OVERVIEW: Avoiding Government Contracting Compliance Pitfalls, Bid Protests and Claims

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Avoiding Government Contracting Compliance Pitfalls

**Civil False Claims Act**
- Provides for treble damages and civil fines for the reckless submission of false claims for payment to the Government.
  - Also includes whistleblower (or *qui tam*) provisions.

**Improper Business Practices**
- The FAR contains several prohibitions and restrictions on actual (and sometimes only apparent) improper business practices, including:
  - Contractor gratuities to Government personnel, kickbacks, antitrust violations, agreements to pay contingent fees, prohibitions on placing unreasonable restrictions on subcontractor sales, and **Organizational Conflicts of Interest** (OCIs)
- Remedies available to the Government include criminal and civil penalties, default termination of affected contracts, and suspension and debarment from Federal acquisitions.
Avoiding Government Contracting Compliance Pitfalls

- **Mandatory Disclosure**
  - Requires mandatory disclosure in writing to the Office of the Inspector General with a copy to the contracting officer whenever, in connection with the award, performance, or closeout of a contract or any subcontract, the contractor has credible evidence of:
    - Criminal law violations involving fraud, conflict of interest, bribery, or gratuity violations;
    - Civil False Claims Act violations; or
    - Significant overpayments.
  - Mandatory Disclosure Rule provides for suspension or debarment penalty for knowing failure to timely disclose.
Avoiding Government Contracting Compliance Pitfalls

**Ethics and Compliance Programs**

- Recent FAR changes require companies to have an ongoing business ethics and compliance program and internal control system within 90 days of contract award (not required for small business or commercial item contracts).

- Program requires companies to:
  - “Establish standards and procedures to facilitate timely discovery of improper conduct in connection with Government contracts”; 
  - “Ensure corrective measures are promptly instituted and carried out”; 
  - Assign responsibility at a sufficiently high level and provide adequate resources to ensure effectiveness of the business ethics awareness and compliance program and internal control system; and 
  - Exclude principals “whom due diligence would have exposed as having engaged in conduct that is in conflict with the Contractor’s code of business ethics and conduct.”
Bid Protests

- Choice of Forum = CO, GAO, USCOFC
- Filing Deadlines
- Varying Degrees of Discovery
- Protective Orders for Competition Sensitive and Source Selection Sensitive Information
- Stay of Contract Performance During the Pendency of the Protest
- Remedies
Contract Disputes Act of 1978

- **Contract Disputes Act (CDA)**
  - Codified a special process for disputes arising under a government contract between the Government and the contractor
  - Contractors must follow the mandated procedures of the CDA, or risk waiving or otherwise losing their right to proceed against the agency
  - The FAR implements the CDA through the standard “disputes clause”

- **The “Disputes Clause” Defines a Claim as:**
  - “A written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to [the] contract.”

- **Contractors Must Continue Performance Pending Resolution of a Dispute with the Government**
Presentation of a “Claim”

- Contractor Initiates the Dispute Process by Submitting a Claim to the Contracting Officer (CO)
- Claims Over $100,000 Must be Certified by the Contractor
- If the Contractor and the Government are Unable to Negotiate a Resolution to the Dispute, the CO Must Issue a “Final Decision”
- Once a Final Decision (or Sufficient Passage of Time) has Occurred, the Contractor may “Appeal” the CO’s Final Decision
Steps In Claims Litigation

- Request for Final Decision
- Issuance of Contracting Officer’s (CO’s) Final Decision
- Notice of Appeal and Filing of the Complaint
- Civilian Agency Board of Contract Appeals or Armed Services Board of Contract Appeals or the U.S. Court of Federal Claims
- Appeal to the U.S. Court of Appeals for the Federal Circuit
Candidate Issues for Contract Disputes

- Contractor Claims for Money
- Government Claims
- Termination for Default
Termination for Default (T4D)

- Cure Notice
- Show Cause Notice
- Challenging the T4D
- Past Performance
- Non-responsibility
- Excess Reprocurement Costs