private, domestic, and foreign entities that may cause contract support to be subject to potential organizational conflicts; and
- illustrative examples of situations related to the potential organizational conflicts identified.

FAR Council is also directed to

- provide agencies with solicitation provisions and contract clauses to avoid or mitigate organizational conflicts, that require contractors to disclose information relevant to potential organizational conflicts and limit future contracting with respect to potential conflicts with the work to be performed under awarded contracts;
- allow agencies to tailor such solicitation provisions and contract clauses as necessary to address risks associated with conflicts of interest and other considerations that may be unique to the agency;
- require agencies to establish or update agency conflict of interest procedures to implement the statutory revisions to the FAR and periodically assess and update procedures as needed to address agency-specific conflict issues; and
- update FAR procedures to permit contracting officers to take into consideration professional standards and procedures to prevent organizational conflicts of interest to which an offeror or contractor is subject.



# End Human Trafficking in Government Contracts Act (Public Law No. 117-211, Oct. 17, 2022)

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Amends Section 1704(c)(1) of the National Defense Authorization Act for Fiscal Year 2013 - requires the implementation of certain contracting provisions related to human trafficking.

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Specifically, the statute **requires**, upon receipt of an office of inspector general report substantiating an allegation that the recipient of a contract, grant, or cooperative agreement (or any subgrantee, subcontractor, or agent of the recipient) engaged in human trafficking, **that the agency refer the matter to the agency suspension and debarment office**

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The Office of Management and Budget must report to Congress on implementation of provisions to end human trafficking in government contracting.

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Report on Implementation of Trafficking in Contracting Provisions -- within 90 days, the OMB Director must submit to Congress an implementation report

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**The aim of the legislation was to "prevent any contractor found to be participating in human trafficking from doing business ever again with U.S. taxpayer dollars."**

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# Cybersecurity Maturity Model Certification (CMMC) 2.0

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- Refresher:
  - Sept. 2020: DoD issued Interim Rule adding a new DFARS clause to implement CMMC, and a requirement that covered contractors/subcontractors undergo a pre-award self-assessment or post-award DoD assessment of compliance with NIST SP 800-171 controls.
  - Mar. 2021: DoD began comprehensive review of CMMC “informed by more than 850 public comments” on the Interim Rule.
- End Result: CMMC 2.0, which “updates the program structure and . . . requirements to streamline and improve implementation.”
- Nov. 2021: Advanced Notice of Proposed Rulemaking issued
  - Formal rulemaking to follow, currently anticipated March 2023

# CMMC 2.0: Way Forward

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Voluntary NIST SP 800-171 assessments ongoing under the Pentagon's Joint Surveillance Program

No new contractual requirements before CMMC 2.0 rulemaking is complete

Expectation (hope?) is that successful voluntary assessments will 'convert' to a CMMC Level 2 certification

Complacency is not an option

Continue to comply with FAR 52.204-21 and/or DFARS 252.204-7012, 252.204-7019, 252.204-7020

DOJ Civil Cyber-Fraud Initiative

# Cases: Bid Protests



# GAO Protest Statistics – GAO Annual Report 2022

	FY2022	FY2021	FY2020	FY2019	FY2018
Cases Filed <sup>1</sup>	1658 (down 12%) <sup>2</sup>	1897 (down 12%)	2149 (down 2%)	2198 (down 16%)	2607 (less than 1% increase)
Cases Closed <sup>3</sup>	1655	2017	2137	2200	2642
Merit (Sustain + Deny) Decisions	455	581	545	587	622
Number of Sustains	59	85	84	77	92
Sustain Rate	13%	15%	15%	13%	15%
Effectiveness Rate <sup>4</sup>	51%	48%	51%	44%	44%
ADR <sup>5</sup> (cases used)	74	76	124	40	86
ADR Success Rate <sup>6</sup>	92%	84%	82%	90%	77%
Hearings <sup>7</sup>	.27% (2 cases)	1% (13 cases)	1% (9 cases)	2% (21 cases)	0.51% (5 cases)

- Bid protests down by 12% from FY 2021
- Sustain rate 13% (455 protests resolved on the merits out of which 59 were sustained)
- GAO “Effectiveness Rate (where GAO sustains a protest or the agency takes corrective action) was 51% and in increase over 2021’s rate of 48%
- GAO’s most prevalent reasons for sustaining a protest
  - Unreasonable technical evaluations
  - Flawed selection criteria
  - Flawed solicitations

# GAO Bid Protest Decisions

# GAO's Late is Late Rule

## *VERSA Integrated Solutions, Inc.*, B-420530, April 13, 2022

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- Versa Integrated Solutions protested the Food and Drug Administration's rejection of Versa's proposal as late under the FDA's RFP which included FAR 52.212-1 (Instructions to Offerors – Commercial Items) which provides in relevant part as follows:
  - (2)(i) Any offer, modification, revision, or withdrawal of an offer received at the Government office designated in the solicitation after the exact time specified for receipt of offers is “late” and will not be considered unless it is received before award is made, the Contracting Officer determines that accepting the late offer would not unduly delay the acquisition; and-
    - (A) If it was transmitted through an electronic commerce method authorized by the solicitation, it was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of offers; or
    - (B) There is acceptable evidence to establish that it was received at the Government installation designated for receipt of offers and was under the Government's control prior to the time set for receipt of offers.
- FDA's investigation revealed that it had received one part of Versa's proposal by email but that the other part of Versa's proposal had been quarantined because the email contained macro files that “generally contain malicious code or computer viruses” and are “harmful to IT environments.”
- The GAO dismissed Versa's protest as its proposal, while received by the FDA, was not received by the contracting officer and contracting specialist by the exact time specified and was “late” as a result.

# Who/What Is a Professional Employee for Purposes of 52.222-46?

## *Sabre Systems, Inc.*, B-420090.3, June 1, 2022

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- Sabre Systems, Inc. protested the Department of the Navy's award of an IDIQ, cost type contract for direct software systems engineering support services to American Systems Corporation on numerous grounds including a challenge to the awardee's proposed professional employee compensation plan under FAR 52.222-46.
- The RFP advised offerors that the NAVY would evaluate total compensation plans in accordance with FAR 2.222-46, and Sabre's protest contended that the Navy had improperly excluded a large number of labor categories from the Navy's professional compensation evaluation.
- The Navy argued that its interpretation of the FAR provision and 29 C.F.R. 541, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Computer and Outside Sales Employees, was reasonable.
- The GAO sustained the protest because
  - FAR 52.222-46 specifically required the Navy to evaluate the compensation of a proposed employee that met 29 C.F.R. 541, Subpart D's, Professional Employees, definition; and
  - The Navy unreasonably excluded from its compensation plan analysis certain proposed employees who met 29 C.F.R., Subpart D's definition.



## Availability of Key Personnel

*ASRC Federal Data Solutions*, B-421008.1 et. al, Dec. 2, 2022

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- ASRC Federal Data Solutions, LLC protested Health and Human Services, National Institute of Environmental Health Sciences, establishment of a BPA under their GSA FSS contract with Arlluk Technology Solutions, LLC for IT services to support the Division of the National Toxicology Program.
- ASRC alleged that Arlluk's quotation contained a material misrepresentation concerning the availability of a proposed key person.
- The HHS's RFQ's third evaluation factor, personnel technical capabilities and qualifications, required vendors to submit information detailing the experience, qualifications, accomplishments, and abilities for three labor categories deemed by the agency to be critical to the success of DNTP's BPA requirements: technical point of contact (TPOC); technical lead; and curation lead.
- The RFQ stated that the agency anticipated identifying these positions as key personnel in task orders issued under the BPA, and that substitution of key personnel would require prior written consent of the agency.

## Availability of Key Personnel

*ASRC Federal Data Solutions*, B-421008.1 et. al, Dec. 2, 2022 (cont.)

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- ASRC alleged that Arlluk's quotation contained material misrepresentations concerning the availability of two of the key personnel identified in Arlluk's quotation in that the individuals identified in Arlluk's quotation for the technical lead and TPOC positions
  - are employees of the incumbent contractor, which is a sister company to ASRC, and
  - and had signed exclusive letters of commitment with ASRC for the procurement
- The GAO sustained the protest as
  - Arlluk and made a material misrepresentation with respect to the individual proposed as key personnel who had refused Arlluk's contingent offers of employment; and
  - The Navy had relied upon the misrepresentation; and
  - The Navy's reliance had a material effect on the evaluation.

## DoD Enhanced Debriefings: Timely Filing of Protest *K&K Industries, Inc.*, B-420422, B-420422.2, Mar. 7, 2022

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K&K Industries, Inc. protested USACE's award of a design-build construction contract to Blinderman Construction Co., Inc. for the design and renovation of a historic barracks building in Fort Riley, Kansas.

The GAO dismissed K&K's protest as untimely based on the following facts:

- USACE provided K&K with an initial debriefing on October 13 which stated that
  - USACE was preparing a redacted version of the SSDD and would provide the redacted SSDD to K&K when complete and
  - K&K should submit any additional questions within two days of receipt of the SSDD.
- USACE provided the redacted SSDD on Friday, October 22.
- K&K submitted additional questions on Monday, October 25.
- USACE answered the questions on November 17 and K&K submitted additional questions which USACE answered on November 23.
- USACE answered the second round of questions on November 23 and stated: "Any additional questions must be submitted by December 1, 2021. This concludes your written debriefing." *Id.* at 105. On November 24, K&K sent the agency additional questions related to its debriefing."

## DoD Enhanced Debriefings: When Does an Extended Debriefing Conclude? *K&K Industries, Inc.*, B-420422, B-420422.2, Mar. 7, 2022 (Cont.)

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K&K submits a third round of questions on November 24

USACE response on December 13 and states: “This concludes your written extended debriefing.”

GAO dismissed K&K’s protest as untimely

- Only an agency can extend a debriefing, and
- A disappointed offeror cannot extend a debriefing by asking further questions, and
- Enhanced debriefing rights entitle a disappointed offeror to one round of required questions and answers only.
- An agency’s agreement to voluntarily answer additional questions after it has declared the conclusion of a required, enhanced debriefing does not extend the time to file a protest.



# DOD Enhanced Debriefings: When They Don't Apply

## *MP Solutions, LLC*, B-420953, B-420953.2, Nov. 21, 2022

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- MP Solutions, LLC protested the Missile Defense Agency's exclusion of MP's proposal from the competitive range under a solicitation for specialized engineering analysis.
- MP Solutions requested and was provided a pre-award debriefing.
- MDA provided the debriefing and advised MP Solutions that it may submit relevant questions by August 3 about whether source selection procedures...were followed.
- MP Solutions timely filed its relevant questions and when MDA had not responded to the questions, MP Solutions filed its bid protest ten days after receipt of its pre-award debriefing.
- MDA responded to the additional questions and sought to dismiss the protest as premature given the pending debriefing.



# DOD Enhanced Debriefings: When They Don't Apply

## *MP Solutions, LLC, B-420953, B-420953.2, Nov. 21, 2022 (cont.)*

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- GAO held that MDA Solutions protest was timely and NOT premature as follows:
  - **Enhanced debriefings are only applicable to post-award debriefings;** and
  - MP solutions took advantage of the opportunity to submit questions did not extend the debriefing (see K&K, above); and
  - MDA created an ambiguity that led MDA to reasonably believe its debriefing was closed
    - the lack of indication as to whether the debriefing would remain open during the opportunity to ask questions  
AND
    - MDA's silence in response to MP Solutions' questions during the 10-day window following the pre-award debriefing.
- The GAO, however, dismissed MDA Solution's grounds of protest.

# Best Value Improperly Converted to LPTA

## *AT&T Mobility LLC, B-420494, May 10, 2022*

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- AT&T Mobility LLC protested the Department of Homeland Security, United States Secret Service, award of a GSA FSS order for cellular communications services and equipment to Cellco Partnership d/b/a/ Verizon Wireless.
- AT&T alleged
  - DHS conducted a pass/fail evaluation under each of the non-price factors, rather than performing a qualitative assessment of proposals
  - DHS improperly converted the source selection from a best-valued tradeoff to a lowest-price technical acceptable procurement
  - DHS evaluated offeror's prices in a manner inconsistent with the solicitation.
- GAO sustained AT&T's protest as
  - The AR was devoid of any meaningful qualitative analysis of proposals under the technical factor;
  - The AR reflected that DHS improperly evaluated on the basis of the pass/fail basis; and
  - The AR demonstrated that DHS conducted the procurement on an LPTA basis contrary to the terms of the solicitation.



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# COFC Bid Protests



# Availability of Key Personnel

## *Golden IT, LLC v. U.S.*, No. 21-1966C, Feb. 4, 2022

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Golden IG, LLC challenged the Department of Commerce and the Geography Division of the U.S. Census Bureau's award of a BPA to Spatial Front, Inc. for IT support services for the MAF/TIGER System and related programs.

After receipt of the AR, Golden IT filed an amended complaint alleged, in part, that Census's evaluation was unreasonable, capricious, and otherwise contrary to law because, SFI improperly received a contract as a result of SFI's misrepresentation of a proposed key personnel.

The AR demonstrated that the individual was an employee of SFI the day SFI submitted its quote and left SFI sometime after that.

In its decision granting Census' MJAR on this protest ground, the Court stated:

- The AR contained no evidence demonstrating that SFI had any knowledge prior to submitting its proposal, or any time prior to the individual's departure, that he intended to leave SFI; and
- The RFQ did not contain a requirement that SFI secure written commitments from proposed key personnel.

COFC held offerors are not required to provide agency with an update where key personnel depart after proposal submission, but prior to award, where the solicitation does not require such a disclosure.

# DoD: Circumstances Favoring Discussions

## *IAP Worldwide Services Inc. v. U.S.*, No. 21-1570C, Mar. 28, 2022

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- IAP Worldwide Services, Inc. challenged the U.S. Department of the Army, Army Contracting Command – Aberdeen Proving Ground’s award of an Operations, Maintenance, and Defense of Army Communications in Southwest Asia and Central Asia contract to Vectrus Systems Corporation.
- The COFC found for IAP on a single issue, but declined to issue either monetary or injunctive relief on the record as it stood as of the date of the decision, and, instead, ordered a supplemental briefing on the question of appropriate relief.
- Solicitation facts:
  - Advised offerors that the Army intended to award without discussions, but reserved the right to hold discussions, if necessary.
  - Provided that, in the event the Army decided to engage in discussions, a competitive range would be determined and offerors would be notified of inclusion/exclusion, but that the competitive range may be limited for the proposes of efficiency.
- IAP contended that the Army’s failure to engage in discussions was arbitrary, capricious and abuse of discretion and was otherwise not in compliance with DFARS 215.306 which creates a presumption favoring discussions in DoD procurements of \$100 million or more.

# DoD: Circumstances Favoring Discussions

## *IAP Worldwide Services Inc. v. U.S.*, No. 21-1570C, Mar. 28, 2022 (cont.)

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- The COFC agreed with IAP based upon the plain language of DFARS 215.306 and the fact that the AR devoid of any support for the Army's stated reason for not conducting discussions.
  - Neither the SSAC nor the SSA provided any facts, explanation or analysis substantiating their conclusions that IAP's initial ratings could not be rectified with discussions
  - Although the SSA asserted her decision was based, in part, on the draft ENs, the SSA did not attempt to explain how those documents led her to conclude that offerors – including IAP – would not have been able to meaningfully improve their respective proposals
  - The point of discussions is to permit offerors at a minimum to address deficiencies and significant weaknesses.
  - The COFC rejected the Army's assertion that a best value decision could substitute for a determination to not conduct discussions where DFARS 215.306 applies; and
  - Other documentation in the AR undermined the SSA's decision to award without discussions.

# OTAs and COFC Jurisdiction

*Hydraulics International, Inc. v. U.S., No. 22-364, Aug. 8, 2022*

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- Hydraulics International brought a post-award bid protest of an Army OTA for Aviation Ground Power Unit prototypes used to service military helicopters.
- The COFC determined it had jurisdiction over a protest of OTAs for prototype project where the OTAs were “in connection with a procurement or proposed procurement” under the Tucker Act.
- The COFC denied all of Hydraulics International’s bid protest allegations as the COFC determined the Agency’s evaluation and best-value determination were rational.



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# Timely Proposal Submission: When Late is Not Late

## *ESimplicity, Inc. v. U.S.*, No. 22-543C, Oct. 13, 2022

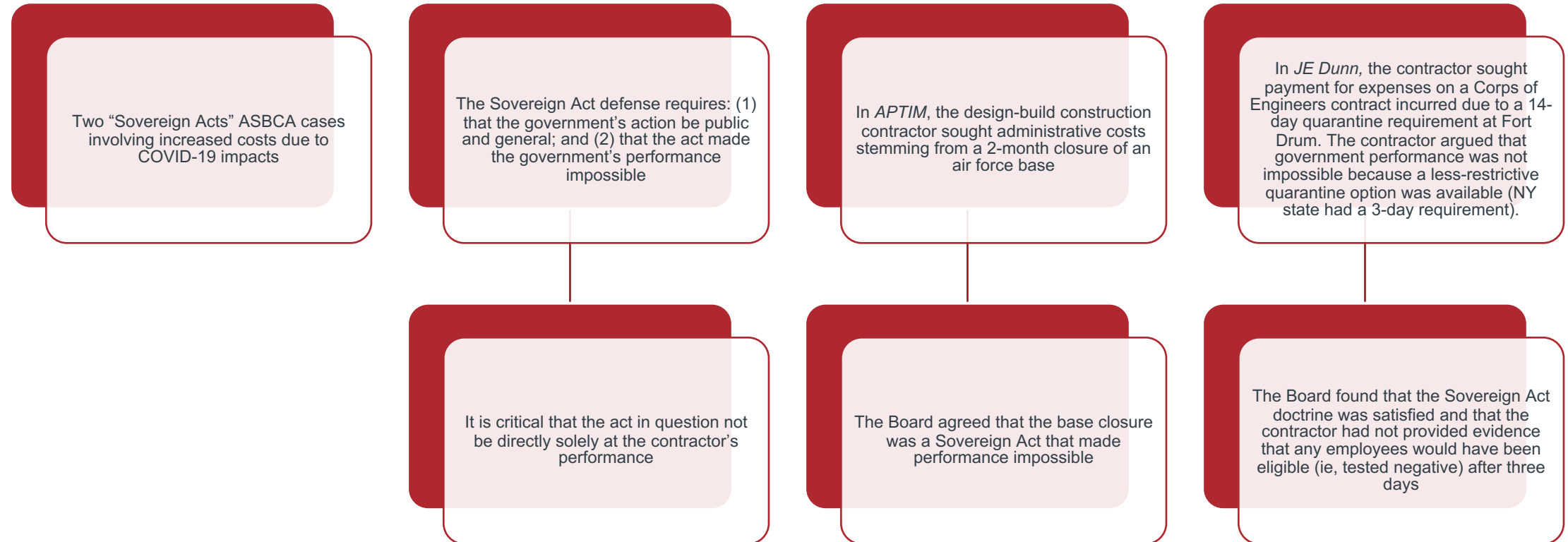
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- ESimplicity protested the Navy's rejection of its proposal submitted in response to a solicitation under FAR 52.212-1(f).
- The relevant facts are:
  - eSimplicity emailed its proposal to the Navy prior to the set deadline and its email application confirmed delivery to the government server.
  - eSimplicity never received either a confirmation of receipt or a delivery failure notification; and
  - when eSimplicity inquired about the proposal's status, it learned that its proposal had not arrived in the recipient's email account.
- DISA performed a forensic investigation that revealed that the proposal had been received by a DISA-managed e-mail server and queued for delivery, but that it had been bounced by the destination server because it exceeded the maximum file size.
- The DISA technician confirmed that no delivery failure notice was sent to eSimplicity.
- Notwithstanding the foregoing facts, the Navy sent eSimplicity a letter advising it that its proposal was late and would not be considered.
- The COFC found that the Navy did not specify a file-size limit in the solicitation, but because of the size of the file, eSimplicity's proposal did not reach its destination.
- The COFC concluded that the Navy imposed unstated criteria in rejecting protester's electronic proposal as late and sustained eSimplicity's protest.

# Cases: Appeals

# *APTIM Federal Services LLC (ASBCA 62982) and JE Dunn Construction Co. (ASBCA 62936)*

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# *Doubleshot, Inc. (ASBCA 61691)*

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Government claim for unallowable costs incurred by the contractor for FY 2009 and 2010

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ASBCA grants summary judgment to the contractor for portions of the claim based upon missing time cards

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The contract included Audit and Records–Negotiation clause (FAR 52.215-2) and the mandatory record-retention period under that clause had expired by the time of the government claim

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ASBCA held that DCAA's previous finding of deficiencies in the contractor's recordkeeping program did not extend the contractor's record-retention obligations

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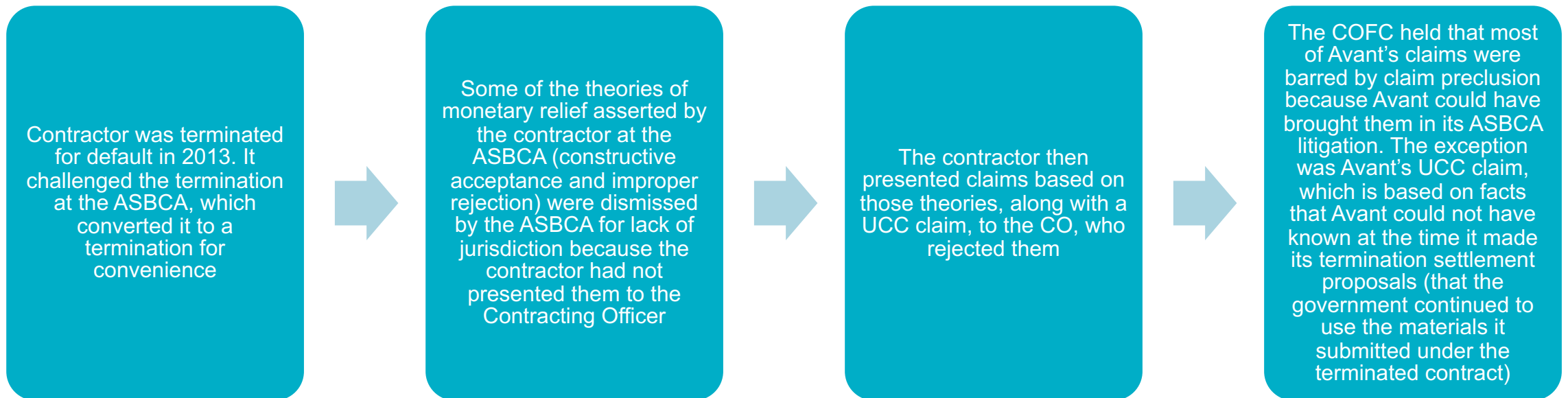


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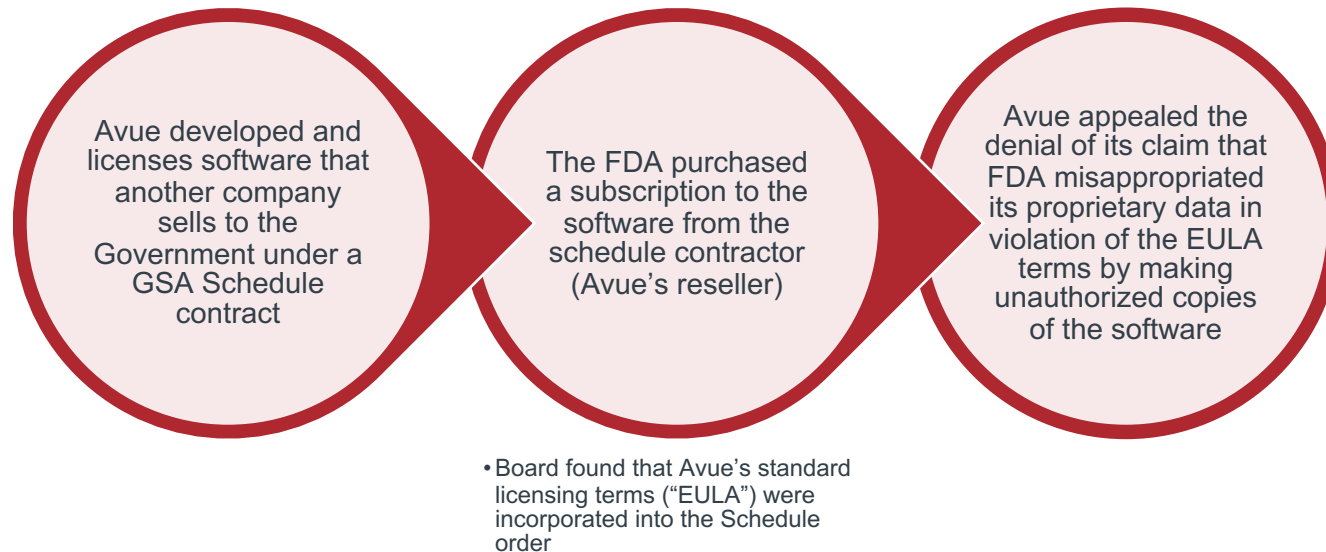
# *Avant Assessment v. U.S.* (No. 20-1185 (Apr. 29, 2022))

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# Avue Technologies Corp. (CBCA Nos. 6360, 6627)

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- *Issue:* whether Avue's claim that FDA breached the software license is a claim under a procurement contract within the Board's jurisdiction under the Contract Disputes Act (CDA)
- *Holding:* Avue's EULA, while binding on the government, was not a "procurement contract" for purposes of conferring jurisdiction under the CDA
- A key element was the fact that the money flow for the procurement was between the government and the Schedule-holder, and not Avue directly
  - Basically – Avue is a subcontractor, and a EULA incorporated as an element of a separate federal contract does not overcome that.

# Cases: False Claims Act and Other Decisions

# *United States ex rel. Sheldon v. Allergan Sales, LLC*

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4<sup>th</sup> Circuit Court of Appeals joins other circuits in finding that a defendant cannot be held liable under the False Claims Act based on a reading of statute or regulation that was objectively reasonable, where there was no substantive guidance warning it away from that interpretation

*Sheldon* was based on an alleged violation of a Medicaid drug pricing statute, under which the manufacturer's price rebates to Medicaid is based on a calculation of commercial prices and rebates. The FCA relator alleged that the defendant had improperly calculated its commercial discounts, resulting in improperly higher Medicaid prices

The 4<sup>th</sup> Circuit agreed with the District court that the FCA's scienter requirement was not met because the defendant's interpretation of the statute was objectively reasonable

This line of cases has significant implications for procurement FCA cases that are based on differing readings of applicable statutes or regulations



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## *Native American Services Corp. and Mirador Enterprises, Inc.; Numet Machining Techniques*

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Settlements relating to allegations of small business program fraud

NASCO and Mirador agreed to pay a total of \$1.15M for improperly obtaining set-aside contracts. The companies formed a mentor-protégé relationship and submitted bids in the name of the protégé (Mirador). However, the government alleged that NASCO took on a much larger role than what is permitted under the mentor-protégé program and effectively controlled the contracts

The government also alleged that when government representatives raised concerns about the arrangement, the companies took steps to conceal the fraud by making it appear that Mirador had the knowledge and employees to perform the work

Numet paid \$5.2M to resolve allegations that it improperly received contracts as a small business and woman-owned small business over a multi-year period. After a 2011 acquisition, Numet was no longer small due to its affiliation with other businesses – yet, it continued to certify its status and receive set-aside contracts. Numet disclosed the affiliation issues in 2019 after an acquisition and received credit for doing so



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# *Precision Metals Corp v. U.S. Dep't of Defense (22-CV-3761)*

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NY federal court vacates and enjoins the debarment of a Defense Logistics Agency parts supplier that was debarred for alleged failures of on-time delivery

Precision argued that DLA violated both the Administrative Procedures Act and the 5<sup>th</sup> Amendment by refusing to hold meet with the company in-person and hold a hearing regarding disputed facts. Precision noted that it had requested a meeting with DLA five separate times to present information regarding improvements to its processes

The government argued that its failing to meet with Precision was harmless and that it sufficient basis to support its debarment decision

The court sided with Precision. The company obtained 99% of its revenues from government contracts, which resulted in a high level of harm due to the debarment. Both the FAR and the DFARS gave Precision the right to a proceeding to determine disputed facts. The court also noted that DLA's Notice of Proposed debarment stated that Precision could provide its response "either in person or in writing, or both"

# Seife v. U.S. Food and Drug Administration

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A journalist sought records of a pharmaceutical company's submissions to FDA. The agency withheld the records as confidential or proprietary information under Exemption 4



The Supreme Court's 2019 decision in *Food Marketing Institute v. Argus Leader Media* overturned the previous Exemption 4 standard expressed in the *National Parks*, which required a showing of "substantial competitive harm" to withhold records under Exemption 4. The *Argus* court held that Exemption 4 applied where (1) the information sought is kept confidential and (2) it was provided to the government with an expectation of privacy



The 2016 FOIA Improvement Act (FIA) provides that an exemption may only be invoked if disclosure would result in a harm protected by the exemption. Some argued that this codified *National Parks* (*Argus* pre-dated the FIA, so the impact of the law was not considered)



The 2<sup>nd</sup> Circuit found that while the FIA does require harm, it does not require "substantial harm." Since some harm will be inherent in most disclosures of confidential or proprietary information, this decision leaves FOIA litigants in largely the same place as *Argus*



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