



# Government Contracts – the Good, the Bad, and the Hidden Unknowns



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# Why Talk About This?

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- **The U.S. government is the single largest purchaser of goods, property, and services and funder of scientific research and financial assistance in the world**
  - \$10.1 Trillion obligated in FY2021
  - Commissary items, office furniture, janitorial services, software licenses, medical treatment development, aerostructures, robotics/AI, weapons systems, technical services and staff augmentation, ...
- **Selling to government customers presents special rules and risks**
  - What is okay in the commercial marketplace may be disallowed (or even illegal!) in government deals and interactions
  - Risks to both companies and individuals involved
- **These differences arise from important governmental policies**
  - Promoting competition and fair treatment
  - Ensuring transparency and truthful dealing
  - Maintaining the industrial base and supporting small businesses
  - Providing good stewardship of taxpayer dollars
- **The breadth of potential compliance considerations is extremely broad**
  - Pick an area and put "government contracting" in front of it!
  - Labor & employment, tax, corporate governance, intellectual property, cybersecurity
- **Companies must be mindful going in**



# Agenda

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- Government vs. Commercial Contracts
- Key Compliance Considerations
- Select issues an in-house counsel might not immediately appreciate when dealing with government contracts
  - Small Business size status
  - Special Agreement Types: SBIR/STTR awards and Other Transactions
  - Foreign ownership, control, and influence (“FOCI”) concerns
  - Unique M&A considerations

# Government vs. Commercial Contracts

# Common Myths

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“We sell the same thing to commercial customers all the time. Why should it be any different selling to the government?”

“We need to focus on the proposed SOW and pricing. The government uses a standard contract template, and we can’t do anything about the terms anyway.”

“We already have other contracts with the government, so I can just copy and paste the same approach from our last proposal.”

“These rules don’t affect my day-to-day job. Our Legal & Compliance department is supposed to manage this stuff.”

# Government vs. Commercial Contracts

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## High public scrutiny and significant customer oversight

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- Employment practices
- Information security / cybersecurity
- Supply chain integrity, sourcing requirements, and subcontractor oversight
- Accounting requirements
- Audit rights

## Some commercial sales practices can be *illegal*:

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- Obtaining competitive information from customer or competitor during acquisition
- Meals or gifts to the customer
- Hiring the customer (or even talking about it)
- Puffery in proposals
- Free goods or services

# Compliance Awareness Begins Before Award

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## Ensuring a level competitive playing field is paramount

- Procurement Integrity Act prohibits accessing agency and competitor sensitive information
- “Cooling off” period for former government personnel that can limit their role
- Limited communications with the agency after a solicitation is issued (“cone of silence”)

## Conflicts of interest can require mitigation steps or disqualify the company from an award

- Helping the customer draft a SOW or spec
- Performing contracts that require access to competitor information, which could affect their bid for another opportunity
- Improper gifts or influence can create a perception of bias

## The government is entitled to strict compliance with all solicitation requirements

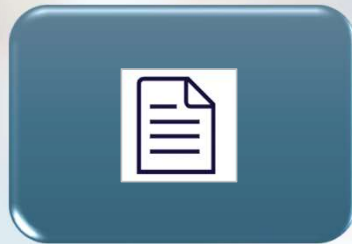
- Beware of puffery
- Page counts, font sizes, performance obligations, regulatory clauses – *they all matter*
- Challenging a procurement requirement or award has strict procedures and deadlines

# Risk Variables

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Award  
Type



Agreement  
Structure



Awarding  
Agency



Work Scope/  
Dollars  
Involved



Position in the  
Supply Chain



# Award Type & Agreement Structure

## Procurement Contracts

### *Principal purpose:*

- Purchase property or services for the direct benefit or use of the U.S. govt

### *Governed by:*

- Federal Acquisition Regulations (FAR), CFR Title 48
- FAA only – Acquisition Management System (AMS)

### *Includes:*

- Contracts
- Purchase orders
- P-card purchases

## Assistance Agreements

### *Principal purpose:*

- Provide assistance money in support of a public purpose

### *Governed by:*

- Uniform Guidance, 2 CFR § § 200 et seq.

### *Includes:*

- Grants
- Cooperative Agmts
- Tech Investment Agreements (TIAs)
- Cooperative Research and Development Agmts (CRADAs)

## Other Transactions

### *Principal purpose:*

- Acquire R&D and prototypes to evaluate govt utility of new/ existing technology

### *Governed by:*

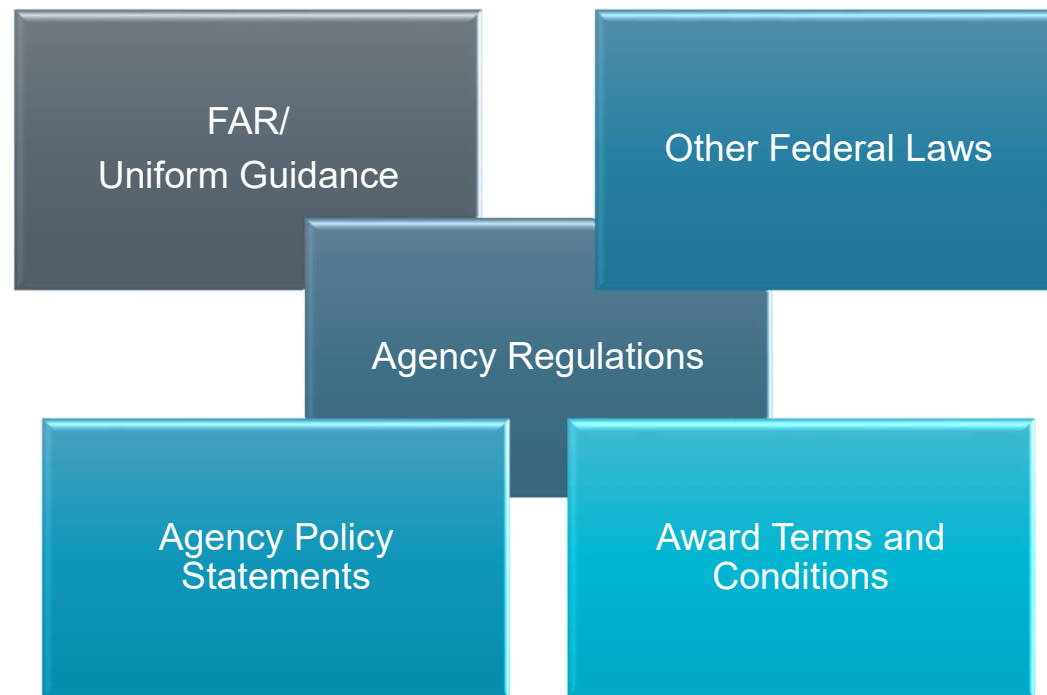
- Applicable federal laws (no cohesive governing laws/ regulations)

*Each agreement type is governed by*

**distinct regulatory frameworks**

# Overlapping Levels of Requirements

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# Other Unique Sovereign Rights

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Performance required  
(even during major  
disputes)

Fiscal restrictions can affect revenue  
recognition and liability/indemnity  
protections (e.g., no open-ended  
indemnification by the government)

Certain sovereign rights that cannot be  
negotiated away

- Termination for Convenience
- Assignment of agreements generally prohibited (novation only)
- Defined disputes process
- Governing law
- “The Christian Doctrine”

No apparent authority  
with respect to federal  
government personnel

# Key Compliance Obligations

# Key Compliance Obligations

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Procurement  
Integrity /  
Ethics



Information  
Security /  
Cybersecurity



Supply Chain  
Integrity and  
Procurement



Labor and  
Employment



Intellectual  
Property  
Protection



Accounting,  
Finance, and  
Audits



# Procurement Integrity / Ethics

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Use of public funds imposes strict ethical standards on awardees:

- Forbids gifts or gratuities to federal employees intended to influence or obtain favorable treatment
- Prohibits paying employees or third parties contingent upon award of a federal contract
- Limits and mandates disclosure of lobbying activities relating to federal awards

Requires contractors (and subcontractors) to implement and train personnel on specific policies and procedures to prevent and detect issues

- Mandatory disclosure to the government if certain types of issues are identified

Provides protections for lawful whistleblower activity, prohibits retaliation

Includes contractual, civil, and criminal remedies for violations



# Information Security / Cybersecurity

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## Ever-increasing concerns about contractor protection of sensitive data

- Personally Identifiable Information
- “Controlled Unclassified Information” (CUI)
- Non-public agency/contract data
- Contractor intellectual property



## No universal approach – each agency/jurisdiction has its own specific rules

### Requirements include

- Federal Risk and Authorization Management Program (FedRAMP) authorization/ equivalence for cloud offerings
- Rapid reporting of “cyber incidents” (e.g., 72 hours from discovery)
- Contractually imposed compliance with published federal standards (e.g., NIST SP 800-171) for information systems



# Data Breach/Cyber Implications

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## Questions to consider if a cyber incident occurs:

- What regulatory and contractual frameworks are involved? One agency's rules? Multiple? Unique contract provisions?
- What terms of art do I need to understand to determine if we have a reporting obligation to the government?
  - "Cyber Incident"
  - "Controlled Unclassified Information"
- What is the boundary of the affected information system and what data is stored or transmits through there?
  - *Note:* The relevant inquiry is generally broader than just the data that was actually compromised
- If I have a reporting obligation, how "rapid" is it? (e.g., DoD: 72 hours, DHS: can be **8 hours**, VA: can be **1 hour**)
  - Are higher-tier contractor notices required? What can/must I disclose to them?
- Are there any logistical elements to solve in order to report? (e.g., DoD DIBNet medium assurance certificate)



# Supply Chain Integrity & Procurement



Increasing view that

*supply chain integrity = national security*

Customer holds prime contractor responsible for oversight

Who/what is in your  
supply chain  
and  
how are you  
monitoring it?

- *Prohibitions on using certain products/services from designated companies:*  
e.g., Huawei, ZTE, Kaspersky Lab, ByteDance
- *Utilization, tracking, and reporting of small businesses:*  
Maximizing awards to small business and certain socioeconomic business categories
- *Subcontractor oversight:*  
Flowing down relevant regulatory requirements and exercising sufficient oversight of sub-tiers

# Labor and Employment Obligations



## Equal Opportunity tracking and reporting

- 3 mandates (apply to contracts as well as assistance agreements involving construction)
  - Executive Order 11246, as amended;
  - Section 503 of the Rehabilitation Act of 1973; and
  - Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212
- Prohibit federal contractors and subcontractors from discriminating on the basis of race, color, religion, sex, national origin, disability, or veteran status and require sub/contractors to take affirmative steps to ensure equal opportunity in their employment processes
- Require annual filing/certification of EEO-1 and VETS-4212 reports and Affirmative Action Plans
- Require creation and maintenance of Affirmative Action Plans within 120 days of contract/subcontract award (where contractor has more than 50 employees and value of contract exceeds \$50K)
- *Regularly* audited and enforced by the Dept. of Labor Office of Federal Contractor Compliance Programs (OFCCP)

# Other Labor and Employment Considerations



## Wage requirements

- Service Contract Labor Standards, minimum wages, paid sick leave



## Executive compensation (and other) reporting



## Heightened diligence when hiring former government/military personnel



## U.S. persons / U.S. citizenship requirements



# Intellectual Property Protection

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*The government generally  
does not own  
a contractor's intellectual property delivered under a contract*

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## Common issues relate to:

1. the scope of the government's license rights to *pre-existing* IP
2. the scope of the government's license rights to *developed* IP ("data rights"); and
3. title/rights to patentable inventions that arise in contract performance

## The scope of the government's license depends on a variety of factors:

- source of funding for development of the technology
- whether the information relates to commercially available products and services
- the parties' negotiations for specialized license terms or restrictions
- agency-specific supplemental laws and regulations



# Patentable Inventions: What to Know

“ The contractor may retain the entire right, title, and interest throughout the world to each subject invention subject to the provisions of this clause and 35 U.S.C. 203. ”

37 CFR 401.14

## “Subject Invention”

Any invention of the contractor

- conceived or first actually reduced to practice; *or*
- at least tentative determination that the plant variety has been reproduced with recognized characteristics.

in the performance of work under a government contract

## “Invention”

Any invention or discovery that is or may be patentable or otherwise protectable under title 35 of the U.S. Code, or any variety of plant that is or may be protectable under the Plant Variety Protection Act

Election (and retention) of title requires timely notifying the government of Subject Inventions and diligently pursuing and maintaining patent applications – *this requires a defined process and is a team sport with your scientists and engineers*

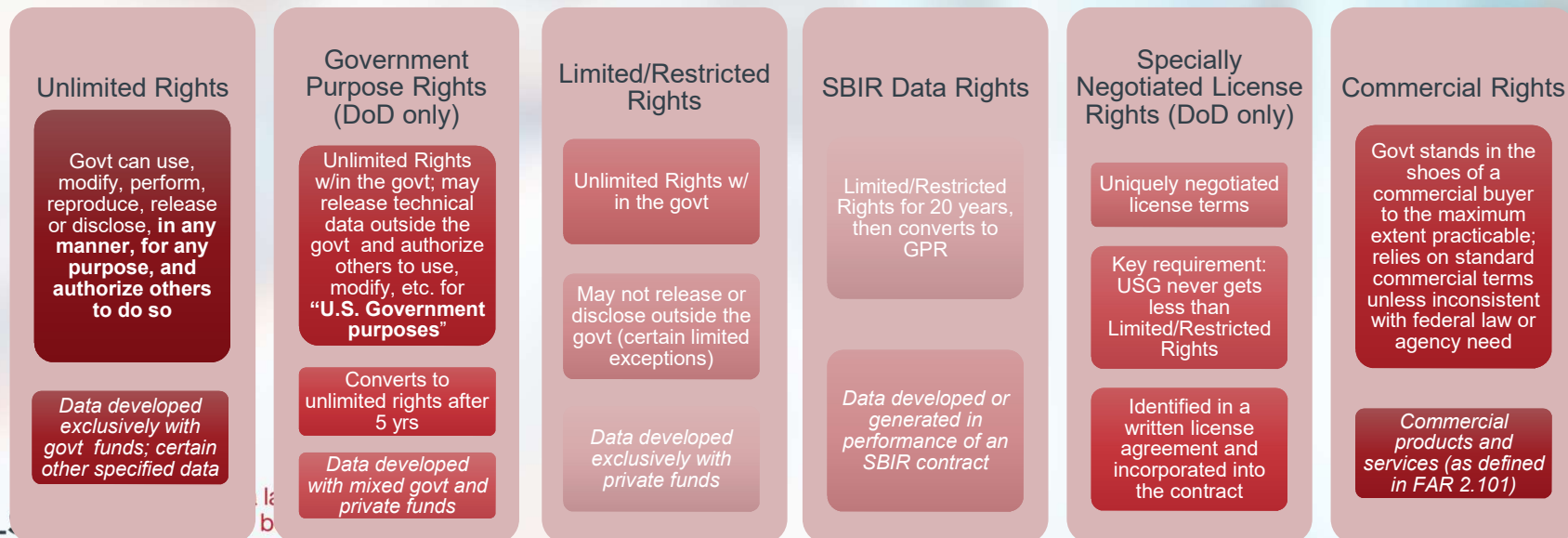
Where the contractor receives title, **the government retains broad license rights and remedies** to ensure commercialization of the invention

Except in very narrow circumstances, granting rights to the “government” means granting rights to the *entire* government, not just the contracting agency or office



# Technical Data and Computer Software

- Contractors grant the government **royalty-free, world-wide, nonexclusive, irrevocable license rights** to use, reproduce, modify, release, and disclose technical data and computer software developed, generated, or delivered under a federal contract
- Multiple data rights categories (listed in descending order of government rights)



# Technical Data and Computer Software – What to Know



Except in very narrow circumstances, granting rights to the “government” means granting rights to the *entire* government, not just the contracting agency or office (same as patents)

Once the government has obtained a level of rights in technical data or computer software, those rights are in perpetuity – you cannot further restrict them under other government contracts

These rights are only vis-à-vis the entity and the government. Subcontractors are not required to grant the same rights to higher-tier contractor customers (though many customers will try!)

Protection does not happen automatically – you must be intentional and consistent

- Identify, disclose, and incorporate into the contract prior to award or as soon as possible upon awareness *all* deliverable IP that qualifies for protection

AND

- **Consistently** mark data subject to protection in every transmittal to the customer

AND

- Be prepared with records to support the validity of your assertions if questioned (*before or after* award)

# Intellectual Property: What to Know



***Protection does not happen automatically***

## Intellectual Property Protection Begins Pre-Bid

- Understand/shape anticipated scope and desired customer deliverables
- Identify pre-existing IP that needs to be protected
- Identify potential IP that will need to be developed and who is paying for it
- Engage with Legal to understand the applicable rules and how to maximize protection







# Accounting, Finance, and Audits

## Government Accounting Requirements

- Level of complexity and govt involvement depends on nature and size of contract(or)
- Prescribes specific treatment of certain cost categories
- Certain types of contracts and award values will trigger additional obligations
- *Reasonable, Allowable, Allocable*

## Audits

- Government generally retains broad oversight and audit rights of contractors
- Specific audit frequency and scope will vary depending on the contract(or)

## Contractor activities most likely to trigger a government review include:

### *Procurement/Subcontracting:*

flowdowns, prime oversight (particularly if a performance issue arises)

### *Financial:*

billing alignment with services provided, change proposal pricing

### *Regulatory:*

compliance with regulatory obligations contained in contract flowdowns (e.g., equal opportunity reporting, data privacy / cybersecurity)

### *Performance-specific:*

quality/timeliness of services provided



# Select Issues

# Small Business Size Status

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- Small business size status is coveted in government contracting – qualified small businesses enjoy preferential procurement treatment and beneficial competitive environments
- Multiple categories of small business status – e.g., WOSB, VOSB, SDVOSB, HUBZone, 8(a)
  - Some are self-certified, others require third party certification
- Size regulations are nuanced and heavily interpreted through case law, and it is VERY easy to make a mistake
  - Potential remedies in the event of size status misrepresentation (even innocent) can be significant
- 2 common problem triggers:
  - **Affiliation**
  - Impacts on size status due to funding round or M&A activity
- Key considerations/questions
  - NAICS code(s) and associated “size standard”
  - Ongoing monitoring of employee count/revenue over time
  - Contract-specific qualification
- The SAM.gov registration “trap”

# Small Business Administration Affiliation Rules

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## General Principles of Affiliation (13 CFR Part 121)

- Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists.
- SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists.
- **In determining the concern's size, SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit.**

## Bases for Affiliation

- Affiliation based on stock ownership, options, convertible securities, and agreements to merge
- Affiliation based on common management
- Affiliation based on identity of interest
- Affiliation based on the newly organized concern rule
- Affiliation based on joint ventures
- Affiliation based on franchise and license agreements

# SBA's Early-Stage Funding Programs for Small Businesses

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- Small Business Innovation Research Program's (SBIR) & Small Business Technology Transfer Program's (STTR) "small business" eligibility requirements:
  - American (U.S.) owned & controlled
  - Organized for profit
  - No more than 500 employees (including affiliates)
- Unique STTR requirement – small business must be teamed with a Research Institution to apply
- Unique SBIR requirement – principal investigator must have primary employment with small business applicant

# SBIR Program Goals

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Stimulate technological innovation



Use small business to meet Federal R&D needs



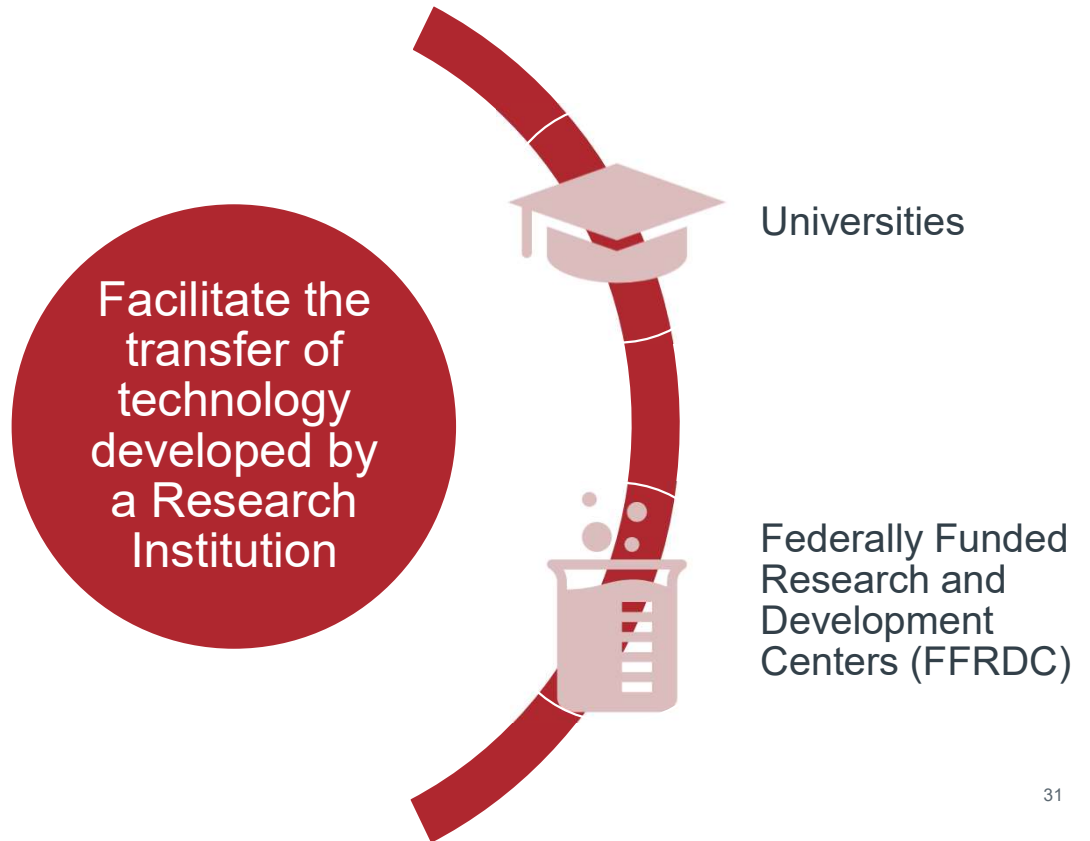
Foster and encourage participation by the socially and economically disadvantaged small businesses in technological innovation



Increase private sector commercialization of innovations derived from Federal R&D

# STTR Program Goal

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# SBIR/STTR Benefits

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01

Funding to conduct R&D

02

Retain increased rights to intellectual property

03

Opportunity to obtain additional funding to continue to the development/commercialization of the technology



# SBIR/STTR – Grant or Procurement Contract?

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***Both!***

Federal Agencies can award SBIRs and STTRs as either

Can also be awarded as an Other Transaction

Significant variability among the Agencies that participate in the SBIR/STTR programs

Administration of SBIR/STTR contracts/grants not necessarily uniform amongst the Agencies

# Comparing the SBIR/STTR Programs

	Small Business Innovation Research (SBIR)	Small Business Technology Transfer (STTR)
<b>Percent of R&amp;D budget</b>	3.2%	0.45%
<b>Partnerships</b>	Research partnerships are allowed	Partnership with a non-profit research institution is required
<b>Work Requirement</b>	Small businesses may outsource: 33% of Phase I research 50% of Phase II research	Minimum work requirements: 40% by small business / 30% by research institution partner The remaining work may be done by either or outsourced
<b>Principal Investigator (PI)</b>	Primary employment (> 50%) must be with the small business	PI must be employed by either the partnering research institution or small business

# NIH SBIR/STTR Phases (Example)

Small Business Program Phases	Description
<b>Phase I</b>	A Phase I award helps the small business focus on the feasibility, technical merit, and commercial potential of the small business's research project.
<b>Phase II</b>	A Phase II award lets small businesses continue the research and development efforts initiated in Phase I. Once a small business has reached its Phase I milestones, it can apply for a Phase II award, even before the end of the Phase I award.
<b>Fast-Track</b>	The fast-track process allows a small business to submit both Phase I and Phase II in one application for review. The Fast-Track mechanism can minimize the funding gap between phases but requires a fully developed Phase II application/plan at the time of submission.
<b>Direct to Phase II (SBIR Only)</b>	If a small business's project has already demonstrated feasibility, but it has not received a Phase I SBIR or STTR, the small business can apply for a Direct to Phase II award and bypass Phase I.
<b>Phase IIB</b>	Some NIH Institutes and Centers offer Phase IIB awards for Phase II projects that require extraordinary time and effort beyond the standard Phase II period of 2 years.
<b>Commercialization Readiness Pilot (CRP) Program</b>	The Commercialization Readiness Pilot (CRP) Program provides awarded Phase II and Phase IIB small businesses technical assistance and funding for late-stage development.

# 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**

## **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

## **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

## **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

# Technical Data and Computer Software – SBIR/STTRs

## SBIR Data Rights

Limited/Restricted Rights for 20 years, then converts to GPR

*Data developed or generated in performance of an SBIR award*

- SBA's [SBIR/STTR Policy Directive](#) (May 2, 2019)\* made major changes to SBIR Data Rights
  - Companies often receive multiple or serial agreements, so multiple rules may apply to a single technology
- *New Rules*
  - Grants the USG **temporary** rights to use, modify, reproduce, release, perform, display, or disclose data generated under a SBIR award
  - Limited rights in SBIR technical data/ Restricted rights in SBIR computer software
  - Protection Period is 20 years from the date of award of the contract under which the data are generated and *cannot be extended*
  - Then converts to Government Purpose Rights, as defined in DFARS
  - For DoE only, converts to Unlimited Rights

# What is an “Other Transaction”?

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## Defined by what they are *not*:

- Procurement contracts
- Grants
- Cooperative agreements

## Potential Benefits

- *Negotiation* – greater acquisition flexibility
- *Innovation* – government business models not subject to typical acquisition regulations
- *Access* – incentivize involvement of entities that may not have previously been involved with the US (“nontraditional contractors”)

## Potential Drawbacks

- *More flexibility = more negotiation = more up front work required!*
- *Fewer rules is a double edged-sword*
  - Definitions/ interpretations cannot be assumed to match the FAR
  - What you don’t think of (and include in the agreement) up front **can** hurt you

# Agency Other Transaction Authority

Agency	OT Authority	Agency Specific OT Requirements, Limitations, and Restrictions
NASA	<a href="#">51 U.S.C. § 20113(e)</a>	No limitations or restrictions.
DOD*	<a href="#">10 U.S.C. § 4021</a>	Authorizes Research OTs and Prototype OTs. See detailed requirements, limitations, and restrictions.
	<a href="#">10 U.S.C. § 4022</a>	
DOE	<a href="#">42 U.S.C. § 7256</a>	Limited to RD&D projects. Cost sharing agreement required. Authorized for RD&D and prototype projects.
HHS	<a href="#">42 U.S.C. § 247-7e</a>	Limited to RD&D projects. Cost sharing agreement required. Authorized for RD&D and prototype projects.
DHS	<a href="#">6 U.S.C. § 391</a>	Prototype projects require a non-traditional contractor and cost sharing agreement.
DOT	<a href="#">49 U.S.C. § 5312</a>	Limited to RD&D focused on public transportation.
FAA	<a href="#">49 U.S.C. § 106(l)</a>	No limitations or restrictions.
TSA	<a href="#">49 U.S.C. § 114(m)</a>	No limitations or restrictions.
DNDO	<a href="#">6 U.S.C. § 596</a>	No limitations or restrictions.
ARPA-E	<a href="#">42 U.S.C. § 16538</a>	No limitations or restrictions.
NIH	<a href="#">42 U.S.C. § 285b-3</a>	Limitations and restrictions differ based on specific research programs.
	<a href="#">42 U.S.C. § 284n</a>	
	<a href="#">42 U.S.C. § 287a</a>	

<https://aida.mitre.org/ota/>

- Because they are creatures of statute, each agency's OT authority is determined by Congress and can vary significantly
  - Permissible use cases
  - Qualifying definitions & criteria
- Department of Defense has special "Prototype OT" authority with sole-source production follow-on capabilities to carry out prototype projects
  - Issued updated "Other Transactions Guide" in July 2023

# How Much is Negotiable?

## *Nearly everything...*

- Definitions
- Changes
- Dispute resolution (some)
- Invoicing/Payments
- Title, risk of loss to property
- **IP (title and license rights, duration, scope)**



*...in  
theory*

*FAR does not apply, but do not be surprised if the government tries to use its standard contracting rules regardless and stands firm*



# (Still) Applicable Laws

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- Federal fiscal law
- Export control laws and regulations (e.g., ITAR / EAR)
- No apparent authority to bind the USG
- IP laws (patent, trademark, copyright, trade secrets)
- Venue and governing law
- Comptroller General access to records
- Freedom of Information Act, 5 U.S.C. § 552

# Foreign Ownership, Control or Influence (FOCI) Adversely Impacts Classified Contracts & May Impact M&A

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## ▪ Facility Security Clearances

- A U.S. company is considered to be under FOCI when a foreign interest has the power, direct or indirect, whether or not exercised, to direct or decide matters affecting the management or operations of the company in a manner which may result in unauthorized access to classified information or may affect adversely the performance of classified contracts.
- A company under FOCI is not eligible for a Facility Security Clearance until the FOCI factors have been resolved.

## ▪ Committee on Foreign Investment in the United States (CFIUS) Reviews

- CFIUS may review certain transactions between a US business and a foreign person. CFIUS has authority to review covered (1) control transactions, (2) investments, and (3) real estate transactions.
- CFIUS has a broad mandate—any transaction with a foreign entity that could control a U.S. business can be defined as a “covered transaction”— and informs the president's ability to **block** foreign investments in U.S. companies on national security grounds.

# Unique M&A Considerations

Diligence 'yellow' flag: when government contracts is a small portion of the company's overall revenue portfolio

Common issues encountered in diligence

- "We aren't a government contractor, we only have subcontracts" or "How do we know which contracts count?"
- Small business size status – previous and current representations, impact of previous acquisitions
- Regulatory (not just operational!) compliance: labor & employment, price maintenance obligations, ethics
- Supply chain compliance/ subcontractor flowdowns

Contract assignment/change of control

- Identifying/scheduling notice and consent obligations for state and local contracts
- Federal contract novation process – timing and seller as ongoing guarantor

Commonly Affected Deal Terms

- Materiality definition for schedules
- Generally longer lookback period to account for Contract Disputes Act and False Claims Act statutes of limitation

Questions?





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# Backup Slides

# Noncompliance Issues

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## Risks of noncompliance are severe!

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Negative past performance ratings, affecting ability to win future contracts

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Contract termination

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Breach of contract claims

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Suspension and debarment

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False Claims Act actions

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## Remedies for Noncompliance

# Negative Past Performance

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Federal agencies are generally required to consider past performance when evaluating sources for potential contract award

- In competitive situations, past performance can be a positive (or negative) determining factor
- Weighting will vary for each solicitation

Contractor Performance Assessment Reports (“CPARs”) are issued by the government at least annually for contracts > \$250,000

- The government’s “official source” for collecting and distributing contractor past performance
- 6 mandatory evaluation categories: Technical, Cost Control, Schedule/Timeliness, Management/Business Relations, Small Business Subcontracting, Other
- One of the primary sources reviewed by source selection teams to assess past performance

*Poor CPAR ratings can directly and adversely affect the company’s ability to receive other contract awards*



## Remedies for Noncompliance

# Termination for Default

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### Similar to commercial termination/default contract provisions

- Failure to perform
- Failure to comply with contract requirements

### Most default or “for cause” termination provisions require the government:

1. To first issue a cure notice to the contractor, and
2. Provide a reasonable opportunity to cure

### Upon default, the contractor’s financial recovery is limited

- Liable to the government for excess reprocurement costs
- Limits on profit
- Offset by government mitigation damages

## Remedies for Noncompliance

# Termination for Convenience / Breach of Contract

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Alternatively, the government always maintains the right to terminate a contract for its sole convenience

- Does not require fault or cause, and no pre-termination cure notice
- Can offer the government a “path of least resistance” to walk away with no due process

### Breach of contract claims

- Similar to commercial contract breach provisions
- Governed by federal law
- Challenging or defending claims falls under the contract’s Disputes provisions

# Remedies for Noncompliance

## Suspension and Debarment

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*Suspension or debarment of a contractor (or an individual!) from government contracting is another available remedy*

- “Agencies shall solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only”
- Present responsibility determination, not punishment (in theory...)

Broad agency discretion rarely overturned by courts

- No practical appeals process

Often resolved through administrative agreements between the company and the government

Consequences



Federal government-wide, *not* just the affected agency

One agency can debar for all

Typically company-wide, *not* just offending business unit

Collateral: debarment from state and local procurements

# Remedies for Noncompliance

## False Claims Actions

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### What is a “False Claims” Action?

- Cause of action brought against a person or company for knowingly making false claims or statements to the U.S. Government that result in overpayments of government funds

### Broad scope definition

- A “claim” includes invoices for payment, certifications related to invoices, and statements in proposals related to invoices, socio-economic status, quality, specifications, etc.
- Actual knowledge not required – “reckless disregard” or deliberate ignorance is sufficient

### Both civil and criminal liability are available in False Claims actions

## Remedies for Noncompliance

# False Claims Actions

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*Government enforcement tool of choice –  
the mere threat of a False Claims action can influence behavior*

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- **Low burden of proof: preponderance of the evidence**
- **Double or treble damages plus penalties per false claim**
  - \$12,537 to \$25,076 per invoice
  - Whistleblower bounty up to 30%
- **Mandatory Disclosure obligations**
  - Government contractors are required to disclose credible evidence of overpayments or fraud (criminal or civil)
  - Definition of “credible evidence” and “fraud” varies in different jurisdictions



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