



508:How Far Will You Go to Do Business with the Government? A Primer on Government Contracting

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Faculty Biographies

Tenley A. Carp

Tenley A. Carp is a partner in the Washington, DC office of McGuireWoods LLP. Ms. Carp's government contracts practice is focused on assisting clients in a wide variety of legal matters, including bid protest litigation, protecting intellectual property in government contracts, mergers and acquisitions, labor and employment, socio-economic concerns, audits, investigations and qui tam actions, suspensions and debarment, contract formation and strategy, and unique ethical obligations.

Ms. Carp is also a member of the DC Bar Association, Maryland Bar Association, ABA, Section of Public Contract Law, Federal Bar Association, Government Contracts Section, and a mediator for the Multi-door Dispute Resolution Division at the Superior Court of the District of Columbia.

Ms. Carp graduated from Tulane University and The George Washington University National Law Center.

Amy Freeman Pierce

Amy Freeman Pierce is senior corporate counsel for Cerner Corporation in Kansas City, Missouri. Her primary responsibilities include drafting and negotiating contracts, including software license, supplier, consultant, and content development agreements, and providing legal counsel on government contracts matters, including RFP responses, performance and compliance issues, and bid protest litigation.

Prior to joining Cerner Corporation, Ms. Freeman Pierce served three years as an attorney in the contracts law division in the Office of General Counsel at the U.S. Department of Commerce in Washington, DC. In this capacity, she provided legal advice to the Census Bureau, NOAA, and NTIA on a variety of substantive areas including contract formation and solicitation issues, and represented the agency in bid protests before the U.S. General Accounting Office, and in contract disputes before the U.S. Court of Federal Claims and the General Services Administration Board of Contract Appeals. For two years prior to her position with the Department of Commerce, Ms. Freeman Pierce served as an associate in the government contracts practice group for the Washington, DC law firm of Verner, Liipfert, Bernhard, McPherson and Hand. She represented federal government contractors in bid protest litigation before various government agencies, and provided counsel on socio-economic issues, contract audits, suspensions, and debarments matters. Following graduation from law school, she served for two years as a law clerk for Judge Robert W. Parker at the General Services Administration Board of Contract Appeals in Washington, DC.

Ms. Freeman Pierce received a BS from Kansas State University and is a graduate of the University of Kansas School of Law.


Philip R. Strauss

Philip R. Strauss is corporate counsel at Adobe Systems Incorporated in San Jose, California, where he handles strategic licensing and mergers/acquisitions for the intelligent document business unit.

Before joining Adobe, Mr. Strauss was vice president, general counsel, and secretary at Brio Software, Inc., in Santa Clara, California, and held associate positions in the structured finance department at Shearman & Sterling in New York and in the general litigation department at Jones Day in Chicago. Mr. Strauss began his legal career as a clerk for the Alaska Supreme Court.

Mr. Strauss is the founder and chair of ACC's New-to-In-House-Practice Network, writes a monthly *ACC Docket* column for new in-house lawyers, and serves as cochair of the Intellectual Property Committee for ACC's San Francisco Bay Area Chapter. He is the immediate past cochair of the chapter's Small Law Department Committee and received the 2003 Robert I. Townsend, Jr. Award for ACC Member of the Year.

Mr. Strauss received his BA from Emory University and his JD from Duke University and is currently getting his MBA part-time at the Walter A. Haas School of Business at the University of California-Berkeley.



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A PRIMER ON GOVERNMENT CONTRACTING**


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GOVERNMENT CONTRACTS LAW

**A Legal Perspective on Dealing
with the World's Largest Customer**

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Statutory Basis

- **Armed Services Procurement Act of 1947**
10 U.S.C. § 2301 *et seq.*
- **Federal Property and Administrative Services Act of 1949**
40 U.S.C. § 471, *et seq.* & 41 U.S.C. § 251 *et seq.*
- **Truth in Negotiations Act of 1962**
10 U.S.C. § 2306 *et seq.*
- **Office of Federal Procurement Policy Act of 1974**
41 U.S.C. § 401 *et seq.*
- **Contract Disputes Act of 1978**
41 U.S.C. § 601 *et seq.*
- **Competition in Contracting Act of 1984**
10 U.S.C. § 2301 *et seq.* & 41 U.S.C. § 403
- **Federal Acquisition Streamlining Act of 1994**
Pub. L. No. 103-355, 108 Stat. 3243 (1994)
- **Clinger-Cohen Act of 1996**
40 U.S.C. § 1401 *et seq.* & 41 U.S.C. § 251 *et seq.*

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Regulatory Basis

- **Federal Acquisition Regulation**
48 CFR Chapter 1
- **Major Agency Supplements to FAR:**
 - DoD
 - GSA
 - NASA
 - DOE

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Comparing Govt & Commercial Ks

- Government bound by ordinary commercial law unless otherwise provided by statute or regulation
- Government contract statutes & regulations predominate over commercial law in nearly every aspect
- No concept of “apparent authority”

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Comparing Govt & Commercial Ks

- Most Favored Customer Pricing Clause
- No Limitation on Liability
- Intellectual Property Provisions
- Cost Accounting Standards
- Termination provisions (T/C & T/D)
- Bid Protest Process
- RFP Response Incorporated into K
- Prompt Payment Act

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Finding Opportunities

- Check FedBizOpps on Internet
- Identify contracting offices that buy your supplies or services
- List company on bidders list for those offices
- Obtain copy of FAR
- Respond to RFPs completely & on time

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Contract Vehicles

- GSA Schedule
- Simplified Acquisition Procedures (SAP)
- Blanket Purchase Agreement (BPA)
- Indefinite Delivery Indefinite Quantity (IDIQ)
- Government-wide Acquisition Contract (GWAC)

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TYPES OF CONTRACTS

- Fixed-price = Government agrees to pay contractor fixed amount upon completion of contract
 - Risk is on contractor
- Cost-reimbursement = Government agrees to reimburse contractor for costs incurred in performing contract
 - Used where difficult to estimate amount of work
- Time & Materials = Hybrid combining fixed-price & cost-reimbursement features

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Unique Issues in Due Diligence

- Anti-Assignment/Novations
- Valuation of Backlog
- Audits/Investigations
- Changes/Claims/Disputes
- Intellectual Property

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Anti-Assignment Acts/Novations

- Prohibits transfer of K or interests in K
- Government must consent to assignment of K
- Novation is completed AFTER transaction has been consummated

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Valuation of Backlog

- Look at receipt of FUNDED orders
- IDIQ, MAS & BPA are all contract vehicles, but award of these contracts may not COMMIT government to purchasing anything

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Audits/Investigations

- Truth in Negotiations Act
 - TINA has limited application to commercial item contracts, but must still look at seller's history with TINA & any pending or expected audits
 - TINA can create civil or criminal fraud liability under the False Claims Act

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Change/Claim/Dispute

- Government has right to change terms of performance and/or to T/C
- Contractor has right to be made whole through REA or claims process
- Buyer must identify all existing claims seller may have & assess likelihood of recovery

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Intellectual Property

- Contractor may protect any intellectual property that was not developed at government expense
- Even if developed at private expense, contractor must institute business practices that will protect property from transferring to government with unlimited rights

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Bid Protests

1. Agency-Level Protest
2. Protest to GAO
3. Protest to U.S. Court of Federal Claims

Rate of success = approx 16% in each forum

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Agency-Level Protest

- **Filing Deadline:** Pre-award protest due before date for receipt of proposals & post-award protest due within 10 calendar days of learning basis for protest (after debriefing)
- **Status of Procurement:** No automatic suspension
- **Standard of Review:** Compliance w/statute & regulations & reasonable basis for action
- **Decision:** Target is 35 days
- **Appeal:** Request reconsideration from agency or file protest at GAO

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GAO Protest

- **Filing Deadline:** Same as agency-level protest
- **Status of Procurement:** AUTOMATIC SUSPENSION
 - Agency may override if "urgent and compelling"
 - Challenge of override in COFC or fed district court
- **Standard of Review:** Same as agency-level protest
- **Decision:** 100 calendar days
 - **Appeal:** Recon from GAO or file protest at COFC
 - **Attorneys' Fees:** Available if protest is sustained
 - **Miscellaneous:** ADR available as alternative

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Protest to COFC

- **Filing Deadline:** No 10-day rule
- **Status of Procurement:** No automatic suspension, but COURT WILL HEAR MOTION FOR TRO & PI
- **Standard of Review:** APA standard -- arbitrary or capricious, not in accordance with law
- **Decision:** No time limit
- **Appeal:** U.S. Court of Appeals for the Federal Circuit
- **Attorneys' Fees:** Not available unless filed under EAJA

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Termination for Convenience & Default

- Government can unilaterally change or terminate any contract for any reason at any time
- If failure to comply with contract provision or failure to make progress, CO issues cure notice and gives contractor 10 days to correct
- Contractor can file for REA to reflect costs incurred during contract performance and reasonable profit

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Claims

- File Notice of Appeal with BCA
 - Expedited procedure if claim is < \$ 100,000 where board renders decision in 180 days w/o hearing
 - Appeal of Board decision is to Federal Circuit
- File Complaint with COFC
 - Appeal from COFC decision also to Federal Circuit

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Socio-Economic Obligations

- Equal Opportunity & Affirmative Action
- Subcontracting Plan
- Labor Standards/Service Contract Act
- Drug-Free Workplace

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EO & Affirmative Action

- Contractor with K or subK > \$10K must not discriminate because of race, color, religion, sex or national origin
- Contractor with K or subK over \$50K & 50 or more employees must keep written Affirmative Action Plan at each location
- Contractor and subs with K of \$10K or more must take affirmative action to employ disabled and Vietnam era veterans
- Contractors and subs with K > \$2,500 must take affirmative action to employ and advance qualified handicapped people

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Subcontracting Plan

- Contractor with K for \$500K or more (\$1 million for construction) must submit subcontracting plan
- Plan details effort to use small, small disadvantaged, woman-owned & HUBZone businesses
- Plan must include total dollar goals & percentage dollar goals for subcontracting to these entities

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Labor Standards

- Walsh Healey Act governs supply contracts
 - 41 U.S.C. § 43
- Davis Bacon Act governs construction contracts
 - 40 U.S.C. § 276a--276a-7
- Service Contract Act of 1965 governs service contracts
 - 41 U.S.C. § 351
- Contract Work Hours and Safety Standards Act
 - 40 U.S.C. § 327-333

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Service Contract Act

- Applies to K > \$2,500 to furnish services through use of service employees (not professionals)
- Contractors must pay these service employees not less than rates required by DOL
- Penalty includes withholding of payments & possible debarment

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Drug-Free Workplace

- Obligates a non-commercial item government contractor with K > \$100K to keep workplace free of illegal drugs

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Ethical Considerations

- Prevention of Bribery & Illegal Gratuities
- False Claims & False Statements
- Lobbying Restrictions
- Procurement Integrity
- Conflicts of Interest
- Kickbacks

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Prevention of Bribery & Illegal Gratuities

- Contractors are restricted by criminal statutes & contracting regulations from providing goods & services to benefit federal employees
- Exceptions: Federal employees may accept non-cash gifts of \$20 or less, not to exceed \$50 annually from any one person or company

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False Claims & False Statement

- False representation re: company's ability to comply with government contracts subjects company, management & employees to criminal liability
18 U.S.C. § 1001
- Contractor making false statement to government faces civil and/or criminal liability
31 U.S.C. §§ 3729-3733; 18 U.S.C. § 287

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Lobbying Restrictions

- Contractors are prohibited from using appropriated funds to attempt to influence award or modification of a contract
31 U.S.C. § 1352
- Contractors can't charge costs associated with lobbying to government contract

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Procurement Integrity

Contractors are prohibited from obtaining bid or proposal info or "agency source selection information" prior to award of a federal contract
41 U.S.C. § 423

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Conflict of Interest

- Contractors may not discuss employment with certain federal officers and employees
41 U.S.C. § 423©; 18 U.S.C. § 208 (a)
- Former federal employees are restricted from performing certain services after they depart government
41 U.S.C. § 423(d); 18 U.S.C. § 207(a)(1)

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Kickbacks

- It is prohibited to give or receive kickback for purpose of improperly obtaining or rewarding favorable treatment in connection with federal K or subK
41 U.S.C. § § 51-58

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Set-Asides & Preference Programs

- 20% government-wide goal for awards of K & subK to small businesses (5% to small disadvantaged & 5% to women-owned)
- Small business is determined by revenue & number of employees per industry
- Set-Asides means only small businesses can compete for that work
- SBA's 8(a) Program awards \$6 billion each year

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SBA's 8(a) Program

- Qualifications:
 - Socially & economically disadvantaged with 51% ownership by socially & economically disadvantaged U.S. citizen(s)
 - Presumption of social disadvantage:
 - Black, Hispanic, Native American, Asian Pacific, Subcontinents Asian, & others determined by SBA
- Must be in existence for 2 years prior to entering 8(a) program
- Ownership must control and manage firm

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Buy American Act

- Exceptions to Buy American Act of 1933:
 - Items for use outside US
 - Domestic items unreasonably priced
 - Compliance not in best interest of government
 - Not produced in US in sufficient quantities
 - Items are specifically for commissary resale
- Exception to exceptions:
 - North Korea, Cuba, Libya, Iran or Iraq

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Treatment of Costs

- Cost Accounting Standards
 - Apply to negotiated non-commercial item K > \$500K
 - Full coverage applies where contractor received single CAS-covered K award of \$50 mil or more or received \$50 mil or more in last year with at least one award exceeding \$7.5 mil
- Truth in Negotiations Act
 - Contractor must submit cost or pricing data if any negotiated K for non-commercial items is expected to exceed \$550K
- Cost Principals
 - Cost must be allowable, allocable and reasonable in a flexibly priced K

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Whistleblower Actions

- Qui Tam: Suing on behalf of sovereign as well as self
- Sarbanes-Oxley Act: Federal whistleblower protections for employees of publicly traded companies
- Contractors are prohibited from discharging, demoting or otherwise discriminating against employee in reprisal for disclosing substantial violations of law related to federal contract
- Employee with evidence of fraud should file a complaint with DOL or IG of contracting agency

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Suspension & Debarment

- Government suspends or debars for two reasons:
 - (1) To further compliance with socioeconomic programs; and/or
 - (2) To protect government from unethical persons
- Debarment = 3 yrs (but 5 for violation of Drug-Free Workplace)
- Judicial Review:
 - Federal district court
 - U.S. Court of Federal Claims

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Why Companies Bother

1. Government will spend \$250 BILLION in 2004
2. Opportunity to perform “cutting-edge” contracts
3. THE GOVERNMENT PAYS ITS BILLS!!!

Protecting Intellectual Property in Government Contracts: The First Three Steps

by Tenley A. Carp, Partner at McGuireWoods LLP in Washington, D.C.

A company selling goods and services to the Federal Government must take pro-active steps to protect its intellectual property in government contracts. Otherwise, the company might inadvertently give the Government "unlimited rights" in its proprietary data. Such unlimited rights would allow the Government to use technical data and computer software for any purpose - including disclosing the data to other companies to stimulate competition for future Government procurements. Such disclosure might also result in new commercial competition. The stakes are far too high for a company to ignore this aspect of its government contract.

The first step in protecting a company's intellectual property in a government contract is to inform the Government of the need to deliver its proprietary data with less than unlimited rights. The company should define the specific rights to be delivered under its contract - such as limited rights, restricted rights, Government purpose rights, standard commercial license rights or nonstandard rights.

"Limited rights" permit the Government to make only a limited and internal use of data. If a company negotiates for giving the Government only limited rights, the Government may not disclose the data outside the Government unless there is an emergency. Most importantly, limited rights do not allow the Government to authorize another company to become a competitor of the developer either vis-à-vis Government customers or vis-à-vis commercial customers. "Restricted rights" actually restrict the Government's use to a single computer per copy of the software. Such restricted rights also prevent the Government from making copies, except for archival purposes. "Government purpose rights" allow the Government to use technical data or computer software for any "Government purposes" which do not include competition against the

developer of the data or software in the commercial marketplace.

“Standard commercial license rights” include the same rights that a company would grant to another commercial company in its license agreement. If a company has enough leverage, it can insist on granting its own standard commercial license rights to the Government. And, “nonstandard rights” are those rights specifically negotiated between the contractor and the agency.

Second, the company must mark every piece of its proprietary data and software according to applicable regulations before submitting it to the Government. A legend is a mark, notice or other insignia that a company places on its technical data and software that asserts ownership or proprietary interests of a specific party. Depending on the governing regulations, the legend will include language such as the following:

These data are submitted with limited rights under Government contract No. _____ and subcontract no. _____. These data may be reproduced and used by the Government with the express limitation that they will not, without written permission of the Contractor, be used for purposes of manufacture nor disclosed outside the Government; except that the Government may disclose the data outside the Government for the following purposes, if any, provided that the Government makes such disclosure subject to prohibition against further use and disclosure. This notice shall be marked on any reproduction that the Government makes of these data, in whole or in part.

Third, the company should keep documentary evidence of any information that supports its need to deliver intellectual property with less than limited rights. This is important in case the company ends up in litigation over these rights with the government at a later stage during the contract.

One strategy for avoiding an inadvertent delivery of intellectual property with unlimited rights to the Federal Government is to deliver

products and services that qualify as "commercial items" since the Government will generally accept the standard commercial licenses. A second strategy is to deliver items developed at private expense since such items may be delivered with limited and restricted rights. A third strategy is to review each statement of work to determine the true value of the project. A company may conclude that the potential profit to be derived from commercial applications far outweighs the revenue to be gained by performance of the government contract.

Legal Considerations for Government Contractors

by Tenley A. Carp, Partner at McGuireWoods LLP in Washington, DC

1. Unique Ethical Responsibilities

Government contractors must ensure that their employees comply with several ethics-related statutes and regulations to avoid civil, administrative or criminal penalties:

- **Prevention of Bribery and Illegal Gratuities:** Government contractors may not provide goods or services to the personal benefit of federal employees. These restrictions apply to anything of value – including gifts, entertainment, loans, travel, favors, hospitality, lodging, discounts and meals. The exception to this rule is that federal employees may accept non-cash gifts of \$20 or less, not to exceed \$50 annually from one company or one person;
- **False Claims and False Statements:** Government contractors must ensure that no false, fictitious or fraudulent statements are made to a federal agency;
- **Conflicts of Interest:** Government contractors are prohibited from discussing employment with certain federal officers and employees;
- **Kickbacks:** Government contractors are prohibited from giving or receiving kickbacks for the purpose of improperly obtaining or rewarding favorable treatment in connection with a federal contract or subcontract;
- **Lobbying Restrictions:** Government contractors can't charge their lobbying costs to a government contract; and
- **Procurement Integrity:** Government contractors must refrain from obtaining contractor bid or proposal information or agency source selection information prior to the award of a federal contract.

2. Equal Opportunity and Affirmative Action

A government contractor or subcontractor with a contract or subcontract over \$10,000 must not discriminate against any employee or applicant because of race, color, religion, sex or national origin. Such a contractor or subcontractor must also take affirmative action to ensure that applicants and employees are treated without regard to race, color, religion, sex or national origin. If the contractor or subcontractor has 50 or more employees and a contract of \$50,000 or more, it must also keep a written Affirmative Action Plan on file at each business establishment. These regulations also mandate that contractors

document their efforts to hire handicapped individuals, special disabled veterans and veterans of the Vietnam era. Contractors must also (1) submit annual compliance reports; (2) post hiring and employment notices provided by the government in conspicuous places; (3) agree to grant the government access to its EEO records; (4) list job openings at state agencies for qualified veterans; and (5) flow down the required clauses to covered subcontractors.

3. Labor Standards

Government contractors must comply with certain labor standards such as: (1) The Walsh-Healey Act, governing supply contracts; (2) the Davis-Bacon Act, governing construction contracts; (3) the Service Contract Act of 1965 ("SCA"), governing service contracts; and (4) the Contract Work Hours and Safety Standards Act requiring payment at 1 1/2 times the basic rate of pay for all hours worked by laborers or mechanics, in excess of 40 hours per week. The SCA requires contractors to pay service employees who are performing on the contract not less than the rates required by the Secretary of Labor (contained in wage determinations usually attached to the solicitation). The SCA applies to every government contract over \$2,500, when the principal purpose of the contract is to furnish *services* in the United States through the use of "service employees." A "service employee" is any person engaged in the performance of a contract other than a person employed in a bona fide executive, administrative, or professional capacity.

4. Subcontracting Plan

If a government contractor receives a contract worth \$500,000 (\$1 million for construction) or more and there are subcontracting opportunities, the contractor is required to submit a written subcontracting plan to the Government. The plan must contain total dollar and percentage dollar goals for subcontracting to small businesses including breakdowns for: (1) women-owned; (2) veteran-owned; (3) disabled veteran-owned; (4) historically underutilized business zone (HUBzone); and (5) small disadvantaged businesses.

5. Most Favored Customer Pricing Policy for Commercial Items

GSA demands that the government receives the most greatly discounted price and the best terms and conditions offered to any customer for similar purchases. In making its determination, the government considers the discounts, terms, conditions and concessions granted to commercial customers for similar purchases. The government places greater emphasis on a contractor's written pricing policies or standard commercial sales practices rather than transactional sales data.

6. Drug-Free Workplace Requirements

The Drug-Free Workplace Act of 1988 obligates a non-commercial item government contractor with contracts valued at more than \$100,000 to keep the work place free of illegal drugs. The requirements include (1) publishing a statement and notifying employees in writing that illegal drugs are prohibited in

the workplace; (2) publishing and notifying employees of the action the contractor will take against violators of the drug prohibition policy; (3) establishing a drug-free awareness program for employees; (4) notifying employees that compliance with the drug prohibition is a condition of employment, and that employees must notify the contractor of any violation of Federal or state drug abuse statutes occurring in the workplace within 5 days of conviction; (5) notifying the government contracting agency within 10 days of receipt of an employee conviction notice; (6) taking appropriate personnel action within 30 days of receipt of an employee conviction notice; (7) requiring that the convicted employee participate in an approved drug abuse assistance or rehabilitation program; and (8) making a good faith effort to maintain a drug-free workplace through the implementation of these requirements. The Drug-Free Workplace Act does not, however, require drug testing of employees.

7. FAR Cost Principles

FAR Part 31 defines when and to what extent costs can be recovered under a government contract. Essentially, costs to be recovered from the government must be (a) allowable, (b) allocable, and (c) reasonable. The factors to be considered in determining allowability include (1) reasonableness; (2) allocability; (3) standards promulgated by the CAS Board; (4) terms of the contract; and (5) other limitations set forth in FAR 31.201-2. A cost is reasonable if "in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business." A cost is "allocable" if "it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship."

If awarded a negotiated non-commercial item contract worth more than \$500,000, a contractor needs to modify its accounting system to ensure that unallowable costs are not charged to the government.

8. The Cost Accounting Standards

The Cost Accounting Standards ("CAS") prescribe how a government contractor must account for costs charged to U.S. government contracts. The CAS generally apply to any *negotiated* contract over \$500,000 (a "covered contract") when at least one award was \$7.5 million or more. Sealed bid contracts are *not* subject to CAS.

Modified coverage requires compliance with only 4 of the 19 CAS:

1. CAS 401 - Consistency in Estimating, Accumulating, and Reporting Costs
2. CAS 402 - Consistency in Allocating Costs Incurred for the Same Purpose
3. CAS 405 - Accounting for Unallowable Costs
4. CAS 406 - Cost Accounting Periods

Full coverage applies to contracts greater than \$500,000 when the following criteria are met:

- A single CAS-covered contract award of \$50 million or more, or
- \$50 million or more in CAS-covered contracts were received during the preceding cost accounting period of which at least one award was \$7.5 million or more.

9. Truth In Negotiations Act Requirements

Under the Truth In Negotiations Act ("TINA"), a government contractor or subcontractor is required to submit "cost or pricing data" if any negotiated contract, subcontract, or modification is expected to exceed \$500,000. "Cost or pricing data" comprise all facts that prudent buyers and sellers would reasonably expect to affect price negotiations significantly. The submission of such data allows the CO to ascertain the reasonableness of the offered prices. In addition, the contractor and subcontractor must certify that the data are accurate, current, and complete. TINA exempts from its coverage a contract of any dollar amount where:

- the price agreed upon is based on adequate price competition;
- the price is set by law or regulation;
- the agency is acquiring a "commercial item"; or
- the agency grants a waiver.

10. Government Audit Rights

The Government has broad rights to conduct audits on government contractors at any time up to three years after final contract payment. The types of audits contractors might encounter include: Pre-Award, Billing System Internal Control, Progress Payment, Paid Vouchers, DCAA Floor Checks, Billing Invoices, Accounting Systems, Incurred Cost, Compensation, Forward Pricing and Closeouts.

11. Termination for Convenience of the Government

The "termination for convenience" clause prevents contractors from recovering anticipatory profit in situations which would normally constitute breach of contract in the private sector. Government contracts include a clause that states, "the Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government's interest." To terminate a contract for convenience, the government must provide the contractor with a written notice that includes: (1) a statement that the contract is being terminated for the convenience of the Government; (2) the effective date of termination; (3) the extent of termination; (4) any special instructions; and (5) the steps the contractor is to take to minimize the impact on personnel. Upon receipt of a termination for convenience, the contractor must (1) stop work immediately on the terminated portion of the contract; (2) terminate all subcontracts related to the terminated portion of the

prime contract; (3) advise the Government of any special circumstances precluding stoppage of work; (4) perform the continued portion of the contract if the termination is partial; (5) take any action necessary to protect property in the contractor's possession in which the Government has an interest; (6) notify the Government of any legal proceedings growing out of any subcontract; (7) settle any subcontractor claims arising out of the termination; and (8) dispose of termination inventory as directed by the Government. If the contractor is terminated for convenience, the contractor may recover (a) its performance costs incurred up to the date of termination; (b) certain costs incurred after the date of termination; (c) termination settlement expenses; and (d) profit or fee for work performed. The contractor has one year from the effective date of termination to submit a claim for such costs.

12. Termination for Default

The government can terminate the contract for default if the contractor breaches the contract -- *i.e.* , fails to (1) deliver the supplies or perform the services within the time specified in the contract; (2) make progress, thereby endangering performance of the contract; or (3) perform any other material provision in the contract. If the Government intends to exercise its right to terminate under the second or third referenced circumstances, it must first notify the contractor in writing and allow the contractor to "cure" its deficient performance within ten days. If the government terminates a contractor for default, the government has the right to reprocure the goods or services required under the terminated contract and charge the defaulting contractor the government's excess costs (a.k.a. excess reprocurement costs).

13. Changes

The Government may make unilateral changes to the contract without breaching the contract. But, the contractor may request an equitable adjustment if the change will increase its costs or time of performance. The contractor file for its equitable adjustment within a certain time period (typically 30 days) of the written formal change order or before final payment if it is a "constructive change." If the government disagrees with the contractor's request for an equitable adjustment, this disagreement is governed by the Disputes clause of the FAR. In the event of such a dispute, the contractor MUST continue performing under the contract, including performing any changes requested by the government. Failure to do so can result in a termination for default.

Gift Giving to Uncle Sam: Rules for Government Contractors

by Tenley A. Carp, Partner at McGuireWoods LLP in Washington, D.C.

As companies prepare to send gifts to their largest and most loyal customers, companies who sell goods or services to the federal government should think twice before sending a gift of any significant value to a government customer. Expensive gift giving to public officials is strictly prohibited by law. The purpose of unique and stringent ethical considerations for government contractors is logical. Government procurement must be free from taint or even the appearance of taint to keep the public from losing faith in how their tax dollars are spent.

To this end, the government has enacted many statutes and regulations to ensure that government contractors uphold these obligations including "Gifts for Public Officials" – Executive Order 12674 as modified by Executive Order 12731 & 5 CFR 2635. Gifts to public officials are prohibited unless the gift meets certain defined exceptions:

- Gifts worth up to \$20 per occasion per public official not to exceed \$50 to the same public official in a calendar year
- Gifts based on a close personal relationship
- Discounts when the discount is offered to all government employees
- Awards up to \$200 and honorary degrees plus meals
- Gifts based on outside business or employment
- Gifts in connection with political activities in accordance with the Hatch Act
- Free attendance for speaking engagements
- Social invitations not including travel or lodging
- Certain prizes in contests as long as the contest is open to the public

Contractors may also give gifts of nominal value to public officials such as cards, home-baked goods, soft drinks, coffee, pastries or similar refreshments not constituting a meal.

Gifts of significant value can be too easily perceived as bribery or as a gratuity -- which is defined as offering, promising or giving a public official anything of value with the intent to influence any official act, influence the public official or induce the public official to do or omit any act in violation of a lawful duty of that official. The penalties for bribery are very steep: (1) imprisonment of up to 15 years; (2) fines of up to three times the monetary equivalent of the thing of value; and (3) disqualification from holding any office of honor, trust or profit under the United States.

In U.S. v. Biaggi, 674 F. Supp. 86; 1987 U.S. Dist. LEXIS 10898, Nov. 25, 1987, two individuals were convicted for bribery. The first individual convicted of bribery was Mr. Esposito, a businessman whose largest customer was a U.S. Navy contractor with financial difficulties. The second individual convicted of

bribery was Mr. Biaggi, a Congressman from New York. Congressman Biaggi accepted a 4-day vacation at a villa in St. Maarten which was owned by Mr. Esposito. Mr. Biaggi also twice accepted a stay at a health resort in Florida from one of Mr. Esposito's business associates. Congressman Biaggi helped Mr. Esposito save the Navy contractor from bankruptcy. Mr. Biaggi was convicted of accepting gratuities and was sentenced to one year and one day in prison and a fine of \$500,000. Mr. Esposito was convicted of paying gratuities and was sentenced to two years probation, 500 hours of community service and a fine of \$500,000.

In another case, the GSA Office of Inspector General investigated a former GSA employee who was allegedly accepting bribes. According to the results of the OIG investigation, this GSA employee accepted \$17,000 worth of home renovations while working as a contracting officer's assistant. In exchange, a GSA employee steered contract work to a specific company. This employee was caught by a tip to the OIG Hotline. The GSA employee pled guilty in U.S. District Court and resigned from GSA while under investigation. The GSA employee was sentenced to two years of supervised probation, 30 days in prison, 60 days of home detention with an electronic monitor and \$17,000 in restitution.

Government contractors must take their ethical obligations seriously. To enforce the rule against giving public officials gifts of significant value, government contractors should take the following steps:

- (1) Consult a government contracts lawyer regarding ethical obligations for government contractors.
- (2) Draft a written code of business ethics and conduct which explains the prohibition against giving gifts of value to public officials. Include the specific exceptions as discussed above.
- (3) Require every employee to read and sign the written code of business ethics and conduct as soon as he or she joins the company.
- (4) Hold periodic meetings in small groups to discuss the various ethical obligations imposed on government contractors to give employees a chance to ask questions and receive clarification about these laws.

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