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2024 Government Contracts Year in Review

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Outline

- I. Laws and Regulations
 - A. Federal Funding Programs
 - B. Regulations
 - C. FY2025 NDAA
 - D. Other Topics
- II. Cases
 - A. Protests
 - B. Other Cases

Laws and Regulations:

Federal Funding Programs

Inflation Reduction Act & Bipartisan Infrastructure Law

\$973 billion total for distribution over five years from FY 2022-2026, though competitive grants, block grants and formula-based allocation

- Transportation: \$284 billion (U.S. Department of Transportation)
- Water: \$55 billion (U.S. Environmental Protection Agency)
- Broadband: \$65 billion (U.S. Department of Commerce)
- Energy & Power: \$73 billion (U.S. Department of Energy)
- Environmental remediation: \$21 billion (U.S. Environmental Protection Agency)
- Western water infrastructure: \$8.3 billion (U.S. Department of the Interior; U.S. Department of Agriculture - U.S. Forest Service)
- Resiliency: \$46 billion (U.S. Department of Homeland Security)

Greenhouse Gas Reduction Fund (GGRF)

- \$27 billion competitive grant program to mobilize financing and private capital to address the climate crisis, ensure our country's economic competitiveness, and promote energy independence
 - \$14 billion National Clean Investment Fund (NCIF)
 - \$6 billion Clean Communities Investment Accelerator (CCIA)
 - \$7 billion Solar for All program
- August 16, 2024 – awards issued for \$27B GGRF competitive grants

Coastal Communities Resilience

- \$2.6 billion to support coastal communities, including Great Lakes communities allocated in 2022
- The National Coastal Resilience Fund invested \$139 million across 94 coastal resilience projects in 2024, \$96 million from the Bipartisan Infrastructure Law

CHIPS and Science Act

**CHIPS PROGRAM
OFFICE (CPO) HAS
ANNOUNCED MORE
THAN \$32.5 BILLION IN
GRANT AWARDS AND
UP TO \$5.5 BILLION IN
LOANS TO 32
COMPANIES ACROSS 48
PROJECTS IN 23
STATES, INCLUDING 17
NEW SEMICONDUCTOR
FABS AND 8 SUPPLY
CHAIN OR PACKAGING
FACILITIES**

Intel \$7.865 billion

- Project: Supporting semiconductor fabrication and advanced packaging projects in Arizona, New Mexico, Ohio and Oregon.

TSMC \$6.6 billion

- Project: Building semiconductor fabs in Phoenix, Ariz.

Micron Technology \$6.165 billion

- Project: Building two new semiconductor fabrication facilities of a planned "megafab" in Clay, N.Y., and developing a high-volume manufacturing fab in Boise, Idaho.

Samsung
Electronics \$4.745 billion

- Project: Expanding existing semiconductor manufacturing facilities in central Texas.

Texas Instruments \$1.61 billion

- Project: Building new semiconductor facilities in Texas and Utah.

GlobalFoundries \$1.5 billion

- Project: Investing in the company's manufacturing sites in New York and Vermont.

Natcast

Natcast is a purpose-built, non-profit entity designated to operate the National Semiconductor Technology Center (NSTC) by the Department of Commerce. Established by the CHIPS and Science Act of the U.S. government, the NSTC is a public-private consortium dedicated to semiconductor R&D in the United States

\$6.3 billion awarded to operate the National Semiconductor Technology Center (NSTC) under a long-term agreement with NIST
The NSTC will reinforce and extend U.S. technology leadership in semiconductors by identifying and advancing promising research initiatives in foundational semiconductor technologies.
Establish a portfolio of physical and digital assets and services for the benefit of the NSTC community.
Utilize the NSTC Workforce Center of Excellence (WCoE) to build and sustain the diverse and skilled workforce required for the U.S. semiconductor industry to grow domestic manufacturing and lead in the development of foundational semiconductor technologies.
CHIPS National Advanced Packaging Manufacturing Program (NAPMP) awarded Natcast \$1.1 billion for advanced packaging activities and capabilities at the CHIPS for America NSTC Prototyping and NAPMP Advanced Packaging Piloting Facility (PPF)

Laws and Regulations:

New Rules

Major CFR rewrites

2 CFR – Updated Guidance for Federal Financial Assistance

- **Final Rule**, effective October 1, 2024 ([89 FR 30046](#))
- **Purpose:** (1) incorporate statutory requirements and administration priorities; (2) reduce agency and recipient burden; (3) clarify sections that recipients or agencies have interpreted in different ways; and (4) rewrite applicable sections in plain language, improving flow, and addressing inconsistent use of terms
- **Notable Changes:**
 - § 25.300 – First-tier subrecipient UEI requirement
 - § 200.113 – Mandatory disclosure requirement
 - § 200.xxx – Increased various thresholds, including single audit requirement (§ 200.501), de minimis indirect cost rate (§ 200.414), and fixed amount subawards (§ 200.333)

32 CFR Part 3 – Transactions Other Than Contracts, Grants, or Cooperative Agreements for Prototype Projects

- **Proposed Rule**, comment period ended November 4, 2024 ([89 FR 71865](#))
- **Purpose:** Implement changes in statutory authority since 2004, including the authority to provide for follow-on production OTs and contracts; special circumstances for award of OTs to small businesses, nontraditional defense contractors, nonprofit research institutions, and consortia; approval requirements for large dollar OTs; authority to supply prototypes and production items to another contractor as Government furnished items; and applying procurement ethics requirements to covered OT agreements

48 CFR Chapter 9 – Department of Energy Acquisition Regulation (DEAR)

- **Final Rule**, effective December 13, 2024 ([89 FR 89720](#))
- **Purpose:** Comprehensively revised the DEAR to update and streamline policies, procedures, provisions, and clauses applicable to DoE's procurement contracts
- **Notable Changes:**
 - Renumbered existing DEAR sections as needed to conform with the FAR numbering system
 - Substantive changes primarily (but significantly) affect DOE's 23 Management & Operating contracts (where a private sector entity operates a DoE facility, such as a national laboratory)



**Clarification of System for
Award Management
Preaward Registration
Requirements**

Effective Nov. 12, 2024

INTERIM RULE

FAR 52.204-7

Revises solicitation provision at FAR 52.204-7(b)(1) in response to recent bid protest decisions

Updates instructions for registration in SAM and “corrects an inconsistency” involving registration timing requirements

- Phrasing of previous FAR 52.204-7(b)(1) language could be interpreted as levying a requirement for offerors to maintain a **continuous, uninterrupted**, registration during the entirety of the pre-award process:
 - *“An Offeror is required to be registered in SAM when submitting an offer or quotation, **and shall continue to be registered until time of award, during performance, and through final payment of any contract, basic agreement, basic ordering agreement, or blanket purchasing agreement** resulting from this solicitation”*
- This language was pivotal in recent bid protest decisions at both GAO and the Court of Federal Claims, which highlighted FAR 52.204-7(b)(1) as requiring an offeror to be registered at the point of offer submission and maintain that registration through contract award
- Interim rule clarifies that the offeror must be registered **at time of offer submission and at time of contract award but NOT** at every moment in between

DoD Pilot program to incentivize contracting with employee-owned businesses

RULE PUBLICATION

- DFARS Proposed Rule Issued: May 30, 2024 (89 FR 46831)
- Final Rule Issued: October 10, 2024 (89 FR 82183)
- Effective: November 25, 2024
- Implements section 874 of the National Defense Authorization Act (NDAA) for FY 2022, as amended by section 872 of the NDAA for FY 2024

OVERVIEW

- Establishes a pilot program permitting noncompetitive award of certain DoD follow-on contracts to certain employee-owned qualified businesses
- “Qualified business”: S corporation where 100% outstanding stock is held through an employee stock ownership plan
- Does not apply to procurements below the Simplified Acquisition Threshold

SOLE SOURCE AWARD CRITERIA:

A contracting officer may award one sole-source, follow-on contract to an incumbent “qualified business” contractor if:

- ✓ The contract is for the continued development, production, or provision of products or services that are the same as or substantially similar to those procured under the prior contract awarded to the contractor by or for DoD;
- ✓ The contractor has a minimum performance rating of satisfactory for the predecessor contract in the Contractor Performance Assessment Reporting System;
- ✓ The contract is not for commercially available off-the-shelf (COTS) items; and
- ✓ The contractor meets limitations on subcontracting certification that it will not pay more than 50% of the contract price to subcontractors unless:
- ✓ Unless waived, the contractor shall not pay more than 50% of the amount paid by the Government to subcontractors that are not qualified businesses

DFARS small business innovation research program data rights

Final Rule

([89 FR 103338](#))

Effective Jan. 17, 2025

Overview

- Implements the data rights portions of the Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) Program Policy Directives
- Aims to provide a consistent framework for protecting the intellectual property interests of small businesses involved in these programs

Key Changes and Provisions

- Introduces a single, non-extendable 20-year SBIR/STTR data protection period
 - Replaces the previous extendable 5-year period
 - After this period, the Government obtains perpetual government purpose rights instead of unlimited rights
- Revises several DFARS clauses to clarify the scope of SBIR/STTR data rights and the applicability of these rights to Phase III work
- Removes language that could imply special licenses may be negotiated before contract award, ensuring that such negotiations occur only post-award
- Clarifies that contractors must mark technical data and computer software with appropriate legends to assert restrictions on the Government's rights
- Contractors must submit a written agreement and representation for STTR program awards, detailing intellectual property rights and responsibilities
 - Applies both preaward and postaward

Additional FAR proposed rules

Combating Trafficking in Persons-Definition and Agency Responsibilities

Aligns the definition of “sex trafficking” with the statutory definition at 22 U.S.C. 7102.

Clarifies the definition of “sex trafficking” at FAR 22.1702 and paragraph (a) of the clause at FAR 52.222-50 to also include “patronizing” or “soliciting” a person for the purpose of a commercial sex act, in accordance with Federal law.

Comment period closed September 16, 2024

Pay Equity and Transparency in Federal Contracting

Prohibits contractors and subcontractors from seeking and considering information about job applicants' compensation history when making employment decisions for certain positions.

Contractors and subcontractors also required to disclose compensation to be offered to the hired applicant in job announcements for certain positions.

Proposed January 30, 2024; Withdrawn January 8, 2025

Improving Consistency Between Procurement and Nonprocurement Procedures on Suspension and Debarment

There are currently two separate suspension and debarment regulatory systems: (1) FAR for procurements; and 2) Nonprocurement Common Rule (NCR) for grants, cooperative agreements, contracts of assistance, loans, and loan guarantees.

Proposed rule aligns these two systems (where appropriate), and incorporates existing practices within the suspension and debarment systems that are not currently in the FAR. Includes new and refined definitions, notice procedures, and timing requirements.

Comment period closed Mar 11, 2024

Dollar threshold updates

FAR: Inflation Adjustment of Acquisition-Related Thresholds

- 5-year adjustment of statutory and non-statutory thresholds – will go into effect October 1, 2025
- Proposed Rule – Comment period closed January 28, 2025 ([89 FR 94649](#))

Threshold	FAR Reference	Previous Threshold	New Threshold
Micro-purchase	2.101	\$10,000	\$15,000
Simplified acquisition	2.101	\$250,000	\$350,000
Executive compensation reporting	4.14	\$30,000	\$40,000
Limiting competition to eligible 8(a) awards	6.303-1	\$25 million	\$30 million
Justifications for other than full and open competition	6.304	\$750,000	\$950,000
Ceiling for using simplified procedures for certain commercial products and commercial services	13.500 13.500(c)	\$7.5 million \$15 million	\$9.5 million \$20 million
<u>Subcontracting Plan</u> Supplies and Services Construction	19.702	\$750,000 \$1.5 million	\$950,000 \$2 million

Threshold adjustments do not apply to the Construction Wage Rate Requirements statute (Davis-Bacon Act), Service Contract Labor Standards statute, or performance and payment bonds



Dollar threshold updates

FAR & DFARS: Trade Agreements Thresholds

- Adjusts various free trade agreement thresholds, as determined by the U.S. Trade Representative
- Final Rule – Effective February 23, 2024 (FAR) and March 26, 2024 (DFARS)

Trade Agreement	Supply Contract or Service Contract* Threshold (equal to or exceeding)	Construction Contract Threshold
WTO GPA	\$174,000	\$6,708,000
FTAs:		
• Australia FTA	\$102,280	\$6,708,000
• Bahrain FTA	\$174,000	\$13,296,489
• Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR) (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua)	\$102,280	\$6,708,000
• Chile FTA	\$102,280	\$6,708,000
• Colombia FTA	\$102,280	\$6,708,000

Trade Agreement	Supply Contract or Service Contract* Threshold (equal to or exceeding)	Construction Contract Threshold
FTAs (Cont'd):		
• Korea FTA	\$100,000	\$6,708,000
• Morocco FTA	\$174,000	\$6,708,000
• United States-Mexico-Canada Agreement (USMCA) – Mexico	\$102,280	\$13,296,489
• Oman FTA*	\$174,000	\$13,296,489
• Panama FTA	\$174,000	\$6,708,000
• Peru FTA	\$174,000	\$6,708,000
• Singapore FTA	\$102,280	\$6,708,000
• Israeli Trade Act*	\$50,000	

**FAR only (not in DFARS)*



FAR:
Certification of
service-disabled
veteran-owned
small businesses

- FAR Final Rule, December 16, 2024, to implement previous SBA final rules related to sections of the FY2021 and FY2022 NDAA's.
- Previously, FY2021 NDAA: (1) transferred the responsibility for verifying the status of SDVOSB concerns from the VA to the SBA; and (2) established a governmentwide certification requirement for SDVOSB concerns seeking sole-source and set-aside contract awards under the SDVOSB Program.
- Contracting officers are now required to check SAM to verify that a concern is designated as an SDVOSB certified by SBA for sole-source or set-aside awards under the SDVOSB Program.
- If a concern submitted an application for certification to SBA on or before December 31, 2023, and represented its status as an SDVOSB concern in SAM, contracting officers may rely on a concern's representation in SAM.
- Additionally, all SDVOSB protests are now handled in accordance with SBA's updated regulations, which require SBA's Office of Hearings and Appeals (OHA) to decide SDVOSB protests.

**Effective:
12/16/2024**

Small business subcontracting payments

- SBA Proposed Rule, December 19, 2024, implements portions of Section 862 of the FY2024 NDAA
- Comments due by February 18, 2025
- Proposed rule will:
 - Require prime contractors to notify contracting officers in writing when it fails to make full or timely payments to a small business subcontractor if the payment is more than 30 days past due;
 - Require prime contractors to cooperate with contracting officers to correct/mitigate any payment failures until payment is made in full to the subcontractor; and
 - Allow contracting officers to modify a prime contractor's past performance for failure to make full or timely payments.

HUBZone program updates and clarifications, and clarifications to other small business programs

- SBA Final Rule, December 17, 2024, to clarify and amend several HUBZone regulations that were previously implemented.
- The notable HUBZone and other Small Business program updates include:
 - Elimination of the one-year certification rule and instead requiring firms to be eligible on the date of offer for HUBZone contracts and only recertify once every three years.
 - Several clarifications concerning disqualifying size and status recertification events, which can now be found at 13 C.F.R. § 125.12.
 - Delay of the effective date of ineligibility for orders and options on underlying small business multiple award contracts due to disqualifying recertifications for one year after the effective date of the final rule; and
 - Update to the negative control provisions to make them consistent across SBA's other socioeconomic set-aside programs.

Effective:
8/29/2024

FAR: Protests of orders set aside for small business

- FAR Final Rule, July 30, 2024, implements regulatory changes made by the SBA in several previous final rules.
- Provides processes and procedures for filing size and socioeconomic status protests associated with multiple-award contracts that are partially set-aside for small businesses or that include reserves for small businesses and orders placed under multiple-award contracts, with the exception of orders and blanket purchase agreements placed under Federal Supply Schedule contracts in accordance with FAR 8.405.
- Size protests for orders placed under multiple-award contracts where the contracting officer requested rerepresentation for the order are due five days after notification from the contracting officer that identifies the successful offeror.
- HUBZone, SDVOSB, EDWOSB, and WOSB status protests must be received by the close of business on the fifth business day after receipt of notification using other communication means when written notification is not required.

DoD Mentor-Protégé program

- DoD Final Rule, March 26, 2024, implements Section 856 of the FY2023 NDAA
- Authorizes the DoD Mentor-Protégé Program on a permanent basis.
- The purpose of the program is to provide incentives to DoD contractors to furnish eligible small business concerns with assistance designed to:
 1. Enhance the capabilities of small business concerns to perform as subcontractors and suppliers under DoD and other Federal Government contracts, and
 2. Increase the participation of small business concerns as subcontractors and suppliers under DoD and other Federal Government contracts.

*Effective:
3/26/2024*

Past performance of affiliate companies of small business concerns

- DoD Final Rule, November 15, 2024, implements Section 865 of the FY2024 NDAA
- When evaluating the past performance of an offeror that is a small business concern in response to a competitive DoD solicitation, contracting officers are required to consider relevant past performance information provided for affiliates of the offeror.
- Applies only to DoD procurements.
- Benefit is only for small business concerns.

*Effective:
11/15/2024*

(My) top 5 cybersecurity developments

1. OMB/CISA Publish Secure Software Development Attestation Form
2. DOD Expands Defense Industrial Base (DIB) Cybersecurity Activities Program
3. SEC Provides Guidance on Cybersecurity Incident Disclosures
4. Cybersecurity Standards – Namely NIST 800-171 and FedRAMP – Continue to Evolve
5. Cybersecurity Maturity Model Certification (CMMC) 2.0 Becomes a Thing . . . Maybe . . .

OMB/CISA software attestation form

- Background: September 2022 OMB Memorandum directed federal agencies to collect software developer attestations of adherence to the NIST Secure Software Development Framework (SP 800-218) and NIST Software Supply Chain Security Guidance.
 - Software = firmware, operating systems, applications, application services (e.g., cloud-based software), and products containing software.
 - “Critical” software meets one of five characteristics described in OMB Memo M-21-30.
 - Memo applies to “software” (a) developed after September 14, 2022, or (b) developed earlier and modified by a major version change after Sept 14, 2022, or continuously updated.
- On March 8, 2024, OMB approved the CISA attestation common form, which started the clock on federal agencies’ obligation to:
 - Collect attestations from providers of “critical software” (within three months); and
 - Collect attestations from all other providers of covered software (within six months).
- Agency can accept Plan of Action & Milestones but must request attestation extension from OMB.
- FAR rulemaking reportedly underway; no advance notice of public rulemaking or other notice.

DIB cybersecurity (CS) activities program

- Background: DIB CS Program started in 2008 as a “public-private cybersecurity partnership providing a collaborative environment for sharing unclassified and classified cyber threat information.”
 - Contractors get access to training, best practices, GFI, access to information sharing via DIBNet and DoD Cyber Crime Center.
- On March 12, 2024, DOD published Final Rule designed to expand CS Program participation:
 - Open to any DOD contractor that owns or operates a covered contractor information system (active Secret facility clearance no longer needed to participate); and
 - Can leverage Procurement Integrated Enterprise Environment registration to meet identity proof requirements (replaces medium assurance certificate and fee).
- Cyber threat information sharing is idealized but hard:
 - about 1,000 DIB CS Program participants before Final Rule;
 - Final Rule (optimistically) projected increase by 800 participants per year for next ten years.

SEC incident disclosure guidance

- Background: July 2023 SEC Final Rule required public companies to disclose material cybersecurity incidents via Form 8-K, new Item 1.05.
 - Disclosure due within four days after materiality determination.
- In mid-2024, SEC issued a flurry of guidance on this requirement:
 - On May 21, 2024, Director of SEC's Division of Corporation Finance distinguished "voluntary" from "required" filings; noted "it could be confusing for investors" if companies use Item 1.05 to disclose immaterial incidents or incidents whose materiality has not been determined.
 - On June 20, 2024, Director of Corporation Finance advised 8-K reporting rules do not prohibit otherwise permitted information sharing about cybersecurity incidents.
 - On June 24, 2024, Corporation Finance issued five new Compliance & Disclosure Interpretations (C&DIs), supplementing four published in December 2023.
- SEC will penalize companies for inadequate cybersecurity disclosures:
 - Four settlements in 2024, with civil penalties ranging from \$990K to \$4M.

Evolving cybersecurity standards

- Background: NIST 800-171 = security controls for safeguarding controlled unclassified information (CUI); FedRAMP/NIST 800-53 = security controls for cloud services used by federal agencies.
- On May 14, 2024, NIST finalized Revision 3 of 800-171 and 800-171A implementing guidance → not yet mandatory, but expected to become required compliance standard via DFARS 252.204-7012, etc.
 - More clarity and specificity → removed the word “periodically”; removed “basic” vs. “derived” requirements (NIST SP 800-53 is the source).
 - Potential for lack of uniformity remains → “organization-defined parameters”
- On July 25, 2024, OMB published the memo “Modernizing the Federal Risk Authorization Management Program” (M-24-25) → reinforces other initiatives to modernize FedRAMP, improve security reviews, and incentivize cloud providers to become compliant:
 - Strategic roadmap published on March 28, 2024 with concrete goals and specific initiatives.
 - Developer hub launched on July 11, 2024 to make authorization more efficient and accessible.
- The evolution of these standards is not quick, but the standards themselves are not static.

CMMC 2.0 on the precipice

- Background: CMMC framework introduced in early 2020 to standardize and enhance protection of unclassified information within the DOD supply chain → various pilot efforts began → “streamlined” CMMC 2.0 announced in late 2021 → pilots shelved.
- On October 15, 2024, DOD issued the Final Rule establishing the CMMC Program with three basic elements (32 CFR Part 170):
 - Three-Tiered Model: Security standards increase depending on type and sensitivity of information handled; broad flowdown requirements.
 - Assessment Requirement: Self, third-party, or DOD, depending on Level.
 - Varying Implementation: Compliance as a condition of award in some cases; phased implementation in others.

CMMC 2.0 on the precipice (cont.)

- On August 15, 2024, DOD issued a Proposed Rule to amend the DFARS to establish the contractual requirements to implement CMMC 2.0 (48 CFR Part 204).
 - Comments were due October 15, 2024 → 97 comments received.
- 32 CFR Part 170 Final Rule took effect on December 16, 2024.
- Regulatory freeze will delay 48 CFR Part 204 Final Rule, at least temporarily.
- 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, as applicable.

Enforcement of contractor cybersecurity compliance requirements

BACKGROUND:

- On August 22, 2024, the Department of Justice filed a complaint-in-intervention against Georgia Tech and GTRC under the False Claims Act for failure to meet cybersecurity requirements in DoD contracts
- Stems from a whistleblower suit by former Georgia Tech cybersecurity team members

KEY ALLEGATIONS:

- Georgia Tech allegedly ignored federal cybersecurity regulations since 2019
- Researchers resisted compliance, leading to inadequate cybersecurity measures in violation of Georgia Tech's DoD contracts
- Specific alleged failures include
 - Failure to develop and implement a system security plan, as required by DoD cybersecurity regulations
 - Intentional failure to install, update or run anti-virus or anti-malware tools on laboratory desktops, laptops, servers and networks used to perform DoD contracts
 - Submission of a false cybersecurity score to the DoD
- The score was based on a non-existent IT system, misleading the DoD

LEGAL AND PRACTICAL IMPACTS:

- This is the first enforcement case under DoJ's Civil Cyber-Fraud Initiative
- Highlights the importance of strict cybersecurity compliance for government contractors



Establishing FAR part 40, information security and supply chain security

- FAR Final Rule, April 1, 2024, implements regulatory changes made by the SBA in several previous final rules.
- Adds the framework for a new FAR part 40, which will contain the policies and procedures for managing information security and supply chain security when acquiring products and services.
- Relocation of the related existing policies or procedures will be done through separate rulemaking.
- This new part will provide a single, consolidated location in the FAR that addresses requirements related to managing information security and supply chain security.

*Effective:
5/1/2024*

Preventing conflicts of interest for certain consulting services

- DoD Proposed Rule, September 26, 2024, implements Section 812 of the FY2024 NDAA.
- Prohibits contracting officers from awarding contracts assigned a NAICS code beginning with 5416 to an offeror that holds a contract for consulting services with one or more covered foreign entities.
- NAICS codes beginning with 5416 are for management, scientific, and technical consulting services.
- Prohibition can be waived if an offeror has an approved COI mitigation plan.
- Consulting services means advisory and assistance services, but does not include:
 - Compliance with legal, audit, accounting, tax, reporting, or other requirements of the laws and standards of countries; or
 - Participation in a judicial, legal, or equitable dispute resolution proceeding.

Prohibition on unmanned aircraft systems from covered foreign entities

- FAR Interim Rule, November 12, 2024, implements the American Security Drone Act of 2023 (subtitle B, title XVIII of the FY2024 NDAA).
- Creates new FAR 52.240-1 that prohibits contractors from:
 - Delivering a Federal Acquisition Security Council (“FASC”)-prohibited unmanned aircraft system or aircraft to the government.
 - On or after December 22, 2025, operating a FASC-prohibited unmanned aircraft system in the performance of the contract
 - On or after December 22, 2025, using Federal funds for the procurement or operation of a FASC-prohibited unmanned aircraft system
- FASC publishes a list of covered foreign entities in SAM.

*Effective:
11/12/2024*

DFARS:

Restriction on certain metal products

- DoD Final Rule, May 30, 2024, implements Section 844 of the of the FY2021 NDAA and Section 854 of the FY2024 NDAA.
- Revises DFARS 225.7018-2 and DFARS 252.225-7052 to update the dates of the current restrictions through December 31, 2026, and to reflect that the new restrictions will be effective on January 1, 2027.
- These DFARS clauses prevent DoD from acquiring certain metals and magnets from covered countries (Iran, North Korea, Russia, and China).
- DoD currently requires that these covered materials not be melted or produced in covered countries.
- Effective January 1, 2027, DoD will prohibit these covered materials from being mined, refined, separated, melted or produced in one of the covered countries.
- COTS items currently are exempt from the prohibition unless they are 50% or more tungsten by weight.
- Effective January 1, 2027, COTS items will be exempt from the updated prohibition unless they are 50% or more covered material (not just tungsten) by weight.

Assuring integrity of overseas fuel supplies

- DoD Final Rule, September 26, 2024, implements Section 843 of the FY2022 NDAA.
- Requires offerors to certify they will:
 - Not provide fuel from a prohibited source;
 - Comply with certain export control and anticorruption regulations and statutes (ITAR, EAR, FCPA, and OFAC sanctions) for contracts awarded for the acquisition of fuel in support of overseas contingency operations.
- Prohibited sources can be found in FAR subpart 25.7 and on the OFAC website.

*Effective:
10/1/2024*

Prohibition on certain semiconductor products and services

- FAR advanced notice of proposed rulemaking, May 30, 2024, implements section 5949 of the of the FY2023 NDAA.
- Rule proposes to ban agencies from procuring products and services that incorporate semiconductors produced, designed, or provided by certain companies based in China and other foreign countries of concern.
- FAR Council is considering requiring contractors to conduct a “reasonable inquiry.”
- The new semiconductor prohibitions will be effective on December 23, 2027.

DFARS:

Disclosure of information regarding foreign obligations

- DoD Proposed Rule, November 15, 2024, to implement a section of the FY2019 NDAA.
- The proposed rule will impose new pre-award and post-award disclosure obligations that are required if an Offeror or Contractor allows review of its source or computer code that is used or will be used for a DoD contract either by a foreign government or a foreign person.
- An Offeror or Contractor is required to disclose whether any time after August 12, 2013, they (1) allowed a foreign person or foreign government to review; or are (2) under any obligation to allow a foreign person or foreign government to review:
 - The source code for any product, system, or service that DoD is using or intends to use; or
 - The computer code for any other than commercial product, system, or service developed for DoD.
- The proposed rule would also require Offerors/Contractors to disclose whether it holds or has sought a license pursuant to the EAR or the ITAR for information technology products, components, software, or services that contain computer code custom-developed for the other than commercial product, system, or service that is the subject of the contract.

DFARS:

Buy American Act requirements

- DoD Final Rule, February 15, 2024, to supplement the FAR implementation of EO 14005.
- Domestic end products must contain at least 75% domestic components, calculated by the value of components, beginning in calendar year 2029.
- For calendar years 2024 through 2028, only 65% domestic components are required.
- These thresholds replace the 55% threshold for domestic components that was set in a June 2022 final rule.
- The rule contains a fallback provision that will allow some contractors to wait until 2030 to comply with the new requirements, just as the FAR rule does.
- Contractors may qualify for the 55% fallback rule if no domestic products are available at a higher threshold or if the cost to acquire compliant goods would be unreasonable.
- The new DFARS rule also provides for enhanced price preferences for critical items and critical components.

Make Personal Protective Equipment in America Act restrictions on foreign acquisition

- DHS Proposed Rule, October 1, 2024, to implement a portion of the Infrastructure Investment and Jobs Act (“IIJA”).
- The proposed rule codifies how DHS will comply with the Make Personal Protective Equipment (“PPE”) in America Act, which is part of the IIJA.
- PPE is defined as surgical masks, respirator masks and powered air purifying respirators and required filters, face shields and protective eyewear, gloves, disposable and reusable surgical and isolation gowns, head and foot coverings, and other gear or clothing used to protect an individual from the transmission of disease.
- The proposed rule will require that any DHS contracts for the procurement of PPE be for items that are domestically grown, reprocessed, reused, or produced in the United States.
- The contracts with for PPE will be required to last at least two years to incentivize investment in the domestic production of PPE.
- Alternatives to the domestic production of PPE will be allowed in certain circumstances.

List of domestically nonavailable articles

- FAR Proposed Rule, February 15, 2024, to implement Section 9 of EO 14005.
- Revises the list of domestically nonavailable articles under the Buy American statute and implements requirements related to making future changes to the list.
- DoD, GSA, and NASA in partnership with MIAO and OFPP, conducted a review of each of the 109 articles on the existing nonavailable articles list.
- The current list of articles identified in FAR 25.104(a) is a wide-ranging mix of natural resources, compounds, materials, and other items of supply.
- The resulting proposed rule removes 70 of those articles from the Federal Government's non-availability list.

Artificial Intelligence (AI) developments

- On March 28, 2024, OMB published the Memo “Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence” (M-24-20):
 - Provided guidance on AI governance and innovation, and established required risk management practices including assessment, testing, and evaluation of AI, and ongoing monitoring and oversight, particularly of AI affecting rights or safety.
- On September 24, 2024, OMB published the Memo “Advancing the Responsible Acquisition of Artificial Intelligence in Government” (M-24-18):
 - Included requirements and guidance for agencies on establishing cross-functional and interagency collaboration, managing AI risk and performance, and promoting innovative approaches to purchasing AI.
- January 24, 2025 EO “Removing Barriers to American Leadership in Artificial Intelligence” rescinded Biden EO and ordered revision of M-24-10 and M-24-18 for consistency with new EO.
- Absent federal legislation, states (notably CA, CO, TN, UT) have taken various steps to regulate AI.

Laws and Regulations:

FY2025 NDAA

Servicemember Quality of Life Improvement and National Defense Authorization Act for Fiscal Year 2025



Procurement Policy

- Sec. 814. Modifying commercial product and service determinations
- Sec. 816. Modifying other transaction authority
- Sec. 824. Extending the temporary authority to modify contracts due to inflation through 12/31/2025 (from FY 2023 NDAA)
- Sec. 849. Supply chain illumination incentives
- Sec. 1411. Restoring the national defense stockpile
- Sec. 1601. Modifying the space contractor responsibility watch list

Buy America | Buy Allied

- Sec. 844. Edits to sourcing requirements for strategic and sensitive materials
- Sec. 845. Requiring domestic sourcing of strategic materials critical to national security
- Sec. 848. Berry Amendment domestic nonavailability determinations
- Sec. 164. Prohibition on using or procuring foreign-made light detection and ranging technologies
- Sec. 839. Employment transparency regarding individuals working in China
- Sec. 853. Prohibiting DoD from buying from companies that provide semiconductors to Huawei

Cyber/AI

- Sec. 237. Pilot program on using artificial intelligence for workflow and operations tasks
- Sec. 1087. Establishing a DoD multilateral AI working group
- Sec. 1522. Modernizing DoD's authorization to operate process
- Sec. 1612. Cyber intelligence center

Laws and Regulations:

Other Topics

“The DoD is committed to protecting its supply chains and defense industrial base from adversarial FOCI. Identifying FOCI concerns early protects national security interests, and where appropriate, enables mitigation in connection with award of a contract or defense research assistance award, as applicable.”

 POLSINELLI. What a law firm should be.

Requires assessments of “covered contractor” beneficial ownership and FOCI to protect national security interests and mitigate risks in connection with contract awards

- *Applies to all DoD Components*



■ FOCI review and mitigation for unclassified contracts

- Covered contractors must undergo FOCI assessments to determine if foreign influence poses a risk to national security
- The Defense Counterintelligence and Security Agency (DCSA) is responsible for reviewing beneficial ownership information and recommending FOCI mitigation measures.
- If a contractor is found to be under FOCI, mitigation measures must be implemented and maintained for the duration of the contract.
- **Contracts may not be awarded or extended if FOCI risks cannot be mitigated.**
- Annual reviews are conducted to ensure compliance with FOCI mitigation measures, and non-compliance is reported to relevant officials

■ “Covered Contractor or Subcontractor” defined

- A company that is an existing or prospective DoD contractor or subcontractor
- On a contract, subcontract, or defense research assistance award with a value exceeding \$5 million
- Contractors for commercial products or services are excluded
 - *Exception if:* the designated official determines that the contract involves a risk or potential risk to national security or potential compromise of sensitive data, systems, or processes such as personally identifiable information, cybersecurity, or national security system.

2025 early developments in the new administration affecting government contractors

Executive Orders Issued

- America First Trade Policy
- Regulatory Freeze Pending Review
- Unleashing American Energy
- Protecting the American People Against Invasion
- Reevaluating and Realigning United States Foreign Aid
- Establishing and Implementing the President's 'Department Of Government Efficiency'
- Defending Women from Gender Ideology and Extremism and Restoring Biological Truth to the Federal Government
- Ending Radical and Wasteful Government DEI Programs and Preferencing
- Ending Illegal Discrimination and Restoring Merit-Based Opportunity
- Designation of Ansar Allah as a Foreign Terrorist Organization
- Council to Assess the Federal Emergency Management Agency
- The Iron Dome for America

Executive Orders Revoked

- E.O. 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government
- E.O. 13989, Ethics Commitments by Executive Branch Personnel
- E.O. 13997, Improving and Expanding Access to Care and Treatments for COVID-19
- E.O. 14006, Reforming Our Incarceration System To Eliminate the Use of Privately Operated Criminal Detention Facilities
- E.O. 14008, Tackling the Climate Crisis at Home and Abroad
- E.O. 14031, Advancing Equity, Justice, and Opportunity for Asian Americans, Native Hawaiians, and Pacific Islanders
- E.O. 14055, Nondisplacement of Qualified Workers Under Service Contracts
- E.O. 14057, Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability

Executive Orders Revoked (Cont'd)

- E.O. 14069, Advancing Economy, Efficiency, and Effectiveness in Federal Contracting by Promoting Pay Equity and Transparency
- E.O. 14096, Revitalizing Our Nation's Commitment to Environmental Justice for All
- E.O. 14110, Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence

Other Notable Actions

- OMB Memorandum M-25-13: Temporary Pause of Agency Grant., Loan, and Other Financial Assistance Programs (Jan. 27, 2025)
- OMB Memorandum M-25-14: Rescission of M-25-13 (Jan. 29, 2025)

Cases: Protests

**WHEN DO YOU HAVE TO BE
REGISTERED IN SAM.GOV?:**

*TLS Joint
Venture LLC,
B-422275 and
FAR 52.204-7*

- Successful protest of a Naval Sea Systems Command contract;
- The solicitation included FAR 52.204-7, which required that each offeror be registered at SAM.gov and “continue to be registered until time of award”;
 - The protester argued that the awardee was ineligible because its registration briefly lapsed during the solicitation period;
 - The Navy argued that continuous registration was not required and that registration is a responsibility matter within the Contracting Officer’s purview;
- GAO determined that FAR 52.204-7 required continuous registration, thereby making the awardee ineligible due to the lapse. It also found registration to be a matter of solicitation compliance, rather than responsibility.
- GAO’s decision in TLS was released in April 2024;
- In November 2024, FAR 52.204-7 was amended to require SAM.gov registration “when submitting an offer or quotation and at time of award” – but not continuously in between.

PROTEST IS NOT LATE WHEN IT'S THE GOVERNMENT'S FAULT:

LinQuest Corp., B-422285 and B-422285.2

The protester filed an agency-level protest regarding a Space Force award – however, the filing was automatically deleted by a government server;

When the protester re-filed, Space Force dismissed the agency-level protest as untimely;

When the protester then filed at GAO, the agency argued that the GAO protest was untimely because there was no timely agency-level protest;

GAO (which denied the protest), rejected Space Force's argument that delays in electronic submission of protests should be treated the same way as electronic submission of proposals.

BUT AN AGENCY CANNOT EXCUSE A LATE PROPOSAL: *Sofia Health LLC, B-422186*

- Protester attempted to electronically submit its proposal – after the VA made award, the protester learned that its proposal was quarantined and never received;
- The protester re-submitted its proposal and requested that the agency consider it;
- When the agency refused, the protester filed a pre-filing notice at the Court of Federal Claims;
- In response, and on the advice of DOJ counsel, the VA evaluated the proposal and confirmed its initial award determination;
- The subsequent protest was dismissed due to GAO's determining that the protester was not an interested party and that the VA did not have discretion to review its proposal;
- Specifically, because the proposal was not received electronically by 5:00 pm the day before the deadline for proposals, no exception for late proposals applied.



Science Applications International Corp., B-422244 and B-422244.2

- SAIC protested the award of a task order to Peraton;
- Counsel for the protester and intervenor were initially admitted to the protective order without objection;
- However, a month later counsel for Peraton submitted a letter withdrawing its consent to the admission of SAIC's attorneys at Crowell & Moring to the protective order due to an alleged conflict of interest involving Crowell's past representation of Peraton's subsidiary, Perspecta – the agency concurred;
- GAO declined to rescind admission to the protective order for SAIC's counsel, holding that it does not adjudicate matters of professional responsibility and that the allegations did indicate that SAIC's counsel would fail to comply with the protective order.

**ADVENTURES IN GAO
OUTCOME PREDICTION:**

*Kearney et al.
v. U.S.*

Successful corrective action protest at the COFC;

Deloitte protested award of a National Geospatial-Intelligence Agency contract to Kearney & Company at GAO;

GAO held outcome prediction, advising that it planned to sustain the protest – NGA then took corrective action to cancel the award to Kearney;

The COFC ordered that the contract be reinstated, finding that the corrective action was based on the GAO attorney's irrational interpretation of the RFP.

Other Cases

ACLR, LLC v. United States, No. 23-1190

- *Centers for Medicare & Medicaid Services (“CMS”) sought recovery auditing services from ACLR’s GSA schedule. A Task Order provided 7.5% commission of amounts collected.*
- *\$313 million in improper payments identified during the data analysis stage.*
- *Changing SOW > No recovery permitted> No bad faith on the part of CMS*
- *Task Order was constructively Terminated for Government’s convenience per FAR 52.212-4(l)*

“...[T]he Contractor shall be paid a percentage of the contract price reflecting the **percentage of the work performed** prior to the notice of termination, plus **reasonable charges** the Contractor can demonstrate to the satisfaction of the Government using its **standard record keeping system**, have resulted from the termination....”
- *No work was performed; therefore, only entitled to reasonable charges (\$157,318).*
- *Dictionary consulted for definition of “standard record keeping”*
- *Non-precedential*

Anchorage v. United States, No. 22-1719

- *Since 2014, the Port of Anchorage has been in litigation with the Maritime Administration (MARAD) over a failed construction project for a new port.*
- *Not a grant, but not a traditional procurement contract either.*
- *Through a MOU executed in 2003, MARAD agreed to provide federal funds to Anchorage for development. MOU included termination language allowing either Party to terminate upon 90-days' notice*
- *COFC awarded Anchorage \$367,446,809 (entitlement and repair)*
- *Holding:*
 - *The MOU did not guarantee that MARAD would deliver a defect-free port; award vacated*
 - *Affirmed \$11M in damages based on 2011 Memorandum that MARAD breached for settling with a construction vendor without Anchorage's consent*

Percipient.ai, Inc. v. United States

No. 23-1970

- *The National Geospatial-Intelligence Agency (NGA) awarded the SAFFIRE IDIQ along with a Task Order to CACI to improve NGA's for services related to improving the use of visual intelligence data.*
- *Percipient did not submit a proposal responsive to SAFFIRE. Instead, it protested that the preference for commercial products and services found in FASA (10 U.S.C. § 3453) requires the NGA to avoid developing new software under a Task Order while Percipient's commercial solution is available.*
- *FASA task order bar did not apply. The protest did not challenge "the issuance" or "proposed issuance" of a task order. 10 U.S.C. § 3406(f)(1). The protest challenged the adequacy of the FASA-required market research (and the review of Percipient's product).*
- *Tucker Act jurisdiction found under the third prong; "any alleged violation of statute [FASA] or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1)*
- *Petition for panel rehearing en banc granted on Nov 22, 2024*

AVUE REDUX:

The CBCA
again rules
that a EULA
does not
create
Contract
Disputes Act
jurisdiction

- Avue sold software to FDA through a federal supply schedule reseller, Carahsoft;
- Avue filed a CBCA appeal alleging that FDA misappropriated its data in violation of its EULA terms;
- The CBCA dismissed in 2022, finding that although the EULA was binding on FDA, there was no jurisdiction over Avue's appeal because the EULA was not a procurement contract;
- The Federal Circuit reversed in March 2024, holding that Avue had sufficiently alleged it was a party to the federal supply schedule contract and task order via the EULA – it remanded to the CBCA to determine if Avue was actually a party to those agreements;
- The CBCA again determined that it lacks jurisdiction over Avue's appeal;
- The Board reasoned that Avue had no enforceable rights under Carahsoft's agreements with the government and that the EULA did not create a separate agreement between Avue and FDA.

Circuit split regarding federal contractor minimum wage



In 2021, Executive Order 14026 raised the minimum wage for federal contractor employees to \$15.00/hour (with provisions for further annual escalations);



Various states and other groups have challenged the Department of Labor rule implementing the EO;



In 2024, the 9th Circuit ruled that the federal contractor minimum wage exceeds the President's authority under the Federal Property and Administrative Services Act; the 10th Circuit found the opposite and upheld the DoL rule – both panels were divided;



The Supreme Court denied cert regarding the 10th Circuit decision; meanwhile, DOJ has requested *en banc* rehearing at the 9th Circuit

2024 SCOTUS - Administrative Law

SEC v. Jarkesy (June 27, 2024)

- The Seventh Amendment right to a jury trial prohibits administrative adjudication of certain civil monetary penalties

Loper Bright Enterprises v. Raimondo and Relentless, Inc. v. Dept. of Commerce (June 28, 2024)

- Overruled the *Chevron* doctrine: (1) is the statute “silent or ambiguous with respect to the specific issue”?; (2) if yes, court must defer to agency interpretation when “based on a permissible construction of the statute”
- Courts are to “exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires”

Corner Post, Inc. v. Board of Governors of the Federal Reserve System (July 1, 2024)

- A potential APA claim accrues upon injury to a plaintiff by final agency action, regardless of the date upon which the final regulation was published

