



Government Contracting: *Key Legal Issues for Generalists & Commercial Companies*



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Overview

– Introduction

- Who is a government contractor?
 - Prime Contractor vs. Subcontractor
 - Value Added Resellers, Vendors, Suppliers
 - Commercial Contracting with the US Government
- How to enter government contracting and/or expand your presence

– Key Principles

- What to know when you're a government contractor
 - Prime contractors and subcontractors (key provisions and other concerns)
 - Compliance (internal programs and controls; requirements under FAR/DFARS; mandatory disclosures)
 - Due Diligence (what to look for when buying a government contractor)

– Hot Topics

- Terminations in 2025
- Small Business Administration (“SBA”) Recertification Regulation

– Questions

Who is a Government Contractor?

Prime Contractors	Subcontractors
<ul style="list-style-type: none">– Bid on and awarded contracts directly from government– Manage subcontractors– Responsible for ensuring work completed as defined in contract– Privity of contract with the government	<ul style="list-style-type: none">– Join prime contractor teams, usually to provide specific capability or product– Privity of contract with prime or subcontractor (not the government); still subject to flow downs– Some government contracts require “other than small” businesses to subcontract with a small business

Who is a Government Contractor?, cont.

– FAR 2.101 Definitions

- Does not define “contractor” or “subcontractor”
- Does define “contract”
 - *“Contract means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C.6301, et seq. For discussion of various types of contracts, see part 16.”*

– Value-Added Reseller (“VAR”)

- A company that takes existing commodities, adds its own value, and resells it as a new product or package

– Vendor/Supplier

Who is a Government Contractor?, cont.

– Commercial Contracting with the U.S. Government

- Executive Order 14271
 - Ensuring Commercial, Cost-Effective Solutions in Federal Contracts (April 15, 2025)
- FAR 2.101 Definitions
 - “Commercial product”
 - “Commercial service”
 - “Commercially available off-the-shelf (COTS) item”
- FAR Part 12 Acquisition of Commercial Products and Commercial Services
 - FAR 12.101 Policy
 - *“The head of the agency shall— ... ((b) Acquire commercial products, commercial services, or nondevelopmental items when they are available to meet the needs of the agency; and (c) Require prime contractors and subcontractors at all tiers to incorporate, to the maximum extent practicable, commercial products, commercial services, or nondevelopmental items as components of items supplied to the agency.”*

Who is a Government Contractor?, *cont.*

- FAR 52.212-4 Contract Terms and Conditions - Commercial Products and Commercial Services
 - Contains terms on: Inspection/Acceptance, Assignment, Changes, Disputes, Definitions, Excusable Delay, Invoicing, Patent Indemnity, Payment, Risk of Loss, Taxes, Termination for the Government's convenience, Termination for cause, Title, Warranty, Limitation of Liability, Compliance with Laws, Order of Precedence, and Unauthorized Obligation
- FAR 52.212-5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders - Commercial Products and Commercial Services
 - *Updated October 2025 – lists mandatory FAR clauses for commercial procurements (including limited flowdowns for subcontractors of commercial products or commercial services)*

Getting Started

How to enter government contracting and/or expand your presence:

**Create a new
entity**

**Use an
existing entity
or division**

**Engage in
M&A**

**Teaming
Options**

Create a New Entity

Pros	Cons
<ul style="list-style-type: none">– Control - starting from the ground up<ul style="list-style-type: none">• Building the team and compliance• No negative past performance– Avoids time/cost burden of M&A<ul style="list-style-type: none">• Due diligence• Capital/cash flow needed to acquire existing government contractor, qualify for financing	<ul style="list-style-type: none">– Time/cost to assemble new team that:<ul style="list-style-type: none">• Understands rules & regulations, e.g., FAR, DFARS, cost accounting standards• Has capabilities specific to performing the government contracting work sought• Has relationships with government contracting customers and supporting vendors/subcontractors– No history of past performance (CPARS)– Time/Cash flow/capital needs<ul style="list-style-type: none">• Pre-award costs, e.g., estimating, bidding, negotiation costs; compliance; qualifying for bid bonds• Post-award costs, e.g., ongoing performance costs, compliance; qualifying for performance and payment bonds

Use an Existing Entity or Division

Pros	Cons
<ul style="list-style-type: none">– If your organization is <u>not</u> entirely new to government contracting:<ul style="list-style-type: none">• Leverage existing past performance record, capabilities, knowledge of rules and regulations• Leverage existing relationships with primes, supporting vendors/subcontractors• Leverage available capital/cash flow to support pre- and post-award costs/burden– Avoids time/cost burden of M&A<ul style="list-style-type: none">• Due diligence• Capital/cash flow needed to acquire existing government contractor, qualify for financing	<ul style="list-style-type: none">– If your organization is <u>entirely</u> new to government contracting, similar list of cons as new entity applies:<ul style="list-style-type: none">• Time/Cost to assemble new team that:<ul style="list-style-type: none">▪ Has awareness of rules & regulations, e.g., FAR, DFARS cost accounting standards▪ Has capabilities specific to performing the government contracting work sought▪ Has relationships with government contracting customers and supporting vendors/subcontractors• Limited or no history of past performance (CPARS)• Time/Cash flow/capital requirements<ul style="list-style-type: none">▪ Pre-award costs, e.g., estimating, bidding, negotiation costs; compliance; qualifying for bid bonds▪ Post-award costs, e.g., ongoing performance costs, compliance qualifying for performance and payment bonds

Engage in M&A

Pros	Cons
<ul style="list-style-type: none">– Acquire an existing base of customers, multi-year contracts, and capabilities (performance of contract work, know-how regarding rules and regulations, etc.)<ul style="list-style-type: none">– Target company's management team, existing relationships, and capabilities may not be easily replaced– Leverage (positive) past performance record– Novating existing contracts may be quicker/easier than winning new contracts	<ul style="list-style-type: none">– Time/cost burden of completing an acquisition (e.g., due diligence, negotiations, post-closing requirements)– Affiliation and eligible post-M&A (e.g., can/will options be exercised, can the post-closing entity bid on orders, is there only set-aside work in the pipeline)– Complications in novation process (assets sale v. stock sale)– Due diligence issues (e.g., unsatisfactory performance, compliance issues, warranty claims, other claims/litigation, indemnification obligations)

Teaming Options

- Regardless of whether your entity is new, existing, or just acquired, there are *various* teaming options to enter or expand your entity's government contracting presence
- These arrangements can help separate entities “team up” and:
 - Complement/leverage each others' capabilities pre- and post-award
 - Offer the best combination of performance, cost, and delivery to the government customer

**Teaming
Agreement**

**Subcontract
Agreement**

**Mentor-
Protégé
Agreement**

**Joint
Venture
Agreement**

Teaming Agreement

- An agreement between a potential prime contractor and another company to act as a potential subcontractor under a specified government contracting opportunity
 - Typically formed and executed before the prime submits its bid
 - Distinguished from “other teaming arrangements,” such as JVs (48 CFR § 9.601.)

Pros	Cons
<ul style="list-style-type: none">– Delineates and limits the parties' obligations to each other– TA provisions/obligations can be tailored to apply to the specific opportunity sought– Reduce risk by requiring the would-be prime contractor and subcontractor to bear their own proposal preparation costs– The team members will not become “affiliates” for small business status eligibility, provided they comply with subcontracting limitations (FAR 52.219-14)	<ul style="list-style-type: none">– Enforceability issues in some jurisdictions– Should the prime contractor win the contract, the prime and sub may still fail to reach agreement on subcontract terms– Prime is typically in control of the proposal process, and if an award is made the prime is the only party in privity of contract with government and bears risk of performance

Teaming Agreement Key Terms

– Confidentiality/Non-Disclosure

- Use a non-disclosure provision or incorporate an executed NDA
- Ensure that the provision or NDA allows the prime to submit the team member's confidential information to the government, to the extent necessary and with protections
 - *Note: team members may request to submit financial information directly to the government*

– Exclusivity/Non-Solicitation/Workshare

- Prevent team members from participating in a proposal with another entity for the same opportunity covered by the teaming agreement
- Define workshare and clearly allocate scope of work

– Terms for a Resulting Subcontract

- Identify key provisions that would be required in a resulting subcontract, including flow downs

Subcontract Agreement

– Subcontract Agreement

- An agreement between the prime contractor and subcontractor that sets forth the terms of performance, rights, and obligations of the parties
- Typically executed after the award is made to the prime (but negotiated before award to the extent practicable)
- Flows down requirements and provisions related to the subcontractor's work, to ensure the prime contractor remains compliant with its prime contract obligations

– Key Terms discussed in next section

Mentor-Protégé Agreement (MPA)

- **SBA Mentor-Protégé Program** helps eligible small businesses (protégé) compete for government contracting opportunities by partnering with a more experienced company (mentor) (13 CFR § 125.9)
 - SBA must approve the MPA, and the MPA may last for up to 6 years from the date of SBA approval
 - The mentor and protégé under the MPA may form joint ventures (“JVs”) and compete for set-aside contracts, so long as the protégé qualifies for such set-aside status, and the JV is in compliance with 13 CFR § 125.8
 - Protégé may sell to the mentor an equity interest of up to 40% to raise capital
 - A MPA JV can use experience and past performance of the mentor and protégé in bidding for prime contracts
 - Contracts may contain obligations to notify USG upon M&A activity creating change in ownership in either JV partner and off-ramping following disqualifying size recertification

Joint Venture (JV)

- More generally, refers to the creation of a **new legal entity** by 2 or more companies to act as a potential prime contractor
- Includes MPA-based JVs (*discussed in last slide*)

Pros	Cons
<ul style="list-style-type: none">– JV entity can be established to cover multiple solicitations or contracts (however, depending on agency, the JV agreement may need to identify the specific government contracting opportunity sought)– Separate entity can benefit from combined bonding capacity of partners– Liability can be limited to the new JV entity, e.g., if LLC or LLP is used– Entity may be able to avoid high-cost structure of its member companies	<ul style="list-style-type: none">– Each member may be jointly and severally liable for its partner(s) obligations– Management issues/partner disagreements/difficulties in decision making/action– Members may be locked into a relationship for longer than intended, e.g., in the post-award contract disputes phase– Potential affiliation issues absent carveouts in the rules (<i>13 CFR § 121.103</i>)

Key Principles: Prime Contracts

- **Types of Contracts (FAR Part 16)**
 - *“The specific contract types range from firm-fixed-price, in which the contractor has full responsibility for the performance costs and resulting profit (or loss), to cost-plus-fixed-fee, in which the contractor has minimal responsibility for the performance costs and the negotiated fee (profit) is fixed. In between are the various incentive contracts (see subpart 16.4), in which the contractor’s responsibility for the performance costs and the profit or fee incentives offered are tailored to the uncertainties involved in contract performance.” (FAR 16.101)*
 - Other agreements with the USG that are technically not “contracts” (e.g., OTAs, CRADA, etc.)
- **Prime Contract Terms (PoP, T4C, Stop Work, etc.)**
- **Bid Protests**
- **Request for Equitable Adjustment**
- **Compliance** (*discussed more later*)

Key Principles: Prime Contracts + Subcontracts

– Mandatory Flowdowns

- FAR/DFARS and contract clauses may impose requirements that apply throughout the supply chain and thus, require a prime contractor to **flowdown** contract obligations to subcontractors
- Some clauses require that prime contractors require that the contract obligations are further flowed down by the first-tier subcontractor to the latter's own subcontractors, suppliers, and lower-tier vendors
- **Every contractor should be aware of its flowdown obligations**
- Many contracts for commercial items or services are expressly exempt from certain flowdown requirements

Key Principles: Subcontracts Key Provisions

– Scope of Work and Period of Performance

- Clearly define subcontractor's scope of work and flowdown applicable prime contract requirements
- Automatic exercise of option years/extensions when the government exercises under the prime contract versus exercising in the prime contractor's discretion

– Payment Terms

- Type of subcontract (FFP, T&M, etc.)
- Primes often try to push for paid when paid type clauses

– Termination for Convenience/Cause; Stop Work

- Subcontractors prefer that these rights be tied to the government's exercise of its termination rights; prime contractors want more flexibility (e.g., the right to terminate regardless of the government exercising its rights to terminate)
- Settlement costs for termination for convenience

– Disputes

- Arbitration v. court – taking into account claims that may involve the Contracting Officer's decision

– Protection and Allocation of Intellectual Property (“IP”)

- Include provisions that allocate/delineate rights in IP (technical data, computer software, inventions, patents, or other confidential/proprietary information)

Key Principles: Compliance

Federal Acquisition Regulation ("FAR")	Defense Federal Acquisition Regulation Supplement ("DFARS")
<ul style="list-style-type: none">– Regulation for use by federal executive agencies for acquisition of supplies and services with appropriated funds– Consists of uniform policies and procedures that govern acquisition process of Federal agencies– Codified in Title 48 of Code of Federal Regulations ("CFR")– Has full force and effect of law	<ul style="list-style-type: none">– Administered by Department of Defense ("DoD")– Implements and supplements FAR– Contains requirements of law, DoD-wide policies, delegations of FAR authorities, deviations from FAR requirements, and policies/procedures that have significant effect on the public– Should be read in conjunction with primary set of rules in the FAR

Key Principles: Compliance

– Mandatory Disclosure Rule (FAR 52.203-13)

- Requires contractors to disclose in writing situations for which they have credible evidence of a potential violation of the civil False Claims Act (“FCA”) or Federal criminal law involving fraud, conflict of interest, bribery, or gratuity
- Requires that contractor make disclosures to respective OIG for Agency or Department that was party to the contract or order
- Contractors also required to disclose credible evidence of "significant overpayments"
 - Failure to timely report credible evidence of significant overpayments is cause to suspend or debar the contractor

Key Principles: Compliance, cont.

– FAR 52.203-13 Contractor Code of Business Ethics and Conduct

- **Threshold** - Included in government contracts (prime and sub) if the value of the contract is expected to exceed \$6 million and the performance period is 120 days or more
- **Written Policy** - Generally, within 30 days of contract award the contractor must have a written code of business ethics and conduct which is made available to all employees performing under the contract
- **Culture of Compliance** - Exercise due diligence to prevent and detect criminal conduct and promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law
- **Disclosure** - Timely disclose, in writing, to the agency OIG, with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed:
 - A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or
 - A violation of the civil False Claims Act (31 U.S.C. 3729-3733)

Key Principles: Building a Compliance Program

– Conduct a Risk Profile

- What is the company selling?
- Where is the company selling/conducting business?
- Who is selling (employees, consultants, subcontractors)?
- Who are the company's customers?
- What are the company's contractual and legal obligations?
- What are the company's strengths/weaknesses?
- Other factors?

– Mitigation + Implementation

- Once you've identified the company's risks, how can they best be mitigated?
- Policies/Procedures
 - **Training** - who should be trained, and by whom on what, and when/how often?
 - **Reporting** - what are the mechanisms to report, how do employees know the procedure, what happens when a report comes in?
 - **Audits** - how often are audits conducted, by whom, what happens if an issue is found during an audit?
 - **Revaluation** - how often is the compliance program updated, is the program working for the company or are there improvements that can be made?

Key Principles: Due Diligence

– Big Picture Considerations:

- Will the transaction add capabilities that the buyer does not have?
- Is the profit margin from contracts worth the transactional costs?
- Are relationships good with USG? Advantage as incumbent in re-competes?
- Does purchase agreement allocate buyer risk fairly:
 - Representations and warranties that survive post-closing
 - Indemnities for known risks (e.g., pending investigation)
- Change of control or novation requirements under FAR 42.1204?
 - Asset v. Stock Sale
 - Will contracts continue/options be exercised post-closing?

Due Diligence: What to Look For

– Indicators of Poor Past Performance

- CPARS, Cure Notices, Show Cause Notices, Default Notices, Letters of Concern, Requests for Corrective Action
- Suspension and debarment-related notices and decisions by the agency

– Indicators of Potential OCI Issues

- Identify every award or bid under which an OCI may exist or there is potential for OCI

– Indicators of Ongoing or Future Legal/Regulatory Risks

- Disputes, litigation, claims, audits, investigations, and proceedings (settled, concluded, ongoing, or threatened) over the past 6 years, including but not limited to False Claims Act enforcement, bid rigging, overcharging, etc.
- Disputes involving subcontractors/vendors, sureties, and insurers
- Liability arising out of noncompliance with export control laws and ITAR
- Cost accounting practices and potential exposure to cost disallowances, overbillings, or defective pricing
- All information relevant to M&A target's "present responsibility"
- All voluntary or mandatory disclosures made to any governmental authority

– Indicators as to Whether Post-M&A, the Buyer can Receive Government Contracts

- All material governmental permits, licenses, and authorizations required to carry out business
- All facility security clearances are active, match the scope of work; personnel clearance and FOCI mitigation plans; compliance with NISPOM
- If transaction is "small to small," all information supporting a post-transaction qualifying size certification

Hot Topics: Termination

Termination for <u>Convenience</u>	Termination for <u>Default</u>
<ul style="list-style-type: none">– Federal contracts typically include terms that give agencies the right to terminate contracts (partially or fully) for convenience “<i>when it is in the government’s interest</i>”– Right unique to Government– Can be due to change in spending priorities or needs or shifts in policy or even unforeseen events—such as the COVID-19 pandemic, acts of war, and natural disasters	<ul style="list-style-type: none">– Government can also terminate contract for default if contractor fails to perform based on contract’s terms, specifications, or delivery schedule– This kind of termination follows different rules and can pose serious consequences for a contractor– Before termination for default, Government typically must give contractor chance to fix issue

Credit: <https://www.gao.gov/blog/what-happens-when-government-contract-terminated>

Hot Topics: Termination

- Terminations as of August 26, 2025
 - 33,701+ actions terminated across 6,154 companies
 - \$2.51B de-obligated
- According to the Federal Procurement Data System (“FPDS”), in FY2024, federal agencies reported terminating nearly 40,000 contracts*

*Credit: <https://www.gao.gov/blog/what-happens-when-government-contract-terminated>

Agency	Number of Termination Actions
Gen’l Servs. Admin.	15,269
Dept of Defense	3,582
Health & Human Servs.	2,577
Agency for Int’l Dev.	1,860
Dept of Agriculture	1,122
Dept of Veterans Affairs	775
Dept of Interior	563
Dept of Homeland Sec.	546
Dept of Treasury	541
Dept of Navy	531

***By Number of Actions**

Credit: <https://govspend.com/blog/doge-terminations-in-fy25-what-the-numbers-say-and-whats-still-to-come/>

Hot Topics: SBA Recertification Rule

- Under SBA's small business regulations, government contractors (or their affiliates) are required to recertify their size status within 30 calendar days of a merger, acquisition, or sale event, which results in a change in controlling interest of the government contractor (or its affiliate) (the "M&A Event")
- Recertification must be provided by:
 - (i) The seller (acquired) and the buyer (acquirer) to the extent each has received an award as a small business or a small business program participant; and,
 - (ii) Any partner to a joint venture that is a party to the M&A Event
- Recertification requirement is intended to prevent small business concerns from having to compete against large businesses who buy up small business concerns

Hot Topics: SBA Recertification Rule, cont.

- The effect of recertification changed as of January 16, 2025, and will change again as applicable to multiple award contracts as of January 17, 2026 (13 CFR 125.12(g)(1))
- Government contractors submitting a disqualifying recertification remain eligible “*for unrestricted awards under a multiple award contract and orders issued under a single award small business contract.*” (13 C.F.R. § 125.12(e)(2)(ii)(B))

If the M&A Event Occurred	Then the recertifying government contractor	Notable Exclusions
<i>after January 16, 2025, but before January 17, 2026</i>	may be eligible to receive new orders issued and options exercised under an underlying set-aside multiple award contract.	This does not apply to GSA Federal Supply Schedule (FSS) contracts.
<i>on or after January 17, 2026</i>	will NOT be eligible to receive new orders or have options exercised under an underlying set-aside multiple award contract.	N/A
<i>any time after January 16, 2025</i>	will NOT be eligible for additional set-aside orders and options issued under GSA Federal Supply Schedule (FSS).	N/A
<i>any time after January 16, 2025</i>	remains eligible to receive options under a single award set-aside or reserve award or any unrestricted award.	N/A

Hot Topics: SBA Recertification Rule

– What happens if a disqualifying recertification is submitted?

- For proposals pending award at the time of the sale:
 - Government contractor is *ineligible* for a pending small business set-aside or reserved award, if the proposal for such pending award was submitted *within 180 days* after the date of an offer but before award;
 - Government contractor remains *eligible* for a pending *single* small business set aside or reserve award, if the proposal for such pending single award was submitted *more than 180 days* after the date of an offer but before award; and
 - Government contractor is *ineligible* for a pending small business set-aside or reserve *multiple* award contract, regardless of when such proposal was submitted
- For joint ventures:
 - the joint venture remains small if both parties are small, or “if the protégé small business in a still active mentor-protégé joint venture qualifies as small at the time of recertification.”

Hot Topics: SBA Recertification Rule

Takeaway?
Thorough due diligence matters!

- Is the government contractor you're acquiring a **small business concern**?
- Are there active **set-aside** contracts that have performance periods ending after the transaction?
- Are these **multiple award contracts**? (MACs)? Are there unexercised option years under task orders?

| Questions?

