SHEET METAL & AIR CONDITIONING CONTRACTORS' NATIONAL ASSOCIATION

SMACNA Guide to Federal Contracting

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Notice to Users

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Introduction - The Basics

The United States Government spends more than $4 trillion each year and more than $500 billion of that total is for goods and services. That makes Uncle Sam the largest purchaser of goods and services in the world. And while the economic climate can quickly and drastically change, impacting the private marketplace, that is not the case when it comes to the federal marketplace. The last recession is a great example.

In 2008 the housing collapse had a serious and detrimental impact on the economy. On September 29, 2008 the DOW industrial average fell 777 points and by March 5, 2009 the DOW was at 6,594, having lost 50% of its value over six months. During that time, 8.4 million jobs were lost and many of them were in the construction industry. For companies that operated solely in the private market, times became very difficult and, in some instances, they were fatal. For companies that were also operating in the federal marketplace, their ability to survive was greatly enhanced, as the government continued to spend billions in allocated funds.

The above illustrates the importance of diversifying one's business model. So, why doesn't everyone do it? Fear. There is a myth that working for the federal government is difficult. While there are certainly nuances to performing work for a public owner, is there really a difference between installing duct in an army barrack versus a factory building or a Target? No, and these guidelines are designed to demystify the federal contracting process and educate SMACNA members. You will learn how federal contracts are awarded, what regulations apply to them and which processes are important to successful project completion. There is no reason why your company cannot use the federal government as a vehicle for success.

Key Aspects of the Federal Acquisition Regulation

Federal contracts, including subcontracts, are subject to a host of federal statutes and regulations. The majority of the regulations applicable to federal contracts can be found in the Federal Acquisition Regulation ("FAR"). In addition to the FAR, individual agencies have supplements that apply specifically to their procurements. For example, the Defense Acquisition Regulations System ("DFARS") applies to Department of Defense procurements, the VA Acquisition Regulation ("VAAR") applies to Department of Veterans Affairs procurements, etc.

The FAR, and its supplements, establish the rules and procedures for federal procurement, applicable to both procuring agencies and federal contractors. The FAR is separated into parts and subparts, each of which address a different aspect of federal procurement. FAR Part 2 contains definitions for key procurement terms. FAR Part 3 contains guidance for contractors relating to improper business practices and conflicts of interest, e.g., gratuities, contingent fees, whistleblower protections, codes of business ethics and conduct, etc. Part 6 contains the competition requirements that procuring agencies must follow, including *full and open* procurements, *small business set-asides*, and *sole source awards*.

The majority of contract awards made by the Federal Government is made under *Negotiated Procurement* procedures, which is covered in FAR Part 15. However, the Government will utilize other contracting methods, including the *Federal Supply Schedules* (covered in Part 8), *Commercial Items* acquisition procedures (covered in Part 12), *Simplified Acquisition Procedures* (Covered in Part 13), and *Sealed Bidding* procedures (covered in Part 14).

FAR Part 19, in coordination with the Small Business Administration Regulations found in Title 13 of the Code of Federal Regulations, implement the policies and procedures for the various contracting programs for small businesses. This includes set-asides and sole source awards to Small Businesses, 8(a) Disadvantaged Small Businesses, HUBZone Small Businesses, Service-Disabled, Veteran-Owned Small Businesses ("SDVOSB"), and Woman-Owned Small Businesses ("WOSB"). Protests, Disputes, and Appeals are addressed in Part 33.

While the FAR contains a complete catalog of regulations applicable to the Federal procurement system, it also includes a list of clauses that are designed to be included within Federal solicitations and contracts. This list of *FAR Contract Clauses* is contained within Part 52.

Full and Open Competition

The Competition in Contracting Act of 1984 requires that all acquisitions are made using full and open competition. This means that all responsible sources are allowed to submit sealed bids or competitive proposals in response to a solicitation. In some instances, the procuring agency is permitted to shrink the pool of responsible sources, such as a procurement set aside for small business concerns, or through one of the small business contracting programs (e.g., HUBZone, 8(a), etc.). However, even in such cases the agency is required to conduct the procurement on a full and open basis, i.e., all contractors eligible under the applicable standard are permitted to submit sealed bids or competitive proposals.

The FAR provides for seven exceptions to the requirement for full and open competition: (1) only one source; (2) unusual and compelling urgency; (3) industrial mobilization and maintaining critical capability; (4) international agreements; (5) authorized or required by another statute; (6) national security; and (7) public interest. Where one of these exceptions applies, the procuring agency may make an award on a sole source basis or with limited competition. However, in any of the above situations, the contracting officer is required to justify, in writing, the use of other than full and open competition.

Small Business Set-Asides

Federal government contract regulations evince a strong preference to make contract awards to small businesses. The "Rule of Two," found in FAR § 19.502-2, essentially provides that an agency is required to set-aside any acquisition with an expected value over $3,500 if there is a reasonable expectation of obtaining offers from two or more responsible small businesses at competitive prices. For acquisitions with an expected value between $3,500 and $150,000, the Rule of Two requires the contacting officer to set-aside the acquisition for small business unless it is determined there is not a reasonable expectation of receiving offers from two or more responsible small businesses that are competitive in terms of market prices, quality, and delivery. For all acquisitions over $150,000, the Rule of Two requires the contracting officer to set-aside the acquisition for small business any time there is a reasonable expectation that offers at fair market prices will be received by at least two small businesses.

Every solicitation must contain the North American Industry Classification System ("NAICS") code number applicable to the goods or services being procured. Each NAICS code establishes a size standard applicable to the procurement. In order to qualify as small under any procurement, a contractor must fall beneath the applicable size standard established by the solicitation's NAICS code. Size standards are either employee-based or revenue-based. For example, to be eligible to compete as a small business on a solicitation with a NAICS code with a size standard of 500 employees, the contractor would need to have 500 or fewer employees.

Similarly, to be eligible to compete as a small business on a solicitation with a NAICS code with a size standard of $27.5 million, the contractor would need to have $27.5 million or less in annual revenue.

It is not necessary that a contracting officer set-aside an entire procurement for small business. In certain situations, a contracting officer can set-aside only a portion of a procurement for small businesses. Where a procurement is to be set aside for small businesses, either partially or in total, contracting officers have discretion as to which small business program to utilize for the set-aside. The set-aside can be for all small businesses (under the applicable NAICS code), or it can be for one of the specific SBA small business contracting programs: 8(a), HUBZone, Service-Disabled, Veteran-Owned Small Business ("SDVOSB"), or Woman-Owned Small Business ("WOSB"). While agencies have small business contracting goals, there is no mandate to set-aside contracts to one small business program over the others. However, for acquisitions with an expected value over $150,000 in which the Rule of Two is met, procuring agencies are required to first consider a set-aside to one of the small business programs (i.e., 8(a), HUBZone, SDVOSB, or WOSB programs) before considering a set-aside for all small businesses.

Sole Source Awards

Procuring agencies are generally required to conduct acquisitions using *full and open* competition. However, under certain conditions, contracting officers are allowed to conduct a competition using other than full and open competition methods. In order to do so, the contracting officer is required to document the justification for refusing to use full and open competition, including a reference to the specific authority utilized. And he or she cannot use any justification. For example, lack of advanced planning by the agency is not a good reason to issue a sole source contract. Even where justification exists for the use of other than full and open competition, contracting officers are required to solicit offers from as many potential sources as is practicable.

Contracting officers are permitted to make a sole source award in certain situations. Generally, sole source awards can be made to small businesses, if certain conditions are met, under the various SBA small business contracting programs, i.e., 8(a), HUBZone, SDVOSB, and WOSB. Outside of the small business programs, contracting officers generally rely upon one of two justifications for making a sole source award: (1) there is only one source available; or (2) there are urgent and compelling circumstances necessitating a sole source award.

Negotiated Procurements

While it is not uncommon for procuring agencies to use negotiation in a *sole source* award, the majority of negotiated procurements are conducted on a competitive basis. Negotiated procurements are typically conducted as a best value tradeoff, whereby the procuring agency seeks to obtain the best value for the government, factoring in the offerors' technical capabilities, past performance, and proposed prices. Procuring agencies have a great deal of discretion in determining the amount of weight to be given to any one evaluative factor (e.g., technical vs. price). However, agencies are required to clearly state all evaluation factors and significant subfactors that will affect the contract award, as well as their relative importance. Importantly, agencies are required to specify how non-price factors will be evaluated. Once an evaluation scheme is established in a solicitation, the agency is prohibited from deviating from it. This prevents an agency from changing the rules after the submission of offers, to ensure fairness for offerors.

Because it is a best value tradeoff, agencies may not always make an award to the lowest priced, or highest technically rated offeror. As long as the agency properly documents their rationale for doing so, agencies can decide that a low-priced, low-rated offeror (or high-priced, high-rated offeror) represents the best value to the government.

Another type of negotiated procurement is a Lowest Price Technically Acceptable ("LPTA") source selection. Under an LPTA procurement, the solicitation specifies the evaluation factors and subfactors that establish the requirements of technical acceptability. Offerors are essentially evaluated on a pass/fail basis for acceptability, and then the lowest-priced acceptable offer is selected for award.

In either a best value or an LPTA procurement, procuring agencies are permitted to conduct exchanges of information with offerors after the submission of proposals. "Discussions" are generally defined as exchanges between the agency and the offeror that allows the offeror to obtain information essential to determine the acceptability of the offeror's proposal, or even revise its proposal. Discussions typically result in the establishment of a "Competitive Range," which includes all offerors that remain in the competition during and after the discussions process. Procuring agencies are required to provide written notice that an offeror has been excluded from the competitive range, stating the basis for the exclusion. (FAR § 15.503.)

If an agency does conduct discussions with offerors, those discussions must be meaningful. To be meaningful, the agency is required to identify to the offeror all of the deficiencies in its proposal. In addition, an agency cannot just conduct discussions with one offeror, but rather must engage in discussions with all offerors being considered for award. (FAR § 15.306.)

Unlike discussions, "Clarifications" do not need to be held with every offeror being considered for award. Clarifications are limited exchanges between the agency and an offeror in order to resolve minor or clerical mistakes in a proposal. These exchanges are not meant to allow revisions or modifications to the offeror's proposal, and thus can be held with individual offerors as necessary.

Once an award is made, the contracting officer is required to provide written notice, within 3 days of award, to each offeror whose proposal was in the competitive range but was not selected for award. This notice is required to include: the number of proposals received; the name and address of each offeror receiving an award; the items being procured, as well as the amounts and unit prices; and the general reasons why the unsuccessful offeror's proposal was not accepted.

In negotiated procurements, offerors may request a post-award debriefing from the agency following notice of award. Such post-award debriefings must be requested, in writing, within 3 days of the offeror receiving notice of award. Agencies are required, to the maximum extent practicable, to provide the post-award debriefing within 5 days after receipt of the request. Agencies have discretion as to the manner and format of the debriefing, as it can be conducted orally, in writing, or any other method found acceptable by the contracting officer. At a minimum, a post-award debriefing must include: (1) the agency's evaluation of significant weaknesses or deficiencies in the offeror's proposal, if any; (2) the successful offeror's overall evaluated cost or price (including unit prices) and technical rating; (3) the debriefed offeror's overall evaluated cost or price and technical rating; (4) the overall ranking of offerors, if one was developed during evaluation; and (5) a summary of the rational for award. For commercial items procurements, agencies are also required to provide the make and model of the item to be delivered by the awardee.

As part of the post-award debriefing, the agency is also required to provide the debriefed offeror an opportunity to ask questions relevant to the source selection and award. The agency is required to provide reasonable responses to relevant questions about whether the agency followed the source selection procedures outlined in the solicitation, as well as any other regulations or authorities applicable to the procurement. Again, the agency has discretion as to the format and manner of the questions and answers to be provided as part of the debriefing. Agencies can answer questions during a face-to-face meeting, allow offerors to submit questions in advance, conduct all questions and answers exchanges via email, or any other method deemed reasonable by the contracting officer. (FAR § 15.506.)

Offerors excluded from the competitive range may request a pre-award debriefing, if filed within 3 days of receiving notice of exclusion from the competition. Offerors are not entitled to more than one debriefing on any procurement, thus offeror may request to postpone a pre-award debriefing until after award, in which case the debriefing will include all information required to be provided in a post-award debriefing. However, if an offeror excluded from the competitive range fails to request a pre-award debriefing, the agency is then under no obligation to provide any debriefing to that offeror, pre-award or post-award. (FAR § 15.505.)

Federal Supply Schedules

The GSA Federal Supply Schedule ("FSS") program (sometimes referred to as the Multiple Award Schedule program) is the most common method for government agencies to quickly purchase commercial products or services. The FSS program obviates the need for individual ordering agencies to negotiate directly with vendors, as GSA has pre-negotiated the pricing for commonly used products and services. The theory behind the program is that government agencies can purchase needed products and services at better prices using the FSS program than negotiating on their own, given the volume of purchases made through the FSS program.

The FSS program generally consists of indefinite-delivery, indefinite-quantity (IDIQ) contracts awarded to multiple vendors for their commercial products and services. The FSS contracts are awarded with a five-year base period, and three five-year option periods. Vendors are awarded these IDIQ contracts on various "schedules" which are organized according to industry. GSA has over 30 different schedules, including the Professional Services Schedule, and Schedule 56 – Buildings and Building Materials/Industrial Services and Supplies. FSS contract holders received over $23 billion in sales in fiscal year 2016, including $170 million on orders under Schedule 56. Contractors holding FSS contracts are required to publish an "Authorized Federal Supply Schedule Pricelist" that contains all products and services that are offered by the contractor. (FAR § 8.402.) This Commercial Price List includes the pricing and terms and conditions for each item on the schedule contract.

Government customers are able to access the schedule contracts through the GSA's online system—"GSA Advantage!". The ordering agencies are able to place task and delivery orders for the products and services needed directly from the Schedule contract holder. Orders under the micro-purchase threshold (currently $3,500) can be made without competition, and these orders are considered to meet the requirement of a full and open competition. (FAR § 8.404.)[1] For orders exceeding the micro-purchase threshold but falling under the simplified acquisition threshold (currently $150,000), ordering agencies are simply required to either survey the pricelist of three different FSS contracts or receive orders from at least three FSS contract holders. (FAR § 8.405-1.)

[1] FAR § 8.404(a).

Orders over the simplified acquisition threshold require some competition, as such orders can only be made after the ordering agency posts a Request for Quotations (RFQ) on GSA's e-Buy system, or provides the RFQ to as many FSS contract holders as possible to reasonably ensure it will receive quotes from at least three FSS contract holders.

FSS contracts do not guarantee any sales to the FSS contract holder and carry only a $2,500 minimum order amount. FSS contract holders are expected to market their products and services to government customers in order to obtain orders. GSA may cancel an FSS contract that fails to receive at least $25,000 in sales over the first two years of the contract or fails to receive at least $25,000 in sales each year thereafter. However, because many government agencies rely on the FSS program to meet a broad scope of acquisition needs, a schedule contract can be a very valuable asset for a contractor.

Commercial Items Procurements

The FAR's definition of a Commercial Item is extremely broad, generally defining a Commercial Item as any item (other than real property) that is of a type customarily used by the public, or by non-governmental entities for non-governmental purposes, and has been sold, leased, or licensed to the general public, or offered for sale, lease, or license to the general public. (FAR § 2.101.) This definition includes both goods and services. The Contracting officer for each procurement is responsible for establishing whether a good or service being procured qualifies as a commercial item, which, for SMACNA members, could mean a determination pertaining to certain types of ductwork, for example.

The definition of a commercial item is not limited to items acquired by the Government from a prime contractor. The definition also includes items acquired from subcontractors at all tiers, as well as items transferred within a contractor's divisions, affiliates, or subsidiaries. Agencies are required to acquire commercial items when it meets the needs of the agency, and further require contractors at all tiers to incorporate commercial items into the components of items supplied to the Government to the maximum extent practicable. (FAR § 12.101.)

While procuring agencies use similar source selection processes as for non-commercial items procurements (e.g., best value tradeoffs), the process is more streamlined. (FAR § 12.602.) While still a Government contract, replete with numerous federal contract clauses, a commercial items contract hews closer to a commercial agreement than it does a traditional *Negotiated Contract*. There is a specified list of contract clauses that are required to be included in any commercial items contract, which generally makes for a faster acquisition process with less regulatory burden. In addition, unlike non-commercial items contracts, where the procuring agency can make unilateral changes to the contract, in a commercial items contract both parties must agree to any changes to the contract in writing.

Simplified Acquisition Procedures

Simplified Acquisition Procedures ("SAP") are contracting methods designed to streamline the acquisition process and facilitate the procurement of goods and services. Contracting agencies are required to use SAP, to the maximum extent practicable, for all purchases of supplies or services in which the value of the contract is not expected to exceed the Simplified Acquisition Threshold (currently $150,000). There are a few exceptions to this requirement, including situations where the agency can meet its requirement using required sources from FAR Part 8 (e.g., Federal Supply Schedules), an existing indefinite-delivery/indefinite-quantity contract, or other established contracts. (FAR § 13.003.) Using SAP reduces paperwork and lowers costs for both the Government and the contractor.

SAP may be used to purchase all manner of supplies and services, including construction, research and development, and commercial items. There are no formal procedures that procuring agencies are required to use when deploying SAP. Contracting officers have the discretion to use any suitable evaluation procedure, including *Sealed Bids* and *Negotiated Awards*. Contracting officers are required to promote competition to the maximum extent practicable, but sole source awards are permitted in some situations.

There are several available methods available to contracting officers utilizing SAP, including: using a governmentwide commercial purchase card; issuing a purchase order to the awardee (POs are typically fixed-price); and issuing a Blanket Purchase Agreement (BPA) to the contractor, which is essentially a "charge account" for supplies or services. SAP give contracting officers flexibility in procuring lower valued goods and services, which promotes efficiency and economy in contracting. Also, because acquisitions under the Simplified Acquisition Threshold are required to be *set aside for small businesses*, the SAP improves the contracting opportunities for small businesses.

Sealed Bids

Sealed Bidding is a method of awarding Government contracts that utilizes sealed competitive bids, a public opening of bids, and awards. The process begins with the issuance of an Invitation for Bids ("IFB"), which must describe the Government's requirements clearly, accurately, and completely. (FAR § 14.101.) The IFB must include all documents needed for prospective bidders to prepare their bid. The procuring agency is then required to publish the IFB by posting in a public place, typically by creating a posting on www.fbo.gov. The public posting of the IFB must provide a deadline for receipt of sealed bids, providing a reasonable amount of time for prospective bidders to prepare and submit their bids.

Bidders are required to submit their sealed bids to the location specified in the IFB by the stated deadline. Following the deadline established in the IFB, there is a public opening of sealed bids. The bids are evaluated as submitted, with no discussions held with bidders. To be considered for award under a Sealed Bid process, a bid must comply in all material respects with the requirements of the IFB. (FAR § 14.301.) After the public opening of bids, the procuring agency will make an award of a fixed-price contract to the reasonable bidder whose bid conformed to the requirements of the IFB and offered the lowest price.

Small Business Contracting Programs

It is the policy of the Federal Government to provide "maximum practicable opportunities" for small businesses in its acquisitions. This includes veteran-owned small businesses, service-disabled, veteran-owned small businesses ("SDVOSB"), HUBZone small businesses, small disadvantaged businesses, woman-owned small businesses ("WOSB"), and any other businesses that qualify as small under the applicable procurement. The Government has established a goal to award at least 23% of all Federal contracting dollars to small businesses. This includes a goal of 5% going to small disadvantaged businesses, 5% to WOSBs, 3% to SDVOSBs, and 3% to HUBZone small businesses.

Resulting from this overall policy encouraging maximum small business participation in Federal Government contracting is the *Small Business Set-Aside* policy that reserves certain procurements exclusively for small business competition. Contracting officers have discretion as to which small business type to restrict competition (e.g., all small businesses, all eligible SDVOSBs, etc.), as there is no preference among the various small business programs. (FAR § 19.203.)

Each solicitation establishes a size standard threshold by which any contractors falling beneath that threshold are eligible to compete for the set-aside award. By submitting an offer in response to a small business set-aside, the offeror is making a good faith representation to the Government that, at the time of its proposal submission, it meets the definition of a small business concern applicable to that solicitation. An offeror's "self-certification" of size or status is not binding, as it may be challenged by an interested party (e.g., another offeror), the contracting officer, or the SBA. Note, while SDVOSBs are allowed to self-certify their eligibility for a set-aside under most procurements, any procurement operated by the Department of Veterans Affairs requires the SDVOSB to be certified by VA prior to proposal submission.

A contractor that was an eligible small business as of the date it submitted its proposal for a small business set-aside is considered to be small for the life of the awarded contract. Thus, if a contractor receives a small business set-aside but then grows to be other-than-small during performance of that contract, the contractor will remain eligible to continue performance on that contract through its expiration. However, in some circumstances, contractors are required to recertify their small business status (e.g., following a merger or acquisition). In such cases, if a contractor can no longer recertify as a small business, it can continue to perform on the contract but the agency would be precluded from counting the value of any future option exercises, orders, purchases, etc. as part of its small business contracting goals.

FAR Contract Clauses

Between the FAR and its many supplements, there are thousands of regulations that may be applicable to a federal solicitation, contract, or contractor. Procuring agencies are required to include FAR clauses (as well as agency-specific clauses, e.g. DFARS, etc.) in their solicitations, either by incorporation or in full text, so that contractors interested in competing for the opportunity are aware of the regulatory obligations of the specific procurement. Those same clauses are then included in the executed contract between the procuring agency and the contractor receiving the award. The specific circumstances of each procurement dictate which clauses are required to be included.

While no means exhaustive, FAR clauses that contractors will commonly find in their Federal solicitations and contracts can be found in *Appendix One*.

Key Federal Contracting Reporting Issues

As part of the bargain of contracting with the Federal Government, contractors are subject to a host of reporting requirements. While not an exhaustive list, below are some of the more common reporting requirements that must be understood by Federal contractors:

- *System for Award Management (SAM) Registration*
- *Equal Employment Opportunity Reporting*
- *Employment Reports on Veterans*

- *Reporting Executive Compensation and First-Tier Subcontract Awards*
- *Small Business Subcontracting Plan Reporting*
- *Industrial Funding Fee and Sales Reporting*
- *Reporting of Government Property*
- *Service Contract Reporting*
- *Mandatory Disclosure Rule*

System for Award Management (SAM) Registration

Prospective contractors are required to be registered in the System for Award Management ("SAM") database prior to the award of any Federal contract or agreement, with a few exceptions (e.g., very low value purchases, classified contracts, etc.). (FAR § 4.1102.) The SAM database is located at www.sam.gov. There is no fee for contractors to register on SAM. To register on SAM, a contractor needs a DUNS number, a Tax Identification Number, as well as a bank routing number (to set up Electronic Funds Transfer). Contractors are required to ensure their SAM profiles are kept current, accurate, and complete. This requires updating the profile as appropriate, with updates occurring at least annually.

SAM was created to increase the efficiency of Federal Government contracting. For the Government, SAM creates a common source of vendor data. (FAR § 4.110.)For contractors, SAM increases the visibility of vendor sources for specific supplies and services, and eliminates the administrative burden of submitting the same company information to numerous contracting agencies. SAM serves as a one-stop-shop for vendor information. In addition to providing basic company information and points of contact, SAM also allows contractors to make blanket representations and certifications applicable to all awarded contracts, as the contractor's numerous representations and certifications are incorporated by reference into each awarded contract. (FAR § 4.1200.)

Because the representations and certifications made in a contractor's SAM profile are incorporated by reference into any awarded contract, contractors are required to ensure that their representations and certifications in SAM are kept current, accurate, and complete. Thus, contractors are required to update their SAM profiles as necessary, but at least every year. Representations and certifications in a SAM profile are effective for one year from the date of submission or latest update. (FAR § 4.1201.) Contractors are not required to provide a representation or certification for every clause listed in the SAM. However, there may be penalties for misrepresenting an entity in any representation or certifications made in a SAM profile.

Some of the representations and certifications that contractors can address in a SAM profile can be found in *Appendix Two*.

Equal Employment Opportunity Reporting

Department of Labor regulations require certain Federal contractors to file complete and accurate employment reports on Standard Form 100 (EEO-1). The requirement applies to any contractor that: (1) is a Federal prime contractor or first-tier subcontractor (or construction subcontractor at any tier); (2) has 50 or more employees; (3) has a contract, subcontract, or purchase order valued at $50,000 or more; and (4) is not exempt from the regulations (e.g., contracts with performance outside the U.S., state and local contracts, contracts with educational institutions, etc.). (41 CFR § 60.1.7). The EEO-1 annual report must be filed on or before September 30, for the previous reporting year. In addition, any contractor required to submit an EEO-1 report is required to file the report to the contracting or administrating agency within 30 days of an award of a contract or subcontract, unless the contractor had submitted an EEO-1 report within 12 months preceding the date of award. Failure to meet the EEO-1 reporting requirements may subject a contractor to sanctions by Department of Labor.

Employment Reports on Veterans

Contracting officers are generally required to insert FAR § 52.222-37 (Employment Reports on Veterans) in all solicitations and contracts with an expected value of $150,000 or more. FAR § 52.222-37 requires the contractor to file a VETS-4212 "Federal Contractor Veterans' Employment Report" no later than September 30th of each year. Contractors are also required to include the requirement to file VETS-4212 reports in all subcontracts of $150,000 or more, unless the subcontract is exempted by rules, regulations, or orders of the Secretary of Labor. The information requested as part of this process is designed to determine the hiring practices of federal contractors and subcontractors as it pertains to disabled veterans and other former members of the United Stated military and assure that these employers are complying with their affirmative action requirements.

Reporting Executive Compensation and First-Tier Subcontract Awards

Contracting officers are generally required to insert FAR § 52.204-10 (Reporting Executive Compensation and First-Tier Subcontract Awards) in all solicitations and contracts with an expected value of $30,000 or more. FAR § 52.204-10 requires a contractor to report, as part of its annual SAM registration, the names and total compensation for each of the five most highly compensated executives for the preceding fiscal year, if: in the preceding fiscal year, the contractor received (1) at least 80% of its gross revenue from Federal money (contracts, grants, etc.); and (2) at least $25 million in annual gross revenue from Federal money (contracts, grants, etc.). Note, this requirement does not apply if the public has access to this information through company filings with the Securities and Exchange Commission.

FAR § 52.204-10 also requires a contractor to report contract information (i.e., name, amount, date, etc.) for any **first-tier** subcontract valued at $30,000 or more. In addition, the contractor must report the names and compensation of the five most highly compensated executives for any first-tier subcontractor meeting the revenue requirements described in the paragraph above. The first-tier subcontract information is required to be reported by the end of the month that follows the month of award, with the reports submitted online at www.fsrs.gov. Continued reporting of first-tier subcontract information is not required, unless one of the reported data elements changes during performance of the subcontract.

Small Business Subcontracting Plan

Contracting officers are generally required to include FAR § 52.219-9 (Small Business Subcontracting Plan) in any solicitations and contracts that offer subcontracting possibilities, and are expected to exceed $700,000. However, FAR § 52.219-9 does not apply to small businesses. Contractors subject to this clause are required to develop a written plan that separately addresses contracting with the various small business programs (e.g., small businesses, HUBZones, etc.). The plan must be submitted to the contracting officer, and it will eventually be incorporated into the contract. Failure to submit a subcontracting plan renders the contractor ineligible for award of the contract. Failure to comply with the submitted small business subcontracting plan constitutes a material breach of the contract, and may lead to the assessment of liquidated damages.

There are two types of subcontracting plans that can be submitted by contractors: Commercial Plans and Individual Plans. A Commercial Plan is a subcontracting plan covering the offeror's fiscal year and applies to the entire production of commercial items sold by either the entire company, or a portion of the company (e.g., division, plant, or product line). A Commercial Plan is the preferred type of plan for contractors furnishing commercial items to the Government. A Commercial Plan is supposed to relate to the contractor's planned subcontracting generally, including both commercial and government business. Once a Commercial Plan is approved by the Government, the contractor will not be required to submit another Commercial Plan as long as the plan remains in effect, and the product or service at issue continues to meet the definition of a Commercial Item. For SMACNA members, if your company sells products to the government, like commercial item ductwork, a Commercial Plan may be required. Alternatively, if your company regularly performs installation work, an Individual Plan is more likely.

An Individual Plan is a subcontracting plan that applies to a specific contract and covers the entire contract period, including any option periods, and has goals based upon the contractor's planned subcontracting for that specific contract. Individual Plans must separately address subcontracting with small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns. An Individual Plan must also include separate parts for the basic contract and each option period (if any).

Contractors must submit reports measuring progress towards the goals set forth in their subcontracting plan. The type of plan (i.e., Commercial Plan vs Individual Plan) and contract language will determine which reports are required. Contractors with a Commercial Plan are required to submit a Summary Subcontract Report ("SSR") for all contracts covered by its plan. The SSR must be submitted within 30 days after the end of the Government's fiscal year, which is September 30th.

Contractors with an Individual Plan must submit both an SSR and an Individual Subcontract Report ("ISR"). Contractors must submit an ISR for each contract that has an Individual Plan. ISRs are to be submitted semi-annually, within 30 days after the end of performance periods ending May 31st and September 30th. ISRs are also required to be submitted within 30 days after contract close out for each contract with an Individual Plan. Like with Commercial Plans, an SSR must be submitted for each Individual Plan, which may result in a contractor being required to submit separate SSRs to multiple agencies. The SSR for Individual plans must be submitted annually by October 30th.

Both SSRs and ISRs are required to be submitted using the web-based system www.esrs.gov. There are some variations in the information required to be submitted in the ISRs and SSRs, however both reports generally must include: administrative information (contractor name, address, DUNS, etc.); the cumulative subcontracting spending separated between large and small businesses; and the cumulative small business subcontracting awards separated by type (e.g., small business, HUBZone small businesses, etc.).

Industrial Funding Fee and Sales Reporting

The Industrial Funding Fee ("IFF") is the charge that GSA applies for the administration of Federal Supply Schedule ("FSS") contracts. (FAR § 552.238-74.) The IFF, currently set at 0.75% of sales, is determined based on the Schedule Contractor's quarterly reported sales under its FSS contract. To determine the amount of IFF owed to GSA, the Schedule Contractor is required to report the dollar value of all sales under the Schedule contract by calendar quarter (e.g., January through March, etc.) within 30 days after the end of the quarter. The sales value reported by the Schedule Contractor should include the Industrial Funding Fee in the total. Note, zero sales in a quarter does not remove the requirement to submit a report.

The applicable regulations provide that within 60 days of contract award, a representative of GSA's Federal Acquisition Service (FAS) will contact the Schedule Contractor with specific instructions on paying the IFF to GSA. The Schedule Contractor must remit the IFF to GSA's Federal Acquisition Service within 30 days after the end of the reporting quarter. Failure to submit the required sales reports or timely pay the IFF is sufficient cause for the USG to terminate the Schedule contract for cause.

A contractor with an FSS contract is required to report all transactional data (e.g., contract number, quantity of items sold, price, etc.) under its FSS contract through GSA's online reporting system (https://vsc.gsa.gov). The transactional data is required to be reported within 30 calendar days from the last calendar day of the month. If there was no contract activity in a month, the contractor is required to submit a confirmation of no reportable transactional data within the same timeframe.

Reporting of Government Property

Contractors are required by FAR § 52.245-1 to maintain an accurate database of all Government-furnished property ("GFP"). Procuring agencies generally include FAR § 52.245-1 in all solicitations and contracts expected to include GFP. The clause requires contractors to have a system of internal controls to manage any GFP in its possession. In addition, the contractor's system must have a process to create and provide reports, if requested by the contracting officer, including reports of discrepancies, loss of GFP, physical inventory results, etc. There is no set schedule for the creation and providing of reports, rather, the contractor must be prepared to provide GFP-related reports to the contracting officer as requested.

Service Contract Reporting

Contractors that employ individuals on services (including construction) contracts may be subject to reporting requirements, depending on the type and value of the contract. Reporting is required for any contracts or orders for services that are either cost-reimbursement, time-and-materials, or labor hour contracts or orders, and exceed the simplified acquisition threshold (currently $150,000). Reporting is required for any fixed-price service contract or order with an estimated value of $500,000 or more. (FAR § 4.1703.)

For indefinite-delivery/indefinite-quantity contracts, the reporting requirements are reflected in FAR § 52.204-15. For all other contracts, the reporting requirements are reflected in FAR § 52.204-14. Under either clause, contractors are required to report: (1) the contract number and order number (if applicable); (2) the total dollar amount invoiced for services performed during the previous fiscal year under the contract/order; (3) the number of direct labor hours expended by the Contractor on the services performed during the previous fiscal year; and (4) information from first-tier subcontractors, including the number of first-tier subcontractor direct-labor hours expended on services performed during the previous fiscal year. Because of the requirement to provide first-tier subcontractor information in the reports, contractors are required to ensure first-tier subcontractors, with contracts meeting the value thresholds discussed above, provide detailed information within sufficient time for the contractor to file its report to the Government.

The service contract reports are required to be filed every year by October 31st. The report covers all services performed under the applicable contract during the preceding Government fiscal year (October 1 – September 30). All service contract reports are submitted through the contractor's profile on SAM.gov.

Mandatory Disclosure Rule

Federal Regulations include requirements for contractors to disclose credible evidence of violations of certain criminal or civil statutes by representatives of the contractor in connection with a contract or subcontract. In addition to the rules on Suspension and Debarment, the FAR includes a mandatory disclosure rule in FAR § 52.203-13 (Contractor Code of Business Ethics and Conduct). FAR § 52.203-13 is applicable to any contract with a value of over $5.5 million and a performance period of 120 days or more. The clause requires contract awardees to have a written code of business ethics and conduct in place within 30 days of contract award. In addition, the clause requires the contractor to exercise due diligence to prevent and detect criminal conduct and promote an organizational culture that encourages ethical conduct and compliance with Federal laws.

As part of its compliance program, contractors subject to the clause are required to make written disclosures to the Government any time it has credible evidence of violation of certain Federal criminal laws and the civil False Claims Act. The criminal statutes at issue are violations involving fraud, conflict of interest, bribery, or gratuities (found in Title 18 of the U.S. Code). The contractor is required to disclose any of these violations—committed by a principal, employee, agent, or subcontractor of the contractor—that are in connection with the award, performance, or close out of the applicable contract or any related subcontract (at any tier).

Teaming and Joint Venturing on Federal Projects

The FAR defines a "Contractor Team Arrangement" as an arrangement in which "(1) Two or more companies form a partnership or joint venture to act as a potential prime contractor; or (2) A potential prime contractor agrees with one or more other companies to have them act as its subcontractors under a specified Government contract or acquisition program." FAR § 9.601. Essentially, this clause covers the three most typical contracting arrangements entered into by Federal Government contractors: *Teaming Agreements*, *Subcontracts*, and *Joint Ventures*.

Teaming Agreements

A **Teaming Agreement** essentially provides two or more government contractors with an integrated plan to pursue an opportunity for a contract award or awards. A Teaming Agreement establishes one party as the prime contractor for the opportunity being pursued, with the remaining party (or parties) serving as a subcontractor. Teaming Agreements are typically formed prior to the submission of a proposal but can be formed at any stage of contracting.

The makeup of a team varies, as a Teaming Agreement can be entered into between two large companies, two small companies, or a large company and a small company. Teaming Agreements can also be entered into by more than two companies, however typically any increase in the number of team members also increases the complexity of the negotiation. For this reason, the vast majority of Teaming Agreements are between two companies. A few common teaming scenarios include:

- A small business pursuing a small business set-aside teams up with a large business to be its subcontractor, which helps bolster the small business prime's technical capabilities and experience.
- Large business prime contractors typically must adopt a small business subcontracting plan. Thus, a large business often strategically teams up with a small business assist meeting the goals of its subcontracting plan.
- Prime contractors with little or no experience with a specific Federal agency will often team up with incumbent contractors or contractors with significant history with the applicable agency.
- On large, complex procurements, contractors (large and small) will often team up with other companies with different capabilities in order to cover all aspects of the solicitation requirements.

Teaming Agreements should always be in writing, as they are essentially contracts. However, unlike *Subcontracts* and *Joint Venture* agreements, which are binding documents that can be enforced in court, a Teaming Agreement is something of a hybrid between a binding agreement and a documented list of wishes. Every Teaming Agreement is generally composed of a mix of (1) binding contract clauses applicable to any procurement; (2) binding contract clauses necessitated by the specific procurement at issue; and (3) potentially non-binding clauses regarding the parties' plans should the team receive a contract award.

In addition to general contract terms, every Teaming Agreement should include clauses that address the following issues:

1. The **purpose** of the Teaming Agreement, i.e., who are the parties, which party is the team lead (prime contractor), and what is the contract opportunity the parties are teaming up to pursue. While Teaming Agreements can be written broadly to cover multiple opportunities, it is best practice to execute a single Teaming Agreement for a single opportunity.
2. The **duties of the prime contractor** relating to the preparation and submission of the proposal. This could address situations such as a prime needing a subcontractor's assistance with portions of a technical proposal, the subcontractor being required to submit its own pricing, the subcontractor's role on oral presentations, etc.
3. **Non-Disclosure provisions**. Often, parties will enter into a separate Non-Disclosure Agreement before entering into a Teaming Agreement. An NDA allows the parties to freely exchange information in order to determine if the team is a good fit without having to worry about one party improperly using the other party's confidential or proprietary information. Teaming Agreements can incorporate prior NDAs, or include separate non-disclosure language. Either way, it is important for a Teaming Agreement to contain some protection language for the parties' confidential and proprietary information that may be disclosed in connection with the pursuit of the applicable contract opportunity.

4. **Rights in Intellectual Property**. Given that Teaming Agreements generally require the teammates to share information, it is important for the agreement to contain a clause addressing each party's intellectual property rights.

5. **Dispute resolution clause**. The Teaming Agreement should contain language addressing how the parties will resolve any disputes relating to the Teaming Agreement, e.g., arbitration, Federal court, etc.

6. **Termination provision**. A Teaming Agreement should have a provision that addresses the termination or expiration of the agreement. Teaming Agreements will typically contain language stating that the agreement expires within one year, unless mutually extended by the parties. A Teaming Agreement can also contain language permitting the parties (or one party) to terminate the agreement (e.g., either party can terminate the agreement if the prime decides not to submit a proposal).

In addition to the above terms which **should** be included in any Teaming Agreement, there are several other clauses that may be appropriate to be included depending on the situation and the relationship between the parties, such as:

1. Whether the Teaming Agreement is **exclusive**. Absent an exclusivity provision, the parties entering into the Teaming Agreement are generally free to enter into similar agreements with other parties. For example, a contractor with a specific technical expertise that corresponds to a small portion of a solicitation's requirements may enter into non-exclusive Teaming Agreements with multiple prime contractors, increasing its chances of being on the winning team. However, contractors can insert an exclusivity provision in a Teaming Agreement, limiting a party's (or both parties') ability to team up with other companies.

   These exclusivity provisions can be one-sided (*e.g.*, a prime contractor wants to lock up a valuable subcontractor partner for its team), or they can apply mutually to both teaming partners.

2. **Non-solicitation of personnel**. In situations where the teaming partners are required to propose individuals that will work on any awarded contract, a Teaming Agreement probably should include a provision by which the parties agree not to recruit the employees of the other party. However, any such clause will need to be written carefully so not as to be overly restrictive of individual employment (i.e., it is generally okay to agree not to recruit certain individuals, companies generally cannot prevent individuals from responding to public job notices).

Terms in a Teaming Agreement covering the issues listed above are generally binding, meaning a party can bring an action in court to enforce these contract provisions. However, Teaming Agreements also often contain other provisions that speak to the parties desired outcomes should the team be successful in winning a contract award. Because these clauses are premised on something that has not happened and is not certain to happen, many courts have deemed these types of provisions to be "agreements to agree," and not enforceable. Thus, while the following types of provisions are commonly found in Teaming Agreements, they are of questionable enforceability:

1. **Good faith negotiation of a subcontract**. While the purpose of a Teaming Agreement is for parties to work together to submit an offer in response to a solicitation, the ultimate goal of the team is for the prime contractor to be awarded a government contract. Thus, it is common for Teaming Agreements

to include a provision stating that if the submission of a proposal results in an award of a contract, the parties will work together in good faith to execute a subcontract.

2. **Expected work to be performed by each party**. Whether a solicitation has been released, or the parties have entered into a Teaming Agreement in anticipation of a solicitation, there is typically some understanding of the type of work that will be required by the procurement at issue. Thus, a Teaming Agreement will typically divvy up the work among the team members, e.g., prime contractor shall perform all requirements related to installation, subcontractor shall perform all requirements related to repair, etc.

3. **Expected workshare**. It is not uncommon for a Teaming Agreement to state the understanding of the parties regarding the split in workshare for the expected requirements. This can be expressed in many ways, *e.g.*, subcontractor will perform up to 25% of the work, subcontractor will perform no less than 25% of the work, subcontractor will perform 25% of the work, etc.

While these provisions may not be enforceable, it can still be helpful for parties to include these provisions in a Teaming Agreement. These provisions help establish each party's understanding of what an eventual subcontract will look like, and the roles and workshare each party is expecting to perform. However, while it is helpful to get the dialogue started with the Teaming Agreement, it is unlikely to mean anything if some version of these provisions is included in a resulting subcontract.

Subcontracts

Subcontracts occur at numerous tiers in the government contracts process. A prime contractor may have subcontract agreements with its subcontractors (first-tier subcontractors), and those subcontractors may have their subcontractors (lower-tier subcontractors). At any tier, a Subcontract is a written agreement that defines the relationship, roles, and responsibilities of the parties with relation to a higher-tier agreement.

Typically, a Subcontract is initially drafted by the prime contractor (or higher-tier subcontractor). However, it is rare for a Subcontract to be executed without negotiations between the parties over the contract terms. It is important for each party to understand the terms and conditions of the Subcontract, and both their own obligations as well as those of the other party. There are myriad provisions that can be included in a Subcontract, some are fairly standard, and some are specific to a certain type of work. Here are several specific contract clauses that should be included in any Subcontract relating to a government contract:

1. The **purpose** of the Subcontract. The Subcontract should specify the project and the prime contract that the parties are working under.

2. The **contract type**. The Subcontract should indicate the type of contract, e.g., firm fixed price, time and materials, cost reimbursement, etc.

3. **Order process**. If the Subcontract is an indefinite delivery, indefinite quantity (IDIQ) contract, it should describe the process by which the prime contractor will issue task/delivery orders to the subcontractor.

4. **Invoicing and Payment**. The Subcontract should specify exactly what the subcontractor needs to submit with its invoices, and when the subcontractor will get paid, e.g., Net 30, within 7 days after prime receives payment from the customer, etc. The exact payment timeline is a negotiation point for the parties.

5. **Statement of Work**. The Subcontract should include a Statement of Work that describes the goods or services to be provided by the subcontractor. The SOW should be clear and comprehensive.

6. **Contract term**. The Subcontract should specify the period of performance. If the applicable prime contract includes option periods, the Subcontract should address that as well. For example, if a prime contract has a 1-year base period with four 1-year option periods, the Subcontract can simply run for 5 total years, or could similarly run for a base year with four option years. How the option years would be exercised is a negotiation point for the parties.

7. **Place of Performance**. Government site, prime's location, subcontractor's location, etc.

8. **Authorized representatives**. Subcontracts should identify the representatives of each party who are empowered to make commitments on behalf of their respective organizations.

9. **Intellectual Property Rights**. This type of clause governs who owns any intellectual property generated under a federal government contract. Federal prime contracts typically require that the government own all intellectual property generated under that contract. Prime contractors will typically need to flow this requirement down into a subcontract, while a subcontractor will typically want to retain ownership of any intellectual property it creates. This is a negotiation point for the parties.

10. **Clause covering changes in the SOW**. Generally, the government can unilaterally modify the SOW of a government contract, as long as the change is still within the general scope of the original contract. If a Subcontract does not include a similar changes clause, then the subcontractor may not be obligated to perform any SOW changed by the government.

11. **Protection of proprietary/confidential information**. Often, parties will enter into a separate Non-Disclosure Agreement, usually even before entering into a Teaming Agreement. An NDA allows the parties to freely exchange proprietary or confidential information as part of performance while being protected from improper disclosure. A Subcontract can incorporate prior NDAs, or include separate non-disclosure language. Either way, it is important for a Subcontract to contain some protection language for the parties' confidential and proprietary information that may be disclosed in connection with performance of the Subcontract.

12. **Dispute resolution procedures**. Prime contracts include specific dispute resolution procedures that must be followed by the prime contractor in any dispute with the government. Because a subcontractor does not have privity with the government (no direct contract between the government and the sub), the subcontract may include a provision which governs how the prime and subcontractor will cooperate regarding any disputes either party has with the government. The Subcontract should also include a dispute resolution provision governing how disputes arising under the Subcontract between the prime contractor and subcontractor will be resolved, e.g., through arbitration, local courts, etc.

13. **Termination of the Subcontract**. The Subcontract should contain some provision that governs how and when the Subcontract can be terminated. This may include a termination for convenience, a termination for default, termination due to bankruptcy, etc. This is a negotiation point for the parties.

Other clauses that may be included depending on the situation:

14. **Exclusivity**. Prime contractor will only work with the specific subcontractor on the project, subcontractor will only provide goods/services required for a multiple award contract to the specific prime, etc.
15. **Key personnel**. If specific individuals were proposed to the government as key personnel, the prime contract may contain a clause requiring the prime contractor to use specific procedures if any of those key personnel are to be substituted or replaced. If so, similar language may need to be included in a Subcontract.
16. **Labor categories and labor rates**. For services contracts, it may be necessary to include the labor categories that the Subcontractor is required to provide, and the labor rates that the Subcontractor is allowed to bill. This may also include the incorporation of a Wage Determination established by the Department of Labor.
17. **Non-Competition of customer**. In this type of clause the subcontractor agrees that for a specified period of time, it will not solicit or compete for work from the specified customer. These clauses can be broadly written to cover any opportunity for a customer, or written narrowly to only include specific types of work.
18. **Non-Solicitation of employees**. This is an agreement not to recruit the employees of the other party. However, any such clause will need to be written carefully so not as to be overly restrictive of individual employment (i.e., it is generally okay to agree not to recruit certain individuals, companies generally cannot prevent individuals from responding to public job notices).

In addition to the list of sample clauses above, many Subcontracts under a government contract also include "flow-downs." Because federal government contracts contain a multitude of FAR clauses, and agency-specific contract clauses (*e.g.,* DFARS for DoD contracts), prime contractors will seek to "flow down" those clauses into a Subcontract. Thus, many Subcontracts contain a list of FAR clauses. However, not all FAR (and agency-specific clauses) are required to be flowed down to subcontractors. A few do have explicit requirements that the prime contractor include the clause, or the substance of the clause, in every lower-tier contract. But, most FAR clauses have no such requirement. Thus, in some cases the inclusion of federal contract clauses is a point to be negotiated between the parties.

Joint Ventures

A Joint Venture is an association of concerns consorting to engage in and carry out specific business ventures for joint profit, for which they combine their efforts, property, money, skill, and/or knowledge. A joint venture is generally designed to last for a limited duration and for a specific purpose. Joint Ventures offer benefits to contractors that are typically not available through prime-sub relationships. Under a prime-sub situation, only the prime contractor has privity with the government, so the prime contractor bears all of the risk of performance. Some of this risk can be shared through a *subcontract*, but the prime contractor will always be the only party with a contractual relationship with the government.

On the other hand, if a Joint Venture pursues and wins a contract award, the Joint Venture will receive the prime contract. Thus, a Joint Venture allows the partner companies to spread the risks of prime contracting.

Joint Ventures also allow the partner companies to leverage their combined financial resources, bonding capacity, past performance, and technical capabilities. Joint Ventures can be comprised of all large businesses, all small businesses, a mix of large and small businesses, or some mix including a specific type of small business (e.g., Women-Owned Small Business). Joint Ventures may even be eligible to compete for contracts set-aside for small businesses, or small businesses in one of the small business contracting programs (8(a), HUBZone, SDVOSB, WOSB). Joint Ventures must have a written agreement and must be registered in SAM.gov prior to receiving an award. Joint Ventures may be in the form of a partnership, or it may exist as a separate legal entity (such as an LLC).

As a general rule, the partners of a Joint Venture are considered to be affiliated for any specific procurement that the Joint Venture is pursuing. (FAR § 19.101(7(iii).) Anytime two (or more) companies are considered to be affiliated, each party must aggregate their affiliates' revenue (or employees) with their own in determining the size of the company. (13 CFR § 121.103(a)(6).) While this may not be an issue for large companies that are ineligible to compete for small business set-asides on their own anyway, but affiliation can cause significant issues for small businesses, unless carefully considering the types and sizes of the companies engaged as joint venture partners. For example, if two small businesses joint venture to pursue a contract set aside for small businesses, the joint venture will likely comply with the pertinent regulations that govern size status. However, in same scenario, if one of the joint venture partners is large by SBA standards, the joint venture will not be eligible for that opportunity.

In the context of a Joint Venture, this general affiliation rule means that, unless an exception applies, the size of the Joint Venture will be determined by aggregating the revenues (or employees) of all of the Joint Venture partners. For example, if a Joint Venture is made up of three partners each with $10 million in annual revenue, then the Joint Venture will be considered to have $30 million in annual revenue. Even if Joint Venture partners are not affiliated, each partner to the Joint Venture must include their share of the Joint Venture's receipts in calculating their own individual annual receipts. (FAR § 19.101(7(iv).) Note that a Joint Venture may not receive more than 3 contracts over a 2-year period (beginning from the date of the first contract award), without the partners being considered affiliated for all purposes. (13 CFR § 121.103(h).) However, once a Joint Venture receives 3 contracts in 2 years, the partners may form a new Joint Venture to start the process over again.

There are several exceptions to this general Joint Venture affiliation rule that makes it easier for small businesses (and sometimes large businesses) to form a Joint Venture and retain eligibility for set-aside contracts. A Joint Venture of two or more small businesses may submit an offer as a small business as long as each partner is small under the stated NAICS code in the applicable solicitation. Also, a Joint Venture between a mentor and protégé with an approved Mentor Protégé Agreement under either the 8(a) Mentor-Protégé Program or the All Small Mentor-Protégé Program, may be eligible to receive a small business set-aside contract as long as the Joint Venture meets applicable requirements and the protégé is small under the stated NAICS code in the applicable solicitation. Note that for Joint Ventures under the 8(a) Mentor-Protégé Program, the SBA must approve the Joint Venture Agreement. (13 CFR § 121.103(h)(i)-(iii).) There are also specific rules governing Joint Ventures under the 8(a), HUBZone, SDVOSB, and WOSB programs.

Because of the cooperative nature of a Joint Venture—with shared management, work, risk, profit, etc.—it is important for a contractor to carefully consider its potential Joint Venture partners. A successful Joint Venture is typically made up of partners with shared goals and capabilities that enhance the strengths and supplement the weaknesses of the other partners.

Small Business Procurement

The United States Government ("USG") spends nearly $500 billion dollars on goods and services each year, making it the largest purchaser of goods and services in the world. It is the USG's stated policy to provide "maximum practicable opportunities" for small businesses to win work as prime contractors and subcontractors. (FAR § 19.201.) The Small Business Administration ("SBA") is charged with ensuring the USG meets certain contracting goals with regard to prime contract dollars awarded to small businesses. Across the entire USG, there is a goal that at least 23% of all federal prime contract dollars are spent on small businesses. After many years of falling short of this goal, the USG has actually met the goal each year from FY 2013 through FY 2017.

In addition to the government-wide goal of 23% of contracting dollars going to small businesses, the USG also has individual goals for each of the SBA socioeconomic small business contracting programs: *8(a) Small Disadvantaged Businesses*, *HUBZone Small Businesses*, *Service-Disabled Veteran Owned Small Businesses ("SDVOSB")*, and *Woman-Owned Small Businesses ("WOSB")*. There is a goal of 5% in federal prime contracting dollars for both the 8(a) program and the WOSB program, and a goal of 3% of federal prime contracting dollars for both the HUBZone and SDVOSB programs. Historically, the USB has met their goals for the 8(a) and SDVOSB programs, but fallen short for the HUBZone and WOSB programs.

To facilitate meeting these small business contracting goals, federal regulations include *requirements to set-aside certain procurements exclusively for award to small businesses*. Above the simplified acquisition threshold (increased to $250,000), contracting officers are required to first consider setting aside an acquisition to one of the small business socioeconomic programs (i.e., 8(a), HUBZone, SDVOSB, WOSB) before considering a set-aside to general small businesses. (FAR § 19.203.) Because these programs (and awards made under these programs) are designed for the benefit of small businesses, there are regulations governing these awards that ensure small businesses are actually performing a substantial amount of the requirements, e.g. the *Limitation on Subcontracting Rule*, the *Non-Manufacturer Rule*, etc. Set-asides for small businesses may be conducted using Simplified Acquisition Procedures, Sealed Bids, or Negotiated Procurements.

To be eligible for a small business set-aside, the offeror must make a good faith representation that it is a small business under the *applicable size standard*, or eligible under the applicable socioeconomic program (e.g., SDVOSB), **as of the date it submits its offer in response to the solicitation**. A contractor's size must include the size of any *affiliates*. Small businesses can qualify under multiple socioeconomic programs, e.g. a WOSB can also be a certified HUBZone, etc. There are *serious penalties for misrepresentation* of a contractor's small business size or status. In some cases, contractors may be required to *recertify* their size status in connection with a contract, or award of a task/delivery order under the contract. An offeror's size or status (as an SDVOSB, etc.) can be challenged by SBA, the contracting officer, or an interested party through the size/status protest process.

Limitations on Subcontracting Rule

Any time a contractor receives a contract valued above the simplified acquisition threshold (increasing to $250,000) that is set aside for small businesses general, or for one of the SBA socioeconomic contracting programs (e.g., 8(a), etc.), the contractor is agreeing to meet the Limitation on Subcontracting Rule ("LOS Rule"). (13 C.F.R. § 125.6.) Essentially, the LOS Rule ensures that the small business prime contractor, along with subcontractors with the same size or status ("similarly situated" entities), are performing a substantial amount of the work required by the prime contract. Important for the LOS rule a "similarly situated" entity is a subcontractor with the same small business program status as the prime contractor, e.g. for a small business set-aside, a subcontractor small under the solicitation's size standard is a similarly situated entity; for a contract set aside for HUBZone small businesses, a subcontractor that is also a HUBZone small business is "similarly situated"; etc.

According to the LOS Rule:

- For services contracts (except construction), a small business prime contractor may not pay more than 50% of the amount paid by the government for the contract to firms that are not "similarly situated";
- For contracts for supplies or products (other than from a nonmanufacturer of such supplies), a small business prime contractor may not pay more than 50% of the amount paid by the government for the contract to firms that are not "similarly situated";
- For contracts for supplies from a nonmanufacturer of those supplies, the small business contractor will supply the product of a domestic small business manufacturer or processor, unless a waiver has been granted;
- For general construction contracts, a small business prime contractor may not pay more than 85% of the amount paid by the government for the contract to firms that are not "similarly situated," but the cost of materials is excluded from the calculation;
- For contracts for special trade contractors, a small business prime contractor may not pay more than 75% of the amount paid by the government for the contract to firms that are not "similarly situated," but the cost of materials is excluded from the calculation.

While any work performed by a "similarly situated" entity (which is performed by its own employees) does not count towards the subcontract amount, that is not the case for work that a "similarly situated" entity further subcontracts. This is even the case if the lower-tiered subcontractor is of the same small business size or status as the prime contractor.

For example, a HUBZone prime contractor receives a $1 million contract for IT services that was set-aside for HUBZone small businesses. The HUBZone prime contractor performs $300,000 of the work with its own employees and subcontracts $300,000 to another HUBZone small business, with the remaining $400,000 to a large business. In this scenario, even though the prime contractor will be performing less than 50% of the work, it will not have not violated the LOS rule because only 40% of the work ($400,000) was subcontracted to a firm not "similarly situated." However, this could change if there is any further subcontracting of the work. If the HUBZone subcontractor in this example subcontracted half of its work ($150,000) to a lower tier subcontractor, then the prime contractor will have violated the LOS Rule because 55% of the work would have been subcontracted (the $400,000 (40%) to the large subcontractor, plus the $150,000 (15%) to the lower tier subcontractor.

The period of time used to determine compliance with the LOS Rule is the base term of the contract, and then each option period. Contracting officers also have the discretion to require contractors receiving a small business set-aside to meet the LOS Rule for each order awarded under a contract. Failing to meet the requirements of the LOS Rule could result in the contractor incurring significant penalties. Any person found to violate the LOS Rule shall be subject to fines of the greater of $500,000 or the amount spent by the contractor on subcontractors, up to 10 years imprisonment, or both. In addition, the contractor could be subject to suspension or debarment.

Non-Manufacturer Rule

In order to qualify as a small business for any manufacturing contract or order that is set aside for small business (including set-asides for 8(a), HUBZone, SDVOSB, or WOSB), the offeror must either be the manufacturer or producer of the end product being procured (with the end product being manufactured or produced in the U.S.), or the offeror must meet the Non-Manufacturer Rule. The Non-Manufacturer Rule does not apply to procurements for services, construction, or specialty trade, but rather only applies to procurements that have been assigned a manufacturing or supply NAICS code, or the ITVAR exception to NAICS code 541519. SMACNA members should pay attention here, for it is possible that a member engaged in the fabrication of ductwork, for example, could provide product falling under NAICS codes where the Non-Manufacturer Rule applies. In addition, the Non-Manufacturer Rule does not apply to small business set-asides with an estimated value between the micro-purchase threshold (increasing to $10,000) and the simplified acquisition threshold (increasing to $250,000).

The Non-Manufacturing Rule provides that an offeror may qualify as a small business to provide manufactured products as a non-manufacturer if the offeror:

1. Does not exceed 500 employees;
2. Is primarily engaged in the retail or wholesale trade and normally sells the type of item being supplied;
3. Takes ownership or possession of the item in a manner consistent with industry practice; and
4. Will supply the end item of a small business manufacturer, processor, or producer made in the United States, unless a waiver has been granted.

SBA grants two types of waivers to the requirement for a small business manufacturer: individual waivers and class waivers. SBA may grant an individual waiver when there is no small business manufacturer that can meet the needs of a specific contract. Individual waivers must be requested by the contracting officer. Because an individual waiver is contract specific, it expires at the end of the contract. SBA may issue a class waiver when it determines that no small business manufacturer exists for an entire class of products. Anyone can request a class waiver from SBA. A current list of SBA-approved class waivers is available here.

Small Business Size Standards/NAICS Codes

The Small Business Administration ("SBA") uses the North American Industry Classification System ("NAICS") codes as part of the small business set-aside program. Every solicitation for a Federal contract award (above the micro-purchase threshold) must include a NAICS code that describes the principal purpose of the product or service being procured.

Each NAICS code corresponds to a specific size standard, which is either employee-based (e.g., 500 employees) or revenue-based (e.g., $15 million). The applicable size standard is the largest an offeror can be and still be considered small for that procurement. For example, if a solicitation includes a NAICS code with a size standard of 500 employees, offerors must have 500 employees or fewer in order to qualify as a small business under that solicitation.

For revenue-based size standards, SBA will count all revenue received by the contractor from whatever source. Generally, a contractor's receipts are considered "total income" (or "gross income for sole proprietorships) plus "cost of goods sold" as those terms are defined and reported on IRS tax returns. SBA uses a contractor's Federal income tax returns filed with IRS prior to the date of small business certification to determine the size of a contractor. For contractors in business for 3 or more fiscal years, SBA will average the contractor's receipts over the prior 3 fiscal years. For contractors in business for less than 3 fiscal years, SBA will take the total receipts since the contractor was in business, divide by the number of weeks in business, and multiply by 52. SBA will also include in the calculation of a contractor's annual receipts the average annual receipts of any *affiliates*.

For employee-based size standards, SBA will count all individuals employed on a full-time, part-time, or other basis. This includes employees from organizations such as temp agencies. SBA bases a contractor's total number of employees on the average number of employees the contractor used for each pay period over the preceding 12 months. The average number of employees of any affiliates are also included in the calculation.

Contractors are required to self-certify their status as small under the size standard specified in the applicable solicitation. In determining whether a contractor is an eligible small business under a procurement, SBA determines the size of the contractor as of the date the contractor submits a written self-certification that it is small as part of the contractor's initial offer (including price) in response to a solicitation. A contractor's size is only ever questioned if there is a size protest. However, there are significant penalties if a contractor *misrepresents* is size status.

Affiliation

In determining a company's size, SBA counts the company's annual receipts and employees as well as those of all of the company's affiliates. (13 CFR § 121.103.) Companies are affiliates of one another when one of them controls, or has the power to control, the other. Companies can be affiliates if both are controlled by a third party, such as a parent company. Control can also be negative, which includes a situation where a minority shareholder has the power to prevent a quorum or otherwise block an action by the company or its board of directors. It does not matter if control is exercised, as SBA finds affiliation to exist any time the power to control exists.

SBA considers several factors in determining whether affiliation exists, including:

- **Common Ownership** – A person or entity owns, or has the power to control, 50% or more of a company's voting stock will be considered to control that company. Also, if a person or entity owns less than 50%, but their ownership stake is large compared to other outstanding blocks of voting stock, they may be found to have control over the company.
- **Common Management** – If one or more officers, directors, managing members, or partners controls the board of directors and/or management of more than one company, those companies will be considered affiliated.

- **Familial Interest** – Companies owned or controlled by spouses, parties to a civil union, parents, children, and siblings are presumed to be affiliated with each other if they conduct business with each other. This includes subcontracts, joint ventures, or the sharing or providing loans, equipment, employees, or locations. This presumption of affiliation may be rebutted by showing a clear line of fracture between the companies.

- **Economic Dependence** – SBA will presume that a company is affiliated with any other company that it derives 70% or more of its revenue over the previous three fiscal years. This presumption can be rebutted by showing that despite the contractual relations, there is no economic dependence, e.g., the company has not been in business for a long period of time.

- **Newly Organized Concern** – Affiliation may be found where former officers, directors, principal stockholders, managing members, or key employees of one company organize a new concern in the same or related industry and then rely upon the former company for contracts, financial or technical assistance, bond assistance, and/or facilities. This presumption of affiliation may be rebutted by showing a clear line of fracture between the two concerns.

- **Joint Ventures** – Unless an exception applies under an approved mentor-protégé agreement, or through one of the SBA socioeconomic contracting programs (i.e., small business, *8(a)*, *HUBZone*, *SDVOSB*, or *WOSB*), all members of a joint venture are considered affiliated for the procurement at issue. However, a joint venture generally may not receive more than 3 contracts over a 2-year time period (starting with the date of the first award) without the parties to the joint venture being considered affiliated for all purposes. It should be noted that joint ventures are permitted under the 3-in-2 rule to submit multiple offers prior to receiving its third contract, thus it is possible that a joint venture would exceed 3 contracts in 2 years. Also, once a joint venture has hit its limit for contract awards under the 3-in-2 rule, the parties to the joint venture have the option of forming a new joint venture and starting the process over again. However, at a certain point, if two companies continue to form joint venture after joint venture together, SBA will consider them to be affiliated.

Another common issue leading to a finding of affiliation is the Ostensible Subcontractor Rule. While the general rules of affiliation typically apply across all procurements (an exception is for joint venture partners), the Ostensible Subcontractor rule applies only for the specific procurement at issue. Essentially, this rule applies when a prime contractor is determined to be affiliated with its subcontractor due to overreliance in the proposed performance of the awarded contract. The Ostensible Subcontractor Rule is often triggered when a large business subcontractor is performing the primary and vital parts of the RFP, or where the roles and responsibilities of the parties are not clearly defined (meaning it's difficult or impossible to determine what portion of the work will be performed by the small business prime contractor).

SBA may also find affiliation even if no single factor is indicative of affiliation. SBA considers the "totality of the circumstances," which includes all of the information considered in the above factors, as well as any other information that may indicate that affiliation exists.

There are several exceptions to the general rules of affiliation. The most common exception to affiliation is for mentors and protégés under an approved mentor-protégé agreement, under either the 8(a) Mentor Protégé Program or the All Small Mentor Protégé Program. Neither a mentor nor protégé will be found affiliated with the other solely because of the assistance the mentor provides the protégé under the program. However, affiliation may still be found for reasons outside of the mentor-protégé assistance. Another exception to affiliation is for concerns owned and controlled by Indian Tribes, Alaskan Native Corporations (ANCs), Native Hawaiian Organizations (NHOs), and Community Development Corporations (CDCs). Concerns owned and controlled by Indian Tribes, ANCs, NHOs, and CDCs, are not considered affiliated with these entities They are also not considered affiliated with other concerns owned by these entities solely due to common ownership or common management, however affiliation may be found for other reasons.

Recertification of Size Status

Generally, a contractor that is small as of the date it submits its initial offer (including price) in response to a solicitation is considered small for the life of that contract. This principle also applies to the status of the contractor (e.g., SDVOSB). This also means that, generally, if a concern was eligible for a set-aside contract as of the date it submitted its offer, it remains eligible to receive set-aside task and delivery orders throughout the life of that contract. However, there are several specific situations where a contractor is required to recertify its size or status:

1. For multiple award ID/IQ contracts, where the contracting officer requires recertification in connection with a specific order. Contracting officers are given the discretion to either accept the awardee's certification of size/status as of the date of initial proposal, or to include in a task order solicitation a request recertification in connection with that specific order. If a contract holder is unable to recertify its size or status, then it will be ineligible to compete for that specific order;
2. Within 30 days after the execution of a novation agreement;
3. Within 30 days after a merger or acquisition of the contractor where a novation was not required;
4. For long term contracts, within 60 to 120 days prior to the end of the fifth year of the contract, and within 60 to 120 days prior to the date specified in the contract for exercising any options thereafter.
5. If a merger, sale, or acquisition occurs after a contractor submits an offer in response to a procurement, but prior to an award, the contractor must recertify its size/status with the contracting officer prior to award.

If a contractor is no longer able to certify that it is small, the contracting agency may no longer count the value of any options or orders under the contract, from that point forward, toward its small business contracting goals.

Rule of Two

The Rule of Two provides that contracting officers are required are required to set aside any acquisition over the simplified acquisition threshold (increased to $250,000) where there is a reasonable expectation that offers will be received from at least two responsible small businesses at fair market prices. (FAR § 19.502-2(b).) For any acquisitions valued between the micro-purchase threshold (increased to $10,000) and the simplified acquisition threshold (increased to $250,000), these are automatically reserved exclusively for small businesses if the Contracting officer determines that there is a reasonable expectation of receiving two or more offers from responsible small businesses at competitive prices in terms of market prices, quality, and delivery. (FAR § 19.502-2(a).)

While a contracting officer is required to set aside any procurement for small businesses where the Rule of Two is met, contracting officers generally may not set aside a competition for one of the SBA socioeconomic small business programs, e.g., WOSBs, **unless** the Rule of Two is met. Contractors may file a protest challenging any procurement where the contractor believes the contracting officer made an incorrect determination on whether the Rule of Two was met.

Penalties for Misrepresentation

Contractors can face serious liability for misrepresenting their size status (13 C.F.R. § 121.108) or status under one of the SBA socioeconomic programs—i.e., 8(a) (13 C.F.R. §124.501), HUBZone small businesses (13 C.F.R. § 126.900), SDVOSBs (13 C.F.R. § 125.29), and WOSBs (13 C.F.R. § 127.700). SBA's regulations outline the consequences of a contractor willfully misrepresenting its small business size/status. First, there is a presumption of loss to the government for a contractor's misrepresentation. Where it is revealed that a contractor willfully sought and obtained an award through misrepresentation of its small business size or status, the presumption of loss will be equal to the total amount expended on the contract or subcontract. This presumption of loss can be utilized by the government in civil and criminal proceedings in Federal court.

It is important for contractors to note that there is a low threshold for whether an award was "willfully" sought and obtained through misrepresentation. The SBA regulations specify that it is an affirmative, willful, and intentional certification of small business size and status anytime a contractor: (1) submits an offer on a small business set-aside; (2) submits an offer that encourages the procuring agency to count the award as a small business award; or (3) registers in any Federal database as a small business concern. (13 C.F.R. § 121.108.) In order to avoid unfair penalties for simple and innocent mistakes, the SBA regulations include limitation of liability provisions that except situations involving unintentional errors or similar situations in which a misrepresentation was not affirmative, intentional or willful. Also, the SBA regulations do not penalize a prime contractor for good faith acceptance of the representations made by its subcontractors.

A contractor that is found to have misrepresented its small business size or status may be subject to severe penalties. The penalties for misrepresentation may include: possible civil penalties, including penalties under the False Claims Act and Program Fraud Civil Remedies Act; severe criminal penalties, including penalties for making false statements (18 U.S.C. § 1001), making fraudulent claims (18 U.S.C. § 287), and penalties pursuant to the Small Business Act; as well as possible suspension and debarment. These penalties apply to both misrepresentations of small business size/status, as well as failure to correct "continuing representations" that are no longer true.

For details on these small business programs, *see Appendix Three*.

- 8(a) Small Disadvantaged Businesses
- HUBZone Small Businesses
- Service-Disabled Veteran Owned Small Businesses
- Woman-Owned Small Businesses

Mentor-Protégé Programs

There are currently two separate mentor-protégé programs administered by the Small Business Administration (SBA): the 8(a) Mentor-Protégé Program (13 CFR § 124.520) and the All Small Mentor-Protégé Program (13 CFR § 125.9). However, with the success of the more recent All Small Mentor-Protégé Program, the SBA has recently announced that it plans to consolidate the two programs into one. It is unclear at this time what that consolidation might look like, but given how similar the two programs are, any changes will likely be limited to the SBA side of things. The actual requirements and benefits of the mentor-protégé programs for contractors will likely remain mostly the same.

While both programs are designed primarily for the benefit of the small business protégés, there is no question that mentors can benefit from participation in either program. Under either program, a mentor provides its protégé assistance to help the growth of the protégé, with such assistance including technical and management assistance, financial assistance through loans and investments, developmental assistance through subcontracts, assistance in performing prime contracts through Joint Venture agreements, and assistance through education and training. As long as this assistance is being provided pursuant to an approved Mentor-Protégé Agreement ("MPA"), it cannot be used as the basis for finding affiliation between the two companies. This exception from affiliation allows the small business protégé to receive significant assistance from its mentor without risk of losing its small business status through affiliation.

Protégés

To be an eligible protégé, the company must qualify as a small business under its primary NAICS code, or it must be seeking assistance with development under a secondary NAICS code (under which the company qualifies as small). A protégé generally may only have one mentor, however SBA may approve a second mentor for a protégé if it can demonstrate the second mentor is either in a different NAICS code or provides some expertise that the first mentor cannot. A company can actually be a protégé and a mentor at the same time, if it can demonstrate to SBA that the second relationship will not compete or conflict with the first mentor-protégé relationship. Once a protégé has had two mentors, under either program, it is ineligible to participate further in either program.

Mentors

A mentor can be a large business or a small business, but in either case it must be able to demonstrate that it possesses good character and is capable of carrying out its responsibilities to provide assistance to the protégé. In addition, an eligible mentor must be able to impart value to its protégé due to lessons learned and practical experience gained, or through its knowledge of general business operations and government contracting. Finally, a mentor must not appear on the federal list of debarred or suspended contractors. Mentors generally only have one protégé at a time, however the SBA may approve up to three different protégés for a single mentor. To add an additional protégé (up to three total), the mentor must demonstrate to SBA that the additional relationship will not adversely affect the development of any of its protégés (e.g., the protégés cannot be competitors). The maximum of three protégés for one mentor applies across both mentor-protégé programs, meaning no matter which program the protégés are from, the mentor can only have a total of three.

As part of the financial assistance provided to the protégé, a mentor can purchase up to a 40% stake in the protégé. This helps the protégé firm raise capital. There is no requirement for the mentor to divest in the protégé after the expiration of the mentor-protégé agreement, however it is important to remember that once the mentor-protégé relationship ends the parties will no longer be protected by the exception to affiliation for approved mentor-protégé agreements. Thus, the mentor's ownership stake in the protégé, along with any assistance provided after the expiration of the mentor-protégé agreement, could lead to SBA finding the two companies affiliated.

Because the mentor-protégé programs are designed to protect and support small businesses, there are built-in enforcement mechanisms that give SBA the ability to discipline a mentor that fails to provide the promised assistance under the mentor-protégé agreement. This punishment could lead to the termination of the mentor-protégé agreement, suspension of the mentor from the program for two years, and a recommendation from SBA to relevant agencies to stop work on any contract the mentor is performing on through a Joint Venture under its mentor-protégé agreement. SBA may also consider a mentor's failure to provide the promised assistance as a basis for debarment from government contracting.

Applying to the Programs

Under either program, the mentor and protégé must enter into a written agreement that discusses what the protégé is hoping to get out of the program. The agreement must also provide a detailed description and timeline for the delivery of assistance that meets the protégé's needs. Each mentor-protégé agreement must contain specific terms and clauses outlined in the applicable regulations, generally including:

- How assistance will be provided;
- Providing a single point of contract for the mentor who is responsible for managing and implementing the program;
- Statement that the mentor will provide such assistance for at least one year;
- Allow either the protégé or mentor to terminate the agreement with 30 days' notice to the other party and SBA; and
- Requiring SBA approval of any changes to the agreement.

A mentor-protégé agreement initially lasts for three years. However, after the first year SBA will review the mentor-protégé relationship to determine whether to allow it to continue for another year. Similar reviews will be held annually. After the initial 3-year period, the agreement can be extended only once for an additional 3-year period, provide that the protégé has received, and will continue to receive, the agreed-upon business development assistance from the mentor.

The written mentor-protégé agreement must be submitted to SBA for approval. Applications for the 8(a) Mentor-Protégé Program are submitted through the SBA 8(a) office, whereas applications for the All Small Mentor-Protégé Program are done through the SBA's certify.SBA.gov website. Note that 8(a) small businesses can apply for either program.

Reporting Requirements

Protégés are required to submit annual reports to SBA that track the progress made under the mentor-protégé agreement. These reports are required to be submitted each year within 30 days of the approval anniversary date. The protégé must report:

1. All technical and/or management assistance provided by the mentor;
2. All loans and/or equity investments made by the mentor in the protégé;
3. All subcontracts awarded by either the mentor or protégé to the other, as well as the value of those subcontracts;
4. All federal contracts awarded to a joint venture formed under the mentor-protégé relationship, as well as the value of the contract and the percentage of revenue going to each party to the joint venture.

In addition, the protégé must provide SBA with a narrative that describes the success the mentor's assistance has had in addressing the developmental needs of the protégé. The narrative must also detail any problems the protégé encountered in the relationship. The protégé's report must also include an accounting of the mentoring services it received organized by categories and hours. The protégé is also required to certify each year as to whether there have been any changes in the terms of the mentor-protégé agreement. In addition to these annual reports, the protégé is required to submit a final report at the completion of the mentor-protégé relationship, stating whether it believed the relationship was beneficial and describing any lasting benefits to the protégé.

Joint Ventures Under a Mentor-Protégé Agreement

Under either program, a mentor and protégé with an approved mentor-protégé agreement may enter into a joint venture as an eligible small business for any government prime contract or subcontract. The joint venture will qualify as small for any procurement in which the protégé qualifies as small. However, under either program, SBA must approve the mentor-protégé agreement before the two firms submit an offer as a joint venture for any government prime contract or subcontract. If the mentor and protégé submit an offer as a joint venture before its mentor-protégé agreement is approved, the joint venture will not get the benefit of the exception from affiliation.

The joint venture agreement must be in writing, and identify:

- The purpose of the joint venture;
- That the protégé is the managing venturer of the joint venture;
- That an employee of the protégé is the program manager for contract performance;
- That a special bank account will be created for the joint venture;
- An itemized list of any equipment, facilities, and resources to be provided;
- The responsibilities of each member of the joint venture;

- The requirement for the protégé to retain accounting and administrative records; and
- The requirement for the joint venture to submit quarterly financial statements and end of project profit and loss statements.

The protégé must own at least 51% of a joint venture that is established as a separate legal entity, and the joint venture agreement must also provide that the protégé will receive profits commensurate with the percentage of work performed.

For the All Small Mentor-Protégé Program, there is no requirement to get SBA approval of a joint venture before submitting offers. As long as the mentor-protégé agreement was approved beforehand, the joint venture is free to submit offers on any type of small business contract under which the protégé qualifies as small. This includes general small business set-asides, as well as set-asides for 8(a), HUBZone, SDVOSB, or WOSB firms.

For the 8(a) Mentor-Protégé Program, SBA must approve any joint venture agreement before the joint venture may submit offers. Once approved, the 8(a) joint venture may then submit an offer as an 8(a) small business on any competitive 8(a) procurement, or be awarded a sole source 8(a) award, as long as the 8(a) protégé qualifies as small under the applicable size standard.

Under either program, there are specific performance of work requirements that must be met. For any set-aside contract awarded to the joint venture, the joint venture is required to meet the limitations on subcontracting requirements of FAR § 125.6. This generally requires the joint venture to perform at least 50% of the work on the contract (15% for construction contracts, 25% for special trade contractors). For whatever work is performed by the joint venture, the small business protégé must perform at least 40% of that work. And because the mentor-protégé program is designed to assist with the development of the protégé, the work performed by the protégé must be substantive, i.e., more than administrative or ministerial.

Bidding-Proposal Preparation

Federal government construction contracts are generally awarded through either sealed bids or negotiated procurements. Sealed bidding is something that most construction contractors are accustomed to and involves the selection of the lowest responsive and responsible bidder. For all intents and purposes, the lowest priced bid will prevail. Negotiated procurements are an entirely different animal. They incorporate the use of evaluation factors as part of the selection process and, more importantly, in most negotiated procurements, price is not the most important factor. This is often a foreign concept to construction contractors new to the federal procurement process. Understanding both processes is important.

Invitation for Bids (IFBs) (Sealed Bids)

"Invitation for bids," or IFBs, is a process by which the federal government solicits work through a competitive sealed bidding process. These opportunities, like most, can be found on the Federal Business Opportunities website, www.fbo.gov. SMACNA members are also encouraged to develop relationships with Contracting Officers and other contracting personnel that are attached to agencies and agency locations in which they have an interest. In that way, members can find out about upcoming opportunities before they become public. An IFB will set forth the scope of work for a project and ask that interested contractors submit their respective bids by a date and time certain. Following the close of the bidding period, timely bids will be publicly read aloud and generally the winner is that bidder which is both responsive and has provided the lowest price to complete the advertised scope. The rules governing the use of sealed bidding can be found in FAR Part 14 and state as follows:

(a) **Preparation of invitations for bids**. Invitations must describe the requirements of the Government clearly, accurately, and completely. Unnecessarily restrictive specifications or requirements that might unduly limit the number of bidders are prohibited. The invitation includes all documents (whether attached or incorporated by reference) furnished prospective bidders for the purpose of bidding.

(b) **Publicizing the invitation for bids**. Invitations must be publicized through distribution to prospective bidders, posting in public places, and such other means as may be appropriate. Publicizing must occur a sufficient time before public opening of bids to enable prospective bidders to prepare and submit bids.

(c) **Submission of bids**. Bidders must submit sealed bids to be opened at the time and place stated in the solicitation for the public opening of bids.

(d) **Evaluation of bids**. Bids shall be evaluated without discussions.

(e) **Contract award**. After bids are publicly opened, an award will be made with reasonable promptness to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, considering only price and the price-related factors included in the invitation.

Negotiated Procurements

Negotiated procurements generally involve the issuance of a "request for proposal," or RFP. For the better part of the last twenty years, most negotiated procurements for construction contracts are conducted on a "best value" basis. The FAR describes "best value" as follows:

> *An agency can obtain best value in negotiated acquisitions by using any one or a combination of source selection approaches. In different types of acquisitions, the relative importance of cost or price may vary. For example, in acquisitions where the requirement is clearly definable and the risk of unsuccessful contract performance is minimal, cost or price may play a dominant role in source selection. The less definitive the requirement, the more development work required, or the greater the performance risk, the more technical or past performance considerations may play a dominant role in source selection.*

FAR 15.101.

As part of an RFP, the government will set forth precisely how its "best value" selection process will be conducted, identifying various evaluation factors that it deems important. Those evaluation factors (and sub factors) can vary widely depending upon the nature of the project. While price must always be a factor, it is important to understand that it does not have to be the most important factor. Quite often, it is not. Other factors that are typically considered are experience (that is, whether you've done something similar), past performance (how well you've performed something of similar size and magnitude), management and key personnel. For construction projects, overall project schedule can be very important as well. As part of a "best value" selection process, an offeror may be asked how certain milestones will be achieved, or how those milestones can be achieved sooner than the dates identified in the solicitation.

As part of a "best value" selection process, there are "trade-offs" that can take place (consistent with the selection criteria set forth in the solicitation), which can result in the selection of an offer that does not include the lowest price. The trade-off process is specifically discussed in FAR 15.101-1:

(a) A tradeoff process is appropriate when it may be in the best interest of the Government to consider award to other than the lowest priced offeror or other than the highest technically rated offeror.

(b) When using a tradeoff process, the following apply:

(1) All evaluation factors and significant subfactors that will affect contract award and their relative importance shall be clearly stated in the solicitation; and

(2) The solicitation shall state whether all evaluation factors other than cost or price, when combined, are significantly more important than, approximately equal to, or significantly less important than cost or price.

(c) This process permits tradeoffs among cost or price and non-cost factors and allows the Government to accept other than the lowest priced proposal. The perceived benefits of the higher priced proposal shall merit the additional cost, and the rationale for tradeoffs must be documented in the file in accordance with 15.406.

For contractors that are not accustomed to this process, it can lead to much confusion. Much of that confusion is based upon what appears to be a very subjective selection process. For example, a project that a contractor believes is very similar in size and complexity to the one upon which it is submitting an offer may be seen differently by a government agency, or another offeror may have performed a prior project that is MORE similar to the one that both companies are vying for and, therefore, is "more qualified" for that project. These can be difficult concepts for contractors to grasp and, based upon how the law has developed, government agencies are afforded a large degree of discretion in terms of how "best value" determinations are made. That said, this discretion is not unfettered and can be challenged if the government agency acted in an "arbitrary or capricious" manner, abused its discretion, or otherwise violated applicable procurement law as part of the selection process.

Making matters more complicated, there are times during a negotiated procurement process where the government will engage in "negotiations" amongst select offerors. When negotiations are opened, the government makes an evaluation of which offers are within what is called the "competitive range." The competitive range is established after a determination as to which offers most closely align with the criteria the government has identified in the solicitation. Each offeror selected for the competitive range is invited to discuss its proposal with the government agency and is given the opportunity to ask questions and, ultimately, to make changes in its offer. Once negotiations have been completed, the government gives each offeror an opportunity to submit a final proposal revision. Award will then be made to the offeror that is deemed to provide the "best value" to the government. *See FAR 15.306-8*.

Protests

In the federal procurement system, a protest is generally a statutorily created right to challenge the rules of a procurement, a proposal evaluation, an award determination, or the qualifications of the prospective awardee.

For the most part, protests fall under one of three broad categories: *Pre-Award Bid Protests*, *Post-Award Bid Protests*, and *Size/Status Protests*. Protests provide offerors an opportunity to ensure a fair and objective chance to compete for government business. The basis of most protests is learned through communications with the procuring agency, such as *debriefings* and notices of award. Protests have unique rules and regulations, and most often require quick action as filing deadlines are short. It is important for contractors to know the rules and their rights, including the proper type of protest to file, the deadlines for filing, and the appropriate forum, otherwise the ability to protest may be lost.

Pre-Award Bid Protests

A Pre-Award Bid Protest is a challenge to the terms of a solicitation or the associated ground rules of the competition. To be able to file a pre-award bid protest, the protester must be an "interested party". An interested party is generally defined as an actual or prospective bidder or offeror with a direct economic interest in the award of a contract under the solicitation. In some cases, a protester must also submit a timely proposal in response to the solicitation in order to preserve standing as an interested party.

Generally, a pre-award bid protest can be filed in one of three forums: the contracting agency, the Government Accountability Office ("GAO"), or the United States Court of Federal Claims ("COFC"). For both Agency-Level and GAO protests, a pre-award bid protest must be filed prior to the due date for receipt of bids/proposals. Once filed at the Agency-Level or at GAO, a pre-award bid protest triggers an automatic stay of award, i.e., the agency is prohibited from making an award until the protest is resolved.

There is no set deadline for protests at COFC, the only requirement is that they are filed within a reasonable time. For pre-award bid protests, COFC generally uses the same deadline as Agency-Level and GAO protests, meaning such a protest must be filed before the due date for receipt of bids/proposals. However, unlike in the other two forums, a pre-award bid protest does not trigger an automatic stay of award. Instead, protesters much seek an injunction to stop the agency from moving forward with the procurement.

It is important that contractors understand the deadlines for filing a pre-award bid protest. A common mistake for protesters is to wait until after they see how a procurement proceeds (i.e., wait to see if they win) before attempting to protest the terms of a solicitation. However, by that time it is invariably too late. Protests challenging the terms of a solicitation filed after the deadline for receipt of bids/proposals are dismissed as untimely with very rare exception.

As stated above, pre-award bid protests challenge the terms of a solicitation. Some common pre-award bid protest grounds include:

- The solicitation is ambiguous
- The solicitation is overly restrictive, or overstates the agency's needs
- There is an unnecessary brand-name requirement
- The solicitation requirements unfairly favor one offeror
- The procurement should have been set aside for small businesses
- The solicitation included inapplicable contract clauses

It is not uncommon for a procuring agency to include terms in a solicitation by mistake. Thus, before resorting to the protest process, it is best practice for contractors to utilize the Q&A process provided for in the solicitation to raise concerns over the solicitation terms with the contracting officer. Doing so could result in the agency addressing the issue on its own, and save the offeror the expense of protesting. However, if efforts through the Q&A process do not resolve the issue, a timely filed protest is an important option for contractors.

Note, a protest of an offeror's exclusion from the competitive range is unique in that it is neither a pre-award bid protest or a post-award bid protest. While such a protest is typically made prior to an award being made, it is not a true pre-award bid protest because it is not challenging the terms of the solicitation. Thus, a protest challenging an exclusion from the competitive range must follow the general timeliness rules of a *post-award bid protest*, which requires that the protest be filed within 10 days of when the protester knew or should have known of the grounds of the protest.

Post-Award Bid Protests

A Post-Award Bid Protest is a challenge to the procuring agency's evaluation of proposals, and/or the source selection decision. To be able to file a post-award bid protest, the protester must be an "interested party." An interested party is generally defined as an actual bidder or offeror with a direct economic interest in the award of a contract under the solicitation. In Sealed Bid procurements, this generally means that the protester must be next in line for award. Generally, this means that the protest must challenge every bidder ranked higher than the protester. In negotiated procurements, this means that there must be a reasonable chance that the protester would be selected for award if its protest were successful. Sometimes this means that the protester must challenge the procuring agency's evaluation of the awardee, and other times it is sufficient for the protester to only challenge the agency's evaluation of its own proposal.

Generally, a post-award bid protest can be filed in one of three forums: the contracting agency, the Government Accountability Office ("GAO"), or the United States Court of Federal Claims ("COFC"). At the Agency-Level, a post-award bid protest must be filed within 10 days of when the protester knew or should have known of the basis of its protest. A similar deadline exists for GAO protests, which requires that post-award bid protests be filed within 10 days of when the protester knew or should have known of the basis of its protest, or within 10 days of a required *debriefing*. Note, where a debriefing is required, and timely requested by the protester, an initial protest cannot be filed until after the first debriefing date offered to the protester.

In certain circumstances, protests at the Agency-Level or at GAO trigger an *automatic stay of performance* under the Competition in Contracting Act. When a stay is triggered, the agency is prohibited from moving forward with performance until the protest is resolved. If performance has already begun, the agency is required to issue a stop work order to the awardee, until resolution of the protest.

There is no set deadline for protests at COFC, the only requirement that they are filed within a reasonable time. For post-award bid protests, this generally means that there was no serious delay in filing the protest. Unlike in the other two forums, there is no option for an automatic stay of performance in a COFC protest. Instead, protesters much seek an injunction to stop the agency from moving forward with the procurement

As stated above, post-award bid protests generally challenge the agency's evaluation of proposals and/or the source selection decision. Some common post-award bid protest grounds include:

- Deviation from the solicitation's stated evaluation criteria in the evaluation
- Unreasonable evaluation of price or cost
- Relaxation of technical requirements favoring the awardee
- Unreasonable evaluation of technical proposals
- Unreasonable evaluation of offerors' past performance
- Improper cost/technical tradeoff
- Improper, unequal, or misleading discussions
- Unequal treatment of offerors

Some issues cannot be protested in a post-award bid protest. Non-protestable issues include:

- Challenges to the terms of the solicitation (unless filed before the deadline for receipt of bids/proposals)
  - A common mistake for protesters is to wait until after award to challenge the terms of the solicitation, these protests are dismissed as untimely almost without fail
- Matters of contract administration – Cannot challenge awardee's ability to meet a post-award requirement (e.g., a post-award certification)
- Challenge to responsibility of the awardee
- Challenge to the size or status of the awardee (although there may be options to protest at SBA)

In addition to the "non-protestable" issues in the list above, there is also a general prohibition against protests of task or delivery orders (does not apply to orders under the Federal Supply Schedules). However, there are two exceptions to this bar against task/delivery order protests. First, a protest may be filed that alleges that a task/delivery order increases the scope, period, or maximum value of the underlying contract. Second, a protest may be filed challenging a task/delivery order with a value of $25 million or more for orders issued by the Department of Defense, or $10 million or more for orders issued by a civilian agency. Note, any task/delivery order protests under the second exception must be filed at GAO, as it has exclusive jurisdiction.

Note, a protest of an offeror's exclusion from the competitive range is unique in that it is neither a pre-award bid protest or a post-award bid protest. While such a protest is typically made prior to an award being made, it is not a true pre-award bid protest because it is not challenging the terms of the solicitation. Thus, a protest challenging an exclusion from the competitive range must follow the general timeliness rules of a *post-award bid protest*, which requires that the protest be filed within 10 days of when the protester knew or should have known of the grounds of the protest.

Debriefings

Debriefings are exchanges of information between an offeror and a procuring agency which give unsuccessful offerors insight into the contracting officer's decision making and evaluation process, and help contractors better compete in future solicitations. There are two types of debriefings: pre-award debriefings and post-award debriefings. A pre-award debriefing may be provided to an offeror that was eliminated from the competition prior to award, e.g., excluded from the competitive range. A post-award debriefing may be provided to unsuccessful offerors following the award of a contract.

While contractors would likely prefer to have a debriefing following any unsuccessful pursuit of an award, debriefings are actually only required in certain situations. Agencies are only required to provide a debriefing (if properly requested) in two situations: (1) if the procurement is a Negotiated Procurement; or the award is for a task or delivery order valued over $5.5 million (FAR § 16.505(b)(6)). Debriefings are not required in Commercial Items procurements (unless the solicitation indicates it is conducted pursuant to FAR Part 15 procedures), acquisitions under the GSA Schedules, Simplified Acquisition procurements, or Sealed Bid procurements. However, even when not required, an agency may still provide a debriefing if requested by a contractor. It is generally a good idea for disappointed offerors to request a debriefing, even if one is not required.

A **pre-award debriefing** must be provided if it is requested, by submitting a written (including email) request to the contracting officer, within 3 days of the contractor's receipt of notice that it had been excluded from the competitive range. (FAR § 15.505.) Contractors are only entitled to one debriefing for each proposal, so contractors have the option to request that its pre-award debriefing be postponed until after award. However, this is generally a bad idea for contractors, as delaying the pre-award debriefing could negatively affect the contractor's protest rights and the *automatic stay*. Note, if a contractor excluded from the competitive range does not timely file for a pre-award debriefing, the agency is under no obligation to provide either a pre-award or a post-award debriefing.

Pre-award debriefings may be held orally, in writing, or by any other means acceptable to the contracting officer. At a minimum, the agency should include in a pre-award debriefing: (1) the agency's evaluation of significant elements in the offeror's proposal; (2) a summary of the rationale for eliminating the offeror from the competitive range; and (3) reasonable responses to relevant questions about whether the agency followed the source selection procedures required by the solicitation and applicable regulations. Agencies are not allowed to disclose in a pre-award debriefing any information about other offerors, including the number of offerors, the identity of other offerors, the ranking of offerors, etc.

Following an award, procuring agencies are required to provide notification to unsuccessful offerors in the competitive range within 3 days of the contract award. (FAR § 15.503(b).) A **post-award debriefing** must be provided if it is requested, by submitting a written (including email) request to the contracting officer, within 3 days after receipt of the notice of award. (FAR § 15.506.) Agencies are required to hold a debriefing within 5 days after receiving the request, to the maximum extent practicable. If a debriefing request is untimely, the agency still has the option of holding the debriefing.

Post-award debriefings may be held orally, in writing, or by any other method acceptable to the contracting officer. At a minimum, the agency should include in a pre-award debriefing: (1) the agency's evaluation of the significant weaknesses or deficiencies in the offeror's proposal; (2) the overall evaluated cost or price (including unit prices), technical rating, and past performance rating of the offeror; (3) the overall evaluated cost or price (including unit prices) and technical rating of the awardee; (4) the overall ranking of offerors, if one was conducted; (5) a summary of the rational for award; (6) if it is a commercial item acquisition, must provide the make and model of the item to be delivered by the awardee; and (7) reasonable responses to relevant questions about whether the agency followed the source selection procedures required by the solicitation and applicable regulations.

There is no requirement that a post-award debriefing include a point-by-point comparison of the offeror's proposal with those of the awardee or any other offerors. Moreover, a post-award debriefing may not disclose any information prohibited from disclosure under the Freedom of Information Act, e.g., trade secrets, privileged/confidential commercial and financial information, etc.

If the agency is conducting an oral debriefing, it is important that the offeror listen carefully to the agency rather than argue, or attempt to persuade the agency to reevaluate their proposal or make a new award, and stay for the entire debriefing. It is best to take diligent notes, and organize the notes as soon as possible, as these will be helpful in any protest. If possible, it is a good idea for offerors to conduct an internal discussion (at the debriefing) following the agency's debriefing presentation, and then ask any questions generated by the team. Finally, while a debriefing may provide key information that could form the basis for a valid protest, it is also an opportunity for the offeror to educate itself on what was important to the agency and why it's offer was not selected. It is good practice to use a debriefing to learn a lesson on how to do better the next time.

Changes to Debriefings in Department of Defense Procurements

The 2018 National Defense Authorization Act introduced several significant changes to debriefings in Department of Defense procurements. The enhanced DoD debriefings will provide more information than previously required to be provided to offerors. For any small business award valued between $10 million and $100 million, and for every contract valued over $100 million, DoD agencies are required to disclose the agency's written source selection award determination. The source selection document may need to be redacted to protect other offeror's information, but this will provide debriefed offerors a great deal more information than under current debriefing requirements.

The new DoD debriefing rules also make it clear that a written or oral debriefing is required for all contract awards (whether or not under FAR Part 15) and any task or delivery order valued at $10 million or more. Finally, the new enhanced DoD debriefings give offerors the ability to ask questions **after** receiving its debriefing. Specifically, offerors have 2 days following its debriefing to submit written questions. The agency is required to respond in writing to any timely submitted post-debriefing questions within 5 days. Most importantly, these new debriefing rules also make it clear that the 5-day period for protesters to file a protest following a debriefing does not begin until the agency provides its response to the post-debriefing questions. This potentially gives protesters more time to develop potential protest arguments.

CICA Stay of Contract Award/Performance

The Competition in Contracting Act (CICA) provides that a protest filed within certain timelines triggers an automatic stay of contract performance while the protest is pending. (31 USC § 3553.) This applies for protests filed either at *GAO* (FAR § 33.104) or at the *Agency-level* (FAR § 33.103). This does not apply to protests at the *COFC*, where the protester is required to seek an injunction to stop the procurement.

For pre-award protests, both at GAO and at the Agency-level, the agency is prohibited from moving forward with an award until the protest is resolved. Agencies may still proceed with other pre-award activities, such as accepting proposals, conducting discussions, and evaluating offers. They simply may not make an award of a contract (without substantial justification).

For post-award protests filed at either GAO or the Agency-level, the agency is required to immediately suspend performance if the protest meets certain timeliness standards. An automatic stay of performance is triggered if the protest is received by the agency (either as filed by the protester or forwarded by GAO) within either: (1) 10 days of contract award; or (2) if a debriefing was required, within 5 days of a debriefing date offered to the protester under a timely request, whichever is later. The key to whether an automatic stay is triggered is **the date the agency receives the protest**. For Agency-level protests, this is easy, the protest is filed directly with the agency. However, for GAO protests, the agency must receive notice of the protest **from GAO** within the required timeframe. Protesters must file prior to the stay deadline with enough time to allow GAO time to notify the agency.

Note that the deadlines for filing a protest to trigger the automatic stay are different than those to file a timely protest. A post-award protest must be filed within 10 days of when the protester knew or should have known of its protest grounds in order to be timely. If there is a required debriefing, this could be well after the award date. It is possible for a protester to be able to timely file a protest, but still file after the deadline to trigger the automatic stay. So it is important for protesters to be aware of the competing deadlines.

Agencies do have the ability to override the automatic stay. For pre-award protests, the agency must demonstrate "urgent and compelling" circumstances to justify a stay override. For post-award protests, the agency must demonstrate either "urgent and compelling" circumstances, or that performance of the contract is in the "best interests of the United States." Stay overrides are somewhat rare, but protesters do have the ability to challenge the override if it is attempted by the agency. Protesters may bring a challenge against a stay override by filing a suit in the COFC. The stay override challenge is a different matter than the underlying protest, so while the stay override is being litigated at the COFC, the protest will continue at GAO (or the Agency).

Agency-Level Protests

Agency-level protests are generally filed directly with the contracting officer. However, each procuring agency has its own regulations which may allow interested parties to request an independent review of the protest at a level above the contracting officers. This alternative process should be outlined in the solicitation. *Pre-award protests* at the Agency-level are required to be filed prior to the deadline for receipt of bids/proposals. *Post-award protests* at the Agency-level are required to be filed within 10 days of when the protester knew or should have known of the protest grounds.

The protester is required to include in its Agency-level protest specific information:

- Name, address, and contact info for the protester
- The solicitation or contract number
- A detailed statement of the protest grounds, including a description of the resulting prejudice to the protester
- Copies of relevant documents

- A request for a ruling by the agency
- A statement as to the form of relief requested
- All information establishing the protester as an interested party
- All information establishing the timeliness of the protest

There is no set process for filing an Agency-level protest; essentially the protester files a complaint and then waits for a decision. Interested parties may request to intervene in the protest, but the agency has discretion as to whether intervention will be allowed. It is rare that an agency will allow an intervenor. Other than the protest document, there is generally no further exchange of information between the agency in the protester. Agencies are required to issue a well-reasoned decision explaining its position in response to the protest. Agencies are required to make their best efforts to issue this decision within 35 days of the protest being filed.

Unfortunately, because there is no requirement for agencies to publish their protest decisions, there are no comprehensive statistics as to the number of Agency-level protests or their success rate. However, it is widely understood that Agency-level protests are rarely successful. Despite this, it sometimes makes the most sense for a protester to file an Agency-level protest over going to one of the other protest forums. Agency-level protests are the least formal, least expensive protest option, and are generally considered to the be least confrontational way to protest. This is because you are essentially asking the agency to change their mind.

GAO Protests

To file a bid protest at GAO, the protester must be an interested party. For Sealed Bid procurements, this means the protester must be next in line for award. Or, if not next in line for award, the protest must challenge the bids of every bidder ranked above the protester. GAO will not hear a protest of a Sealed Bid award if the protester has no chance of receiving the award even if it wins its protest. For Negotiated Procurements, an interested party is an offeror that has a reasonable chance of award if the protest is successful. Because most negotiated procurements are conducted on a best value basis, protesters generally only need establish a reasonable possibility that it would be selected for award if it was successful on its protest. *Pre-award protests* at GAO are required to be filed prior to the deadline for receipt of bids/proposals. *Post-award protests* at GAO are required to be filed within 10 days of when the protester knew or should have known of the protest grounds, or if there was a required *debriefing*, within 10 days of the debriefing date, whichever date is later.

GAO protests are filed, and administered, through the GAO's own electronic filing system. There is now a $350 filing fee for protests. However, there are no additional fees for any supplemental protests. Once a protest is filed, the agency is required to file an "Agency Report" within 30 days. The Agency Report is required to include a contracting officer's statement of facts, a legal memorandum defending the agency's position, and a list and copy of all relevant documents, e.g., the protester's bid/proposal, the awardee's bid/proposal, evaluation documents, the solicitation, the source selection decision with cost/technical tradeoff, etc. At least 5 days prior to the submission of the Agency Report, the agency is required to file a response to the protest's request for specific documents, where the agency must identify all documents it intends to produce with the Agency Report, as well as which documents (or portions of documents) it intends to withhold and the basis for such withholding. Protesters may object to the scope of the agency's proposed disclosure within 2 days of receiving the notice.

The Protester (and any intervenors) have 10 days from the receipt of the Agency Report to file Comments on the Agency Report. If a protester fails to file Comments, GAO will consider its protest to be withdrawn. In addition, if the protester fails to address in its Comments any of the protest grounds that were discussed in the Agency Report's legal memorandum, GAO will consider it a withdrawal of the unaddressed protest grounds.

In addition to Comments, protesters also have the ability to file supplemental protest grounds based upon the information learned in the Agency Report. The deadline for any supplemental protest grounds are the same as for other post-award protests—must be filed within 10 days of when the protester knew or should have known of the protest grounds. So, protesters may file supplemental protests based upon information learned for the first time in the Agency Report, but any protest based upon information contained in the Agency Report, but known or should have been known by the protester when it filed its initial protest, will be dismissed by GAO as untimely. If any supplemental protests are filed, the agency is required to file a supplemental agency report which responds specifically to the supplemental protest grounds. The protester (and any intervenors) then have the ability to file comments on the supplemental agency report. The timeline for this supplemental process is set by GAO, and is typically much shorter than the timeframe for the initial agency report and comments.

Awardees (and other interested parties) are allowed to intervene in the protest proceedings. If a protest is expected to discuss proprietary or confidential information, e.g. the protester's technical approach, prices, etc., the protester (or any other party) may request that GAO issue a protective order. If a protective order is issued, then the parties are required to submit unredacted and redacted copies of all filings. Individuals must be admitted by GAO under the protective order to have access to unredacted materials. For most protesters, this requires the engagement of outside counsel. However, if outside counsel is admitted under the protective order, this counsel will not be able to share any of the protected material with the protester. Only information releasable to the public (i.e., redacted copies) are eligible to be discussed.

GAO protest are required to be resolved within 100 days of the filing of the protest. There is also an express option, which has a 65-day protest timeline. GAO has the ability to hold hearings prior to issuing a decision, but hearings are rare. Not all protests make it to a GAO decision. Protesters have the option to withdraw their protest at any time, and agencies have the ability to take "corrective action" at any time. Corrective action is where the agency recognizes a flaw in the procurement, often brought to light by the protest, and elects to fix the issue rather than continue the fight at GAO. If an agency elects to take corrective action, GAO will invariably dismiss the protest as academic.

If GAO does issue a decision, it has the ability to dismiss or deny the protest grounds. Or, GAO can sustain a protest (in whole or in part) and make a "recommendation" for agency action. Because GAO is not a federal court, it cannot issue a decision like a court. Instead, it recommends the proper action that the agency should take in response to the protest (e.g. reevaluate proposals, cancel contract and make new award, etc.), and the agency has the option to accept the recommendation. However, each year GAO files a report to Congress in which it identifies any agencies that failed to accept its recommendation following a protest. As a result, agencies very rarely elect not to follow a GAO recommendation.

Unsuccessful protesters have two "appeal" options following a losing protest. First, the protester can request reconsideration from GAO within 10 days of when it knew or should have known of its grounds for reconsideration. However, there is no set timeline for when (or if) GAO is to respond to such a request. Thus, these requests are very rarely successful. The second option is to challenge the denial or dismissal of the protest by filing a protest at the *US Court of Federal Claims ("COFC")*. However, this filing at COFC is not a true appeal. The Court will give GAO's decision some deference, but they will essentially treat the matter as a new protest.

Each fiscal year, GAO is required to submit a report to Congress that provides information and statistics on the number of protests (and number of successful protests) for the prior year. According to these reports, GAO receives approximately 2,500 protests each year. GAO statistics show that approximately 16% of protests are sustained in a decision issued by GAO. However, GAO has also indicated that approximately 45% of GAO protests result in some form of relief to the protester. This includes protests where the agency voluntarily took corrective action in response to the protest.

COFC Protests

The US Court of Federal Claims ("COFC") has jurisdiction to hear any protest by an interested party objecting to a solicitation issued by a federal agency, a proposed award or award of a contract by a federal agency, or any other alleged violation of a statute or regulation in connection with a procurement or proposed procurement. In order to establish itself as an interested party, the protester must show that it was an actual or prospective bidder or offeror with a direct economic interest in the procurement. A protester has a direct economic interest where it has a substantial chance of receiving the contract had the agency not made the alleged errors in the procurement process. Note, the COFC has no jurisdiction over protests challenging the award of a task order, unless the protest is arguing that the task order increased the scope, period, or maximum value of the underlying contract.

There is a $400 filing fee to file a protest at the COFC. Unlike protests at the *Agency-level* or at *GAO*, the COFC does not have specific rules as to the deadline for filing protests. However, the Court has previously held that *pre-award protests* must be filed prior to the deadline for receipt of bids/proposals. Post-award protests should only be filed without a serious delay, although it is typically in the protester's best interest to file the protest as soon as possible. This is because at the COFC, there is no *automatic stay*. Protesters at the COFC must seek an injunction from the Court in order to put a stop to an award, or to performance. A delay in filing may negatively affect the protester's ability to obtain an injunction.

Unlike at the Agency-level or at GAO, the agency does not represent itself in the protest proceedings. In COFC protests, the Department of Justice handles the defense of the agency's action/inaction. Awardees (and other interested parties) are allowed to intervene in the protest proceedings. If a protest is expected to discuss proprietary or confidential information, e.g. the protester's technical approach, prices, etc., the protester (or any other party) may request that the Court issue a protective order. If a protective order is issued, then the parties are required to submit unredacted and redacted copies of all filings. Individuals must be admitted by the Court under the protective order to have access to unredacted materials. For most protesters, this requires the engagement of outside counsel. However, if outside counsel is admitted under the protective order, this counsel will not be able to share any of the protected material with the protester. Only information releasable to the public (i.e., redacted copies) are eligible to be discussed.

Whereas GAO protests generally have a limited record made up of documents relating to the specific protest grounds, the administrative record in a COFC protest is fairly broad. In a COFC protest, the government is required to produce in the administrative record all documents relied upon by the government in making the procurement decision. This includes the proposals and evaluations of both the awardee(s) and the protester (and any other interested parties), the agency's source selection plan, and documentation relating to the source selection decision.

COFC protests are the most formal of the three protest forums. There are generally significantly more filings in a COFC protest (as compared to GAO and Agency-Level protests), which often include a discovery process and the holding of depositions. There are also routine conferences with DOJ and the Court, and COFC protests are far more likely to have a hearing. As a result, COFC protests are generally the most expensive of the three protest forums.

Size and Status Protests

In addition to bid protest options, contractors also may have the ability to protest an awardee's size or status at the Small Business Administration. Just as there are *pre-award bid protests* and *post-award bid protests*, there are also pre-award and post-award SBA protests. Prior to award, contractors have the ability to protest the solicitation's stated NAICS code. After award, contractors have the ability to file a size protest or a status protest challenging the size or status of the presumptive awardee in a set-aside contract.

NAICS Code Appeals

Every solicitation for a Federal contract award (above the micro-purchase threshold) must include a NAICS code that describes the principal purpose of the product or service being procured. Each NAICS code corresponds to a specific size standard, which is either employee-based (e.g., 500 employees) or revenue-based (e.g., $15 million). The applicable size standard is the largest an offeror can be and still be considered small for that procurement. For example, if a solicitation includes a NAICS code with a size standard of 500 employees, offerors must have 500 employees or fewer in order to qualify as a small business under that solicitation.

A solicitation's selected NAICS code may be challenged by the SBA, the Contracting Officer, or any individual/entity adversely affected by the NAICS code determination. A challenge to a selected NAICS code must be filed within 10 calendar days after the issuance of the solicitation, or within 10 days of any solicitation amendment affecting the NAICS code or size standard. These NAICS code challenges are filed directly with the SBA's Office of Hearings and Appeals ("OHA"). Other interested parties (e.g., the agency, other potential offerors, etc.) have 15 days to file a response to the NAICS appeal. OHA is required to issue a decision in a NAICS code as soon as practicable after the close of the record.

If OHA grants the appeal, and the contracting officer receives the decision by the date the offers are due under the solicitation, the contracting officer is required to amend the solicitation to reflect the new NAICS code. However, if the contracting officer does not receive the OHA decision until after the date offers are due, the contracting officer is only required to apply the decision to future solicitations for the same supplies or services. NAICS code appeal decisions issued by OHA may be appealed in Federal Court (such as the *US Court of Federal Claims*). However, the OHA appeal is an administrative remedy that must be exhausted before judicial review may be sought in court.

Size Protests

As noted in the discussion of *NAICS Code Appeals*, every solicitation for a Federal contract award (above the micro-purchase threshold) must include a NAICS code that describes the principal purpose of the product or service being procured. Each NAICS code corresponds to a specific size standard, which is either employee-based (e.g., 500 employees) or revenue-based (e.g., $15 million). The applicable size standard is the largest an offeror can be and still be considered small for that procurement. For example, if a solicitation includes a NAICS code with a size standard of 500 employees, offerors must have 500 employees or fewer in order to qualify as a small business under that solicitation. Contractors have the ability to protest whether a presumptive awardee meets the applicable size standard in a small business set-aside procurement.

In procurements that are set aside for small businesses, contracting officers are required to provide notice of the selected offeror to all disappointed offerors before an award is made. (FAR § 15.503(1)(2).) Disappointed offerors have 5 business days after receiving the notice identifying the selected awardee in order to file a protest challenging the size of the awardee. The protest is filed directly to the contracting officer, who then forwards the protest to the applicable SBA Area Office.

Note, with long-term contracts, such as multi-year ID/IQ contracts, size protests may only be filed at 3 points: (1) when the original contract is awarded; (2) after an option is exercised on the original contract; or (3) after the award of a task or delivery order where the contracting officer requested a recertification of size status in connection with that order. Otherwise, the size of a long-term contract holder cannot be protested by other contractors. However, the contracting officer and the SBA can initiate a size protest at any time.

Once a size protest reaches the SBA, the protested contractor will be notified of the protest. It is up to the protested contractor to establish its small business status. The protested contractor will be given a blank copy of SBA Form 355, which is a form used by SBA to gather relevant information about the protested contractor in order to make a size determination. The protester contractor is generally required to return the completed Form 355 to SBA within 3 business days. The protested contractor may also supplement the Form 355 response with additional information helping to establish its small business status, and SBA may request additional information from the protested contractor.

SBA size determinations are required to be issued within 15 business days of the filing of the protest, when possible. A contracting officer cannot make an award until receiving the size determination, unless the contracting officer makes a written determination that award is required to protect the public interest. However, if SBA has not issued its size determination within 15 business days (or longer if an extension was granted by the contracting officer), the contracting officer can make award if it is determined in writing that there is an immediate need to award the contract.

If the SBA Area Office issues a size determination finding the protested contractor to be other than small, the contracting officer is prohibited from making the award to that contractor. If the contracting officer receives a size determination after an award was already made, and the size determination found the awardee to be other than small, the contracting officer is required to cancel the contract (unless the protested contractor appeals the size determination to SBA's Office of Hearings and Appeals). If a contractor is found to be other than small in a size determination, it has the ability to request SBA to recertify it as a small business at any time by filing an application for recertification to the appropriate SBA Area Office.

Size determinations may be appealed to the SBA Office of Hearings and Appeals ("OHA"), or federal court. An appeal to OHA is an administrative remedy that must be exhausted before a contractor can request judicial review of a size determination. OHA appeals of size determinations must be filed within 15 calendar days after receipt of the size determination. OHA generally makes its decision in the appeal based solely on the information that was considered by the Area Office in making the size determination. Decisions in an OHA appeal of a size determination are issued within 60 days after the close of the record, when practicable.

Status Protests

In procurements that are set aside for HUBZone small businesses, Service-Disabled Veteran-Owned small businesses ("SDVOSB"), or Women-Owned small businesses ("WOSB"), contracting officers are required to provide notice of the selected offeror to all disappointed offerors before an award is made. (FAR § 15.503(1)(2).) Disappointed offerors have 5 business days after receiving the notice identifying the selected awardee in order to file a protest challenging the status of the awardee (note, the status of an 8(a) small business cannot be protested).

For protests challenging the status of an SDVOSB, a protester can challenge the status of the individual upon whom the SDVOSB status is based, or the protester may challenge whether the presumptive awardee is owned and controlled by one or more service-disabled veterans. For protests challenging the status of a HUBZone small business, a protester can challenge whether the principal office of the protested contractor is in a designated HUBZone, whether 35% of the employees of the protested contractor reside in a designated HUBZone, whether the protested contractor is at least 51% owned and controlled by US citizens, or any other reason that disqualifies the presumptive awardee as a qualified HUBZone small business.

For protests challenging the status of a WOSB small business, a protester can challenge whether a WOSB (or Economically Disadvantaged Women-Owned small business ("EDWOSB")) is owned and controlled by one or more women who are US citizens. If the protest is in connection with an EDWOSB set-aside contract, the protester may also challenge whether the protested contractor is at least 51% owned and controlled by one or more women who are economically disadvantaged.

Status protests are filed directly to the contracting officer, who then forwards the protest to SBA. Once the status protest reaches the SBA, the protested contractor will be notified of the protest. For SDVOSB status protests, the protested contractor is given 10 business days to file a response to the protest that supports its status as an eligible SDVOSB. For HUBZone, WOSB, and EDWOSB status protests, the protested contractor is given 5 business days to file a response to the protest that supports its status under the applicable set-aside program.

SBA status determinations are required to be issued within 15 business days of the filing of the protest, when possible. A contracting officer cannot make an award until receiving the status determination, unless the contracting officer makes a written determination that award is required to protect the public interest. However, if SBA has not issued its status determination within 15 business days (or longer if an extension was granted by the contracting officer), the contracting officer can make award if it is determined in writing that there is an immediate need to award the contract.

If the SBA Area Office issues a status determination finding the protested contractor to be ineligible under the applicable set-aside program, the contracting officer is prohibited from making the award to that contractor.

If the contracting officer receives a status determination after an award was already made, and the status determination found the awardee to be ineligible for the set-aside award, the contracting officer is required to cancel the contract (unless the protested contractor appeals the status determination to SBA's Office of Hearings and Appeals).

If a contractor is found to be ineligible in an SDVOSB, WOSB, or EDWOSB status determination, it is ineligible to submit another offer as an SDVOSB, WOSB, or EDWOSB, respectively, unless it demonstrates to SBA's satisfaction that it has overcome the reasons for the protest and SBA issues a decision to that effect. If a contractor is found to be ineligible in a HUBZone status determination, it is precluded from reapplying for the HUBZone program for 90 calendar days after the final agency decision.

SDVOSB, WOSB, and EDWOSB status determinations may be appealed to the SBA Office of Hearings and Appeals ("OHA"), or federal court. OHA appeals of SDVOSB, WOSB, or EDWOSB status determinations must be filed within 10 calendar days after receipt of the size determination. OHA generally makes its decision in the appeal based solely on the information that was considered by the Area Office in making the status determination. Decisions in an OHA appeal of a status determination are issued within 15 days after the close of the record, when practicable. Note, appeals of HUBZone status determinations must be filed with the SBA Director of Office of HUBZone within 5 business days after the status determination. A decision will be issued in a HUBZone appeal within 5 business days, when practicable.

Contract Performance

After contract award, and after any and all protests have been resolved, a contractor must then actually perform the work for which it was retained. For the construction contractor, there are a myriad of issues that can arise during performance that frustrate initial expectations. Whether those issues impact time of performance or scope, when operating in the federal space, a construction contractor must understand certain key contract provisions that will assist in addressing unexpected circumstances when they arise. The construction contractor must also understand how impacts to performance may present themselves on a federal construction project and the steps it must take to reach resolution.

Changes Clause

The "Changes" clause permits the government to make changes in the general scope of the Contract. Those changes may include modifications to the drawings, specifications, material requirements manners of performance or method of performance. If the government initiates a change, the clause requires it to also make an equitable adjustment to the contract to account for impacts to time, cost, or both. The typical changes clause found in a government construction contract also permits the contractor to assert that a change has occurred if the government gives any written or oral order (such as an instruction, interpretation, direction) that causes an unanticipated impact to cost or time. (The typical changes clause found in a federal construction contract is FAR 52.243-4). This is what is known as a "constructive change." If a contractor believes that an oral or written statement by a government official has caused a change in the work, it should immediately notify the government of the change in writing. The contractor should subsequently track all costs incurred and additional time needed based upon this change and submit a request for an equitable adjustment to the contract. FAR 52.243-4).

Differing Site Conditions Clause

The "differing site conditions" clause (FAR 52.236-2) is designed to address a special type of changed condition. It covers unknown physical conditions encountered in performing the work, which were not visible, or were otherwise not known, to the contractor at the time of bid or proposal submission. Examples include the existence of unanticipated subsurface rock, inadequate soil conditions that prevent building construction, unknown groundwater and concealed conditions, such as asbestos laden pipe, found as part of a renovation project. Unlike issues that may arise under the "Changes" clause, which the government has the ability to more easily control, the risk in situations triggering the "Differing Site Conditions" clause is typically something that neither party can anticipate or control. Despite that, when applicable, the idea behind the "Differing Site Conditions" clause is to shift the risk of loss away from the contractor such that its bids and proposals do not include contingent costs to account for possible issues and problems.

Differing site conditions are broken down into two categories, Type I and Type II. Type I differing site conditions cover unexpected conditions that differ "materially from those indicated in the contract." Type II differing site conditions pertain to unexpected conditions of an "unusual nature," which are materially different from that which one would normally encounter in doing the type of work at issue. Regardless of which type of differing site condition a construction contractor may encounter, the notice requirements in the FAR are the same and they are more stringent than the notice requirements in the "Changes" clause.

If a contractor encounters what it believes is a differing site condition, it must stop work, provide written notice of the condition and await direction from the government before proceeding with the work. The idea is to provide the government with the ability to decide how best to deal with an issue for which it will ultimately be responsible. Construction contractors who fail to follow the notice requirements set forth in the FAR can potentially waive their right to time and money associated with a differing site condition, so it is extremely important to understand these requirements.

Delay, Inefficiency and Acceleration

Construction contractors know all too well the meaning of "time is money." If things do not proceed as anticipated and a project takes longer than planned, or a contractor must rush to finish on time to account for early project delays, the result can be disastrous. Unfortunately, delays and acceleration happen all too often, along with cost impacts associated with an inefficient work environment. For a construction contractor entering the federal market place, it must be understood that these problems will arise. The key to mitigating the harm is understanding not only how these issues may manifest themselves, but also how the federal regulatory system factors into the equation.

Delay

Government-caused delays can fall into two general categories: excusable and compensable. A delay that is simply excusable allows a construction contractor to demand more time to complete its work. Excusable delays can emanate from the following events: unusually severe weather, acts of God and labor shortages or strikes. Generally, a delay that is excusable means that the contractor is afforded **additional time** to complete its work, but no additional money. In order for a construction contractor to demand money in connection with an event that delays project progress, the contractor must also prove that the delay is compensable. Examples of compensable events include delay in issuing a notice to proceed, the failure to timely furnish complete plans and specifications, the failure to provide site access, the failure to coordinate multiple prime contractors, the failure to timely respond to submittals or shop drawings, the failure to provide timely direction when required and the failure to timely and adequately inspect a contractor's work. In many instances, a construction contractor performing work on a federal project that experiences excusable, compensable delays will argue application of the "Changes" or "Differing Site Conditions" clause as support for additional time and money.

Acceleration

Acceleration is defined as a directive to increase efforts in order to complete performance on time, despite excusable delay. To prevail on an acceleration claim, a contractor must show excusable delay; notice to the Government of the excusable delay, with a request for a contract extension; and an express or implied order to overcome that excusable delay. The contractor must also generally prove that the costs claimed were actually incurred as a result of actions specifically taken to accelerate performance. This concept is separate and distinct from the notion of completing early. A construction contractor is generally afforded with the right to complete a project early, if it desires to do so and doing so does not harm the government or another prime contractor. However, there is no corresponding right for a contractor to demand that the government assist it in completing ahead of schedule.

Inefficiencies

It is well established that the increased cost of disrupted work which flows directlyfrom a changed condition is compensable under the "Changes" clause. The burden rests with the contractor to show that the disruption (and any corresponding delay) resulted from some government-initiated act or omission. The contractor is also obligated to show the extent of the harm that flowed from that act or omission. It is important to note that "disruption damages" are distinct from "delay damages." Disruption damages compensate a contractor for government actions that make its base scope of work more difficult and expensive than expected at the time of bid or proposal submission. Disrupted work very often results in performance of activities in a sequence that differs from that which was anticipated. Federal contracting jurisprudence generally recognizes that a construction contractor has a right to perform according to its original schedule. As such, it is entitled to recover for loss of efficiency caused by disruptions which cause it to work out of sequence. Delay damages compensate a contractor for the additional costs of remaining on a project longer than contractually required.

Importance of the Contracting Officer

One of the most difficult concepts that construction contractors who are new to the federal contracting must understand is the importance of the Contracting Officer. The responsibilities of a Contracting Officer are detailed in FAR Part 1.602-2: "Contracting officers are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships." If this definition sounds broad, it is because it is. While a Contracting Officer can delegate his or her authority to, for example, a "Contracting Officer's Representative" (COR). The FAR specifically states that a Contracting Officer's Representative "[h]as no authority to make any commitments or changes that affect price, quality, quantity, delivery, or other terms and conditions of the contract nor in any way direct the contractor or its subcontractors to operate in conflict with the contract terms and conditions." FAR Part 1.602-2(d)(5).

Given the above, when it comes to changes in scope, whether directed or constructive, a construction contractor must be very careful to whom it listens. If direction is issued from anyone other than the Contracting Officer, which is highly likely based upon how construction projects are typically administered by the government, a construction contractor must carefully consider how to respond before acting. A construction contractor would be very wise to inform the Contracting Officer each and every time it receives a directive, or apparent directive, from a COR, or other government officer, to perform in a manner that the contractor believes is contrary to its contract and will result in an impact to the schedule or price. Failing to receive confirmation from the Contracting Officer that it will receive more time and/or additional compensation prior to proceeding, could result in a contractor being denied entitlement later.

Dispute Resolution

In the commercial sector, dispute resolution involving a construction contract is often dictated by the contractual terms negotiated between the parties, which may call for mediation followed by arbitration once a dispute arises, however; things operate a bit differently in the federal sector. The contract between the government and a prime contractor certainly matters, but that contract is not negotiated, at least not in the traditional sense. Certainly, the dispute resolution process is not one that is ever negotiated. That process is governed by the FAR, the relevant provisions of which will be identified in the prime contract (see FAR Part 33). Generally speaking, the dispute resolution process can either begin through a request for an equitable adjustment made by the construction contractor, or by the submission of a claim. If this, or these, processes does not result in resolution, the contractor may then proceed to litigation at one of the Boards of Contract Appeals, or the Court of Federal Claims. One notable exception to this general principal is the process by which the government terminates a contract based upon the alleged default of the prime contractor. Under such a circumstance, the contractor need not proceed through a formal claim process to access the court system. It can simply appeal the determination and litigate to resolution, if an amicable resolution is not possible.

What is the difference between a request for equitable adjustment and a claim? What follows is the definition of each, along with a discussion of a contractor's options if neither results in a satisfactory result.

Requests for Equitable Adjustment

A request for an equitable adjustment, or "REA," is a request by the construction contractor to the government for an upward adjustment of the value of the contact such that the contractor is not forced to fund an out of scope work activity. While neither "equitable adjustment" nor "request for equitable adjustment" is defined by the FAR, the terms are used in clauses, such as the "Changes" clause, to suggest that a contractor is entitled to additional compensation when something unexpected occurs.

For those accustomed to operating in the commercial world, a request for an equitable adjustment can be thought of as a more elaborate change order request. If something unexpected occurs that will impede a contractor's progress and/or cause it to incur unanticipated cost, the construction contractor should immediately notify the government of the condition giving rise to the impact, provide some type of narrative explanation of the events, assemble the costs to address the issue and set forth some approximation of how much additional time the contractor will need to overcome the issue. Effectively what the contractor is requesting is for the government to issue a modification to the contractor to cover the additional costs and, if necessary, provide it with additional time to complete its work.

Once a request for an equitable adjustment is submitted by the contractor, there is no deadline by which the government must respond. That can often create a problem for the contractor. It certainly cannot wait forever, but it also cannot refuse to move forward. Nor can the contractor proceed directly to court to resolve the matter or, at the very least, force the government's hand. As we shall see, the FAR requires the contractor to follow the claims process and, thereby, exhaust its administrative remedies through that process, prior to seeking judicial review. It is one of several important distinctions that construction contractor must understand if it finds itself in a dispute on a federal project.

Claims and the False Claims Act

A "claim" is a "written assertion…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." FAR Part 2.101. It must be submitted to the Contracting Officer for consideration and, upon receipt, the Contracting Officer must act. This requirement represents but one way in which a claim differs from a request for equitable adjustment. The timing of what is referred to as a "Contracting Officer's Final Decision" is dependent upon the size of the claim. The FAR states as follows:

The contracting officer shall issue the decision within the following statutory time limitations:

(1) For claims of $100,000 or less, 60 days after receiving a written request from the contractor that a decision be rendered within that period, or within a reasonable time after receipt of the claim if the contractor does not make such a request.

(2) For claims over $100,000, 60 days after receiving a certified claim; provided, however, that if a decision will not be issued within 60 days, the contracting officer shall notify the contractor, within that period, of the time within which a decision will be issued.

FAR Part 32.211(c).

While there is no required method of compiling and presenting a claim to the government, it goes without saying that a construction contractor must prove both entitlement and damages and, generally speaking, claims are much more detailed representations of both, as compared with requests for equitable adjustment. One big reason for the additional detail is the adversarial nature of a claim versus an REA.

The submission and negotiation of an REA is considered an act of contract administration. It is typically done in the ordinary course of business as a project is progressing. A claim, on the other hand, is sometimes submitted as a project is progressing, but it does not have to be. A claim represents the first step in the litigation process. For those claims in excess of $100,000, the contractor will have to certify to the accuracy of the information in the claim document, which can lead to false claims allegations by the government if a contractor is not careful in assembling its claim. (This is yet another reason why claims are generally much more detailed and carefully crafted than REAs). If a contractor is not satisfied with a Contracting Officer's Final Decision, its option is to then "appeal" that decision to either of the Boards of Contract Appeals (there is a Civilian Board and an Armed-Services Board) or to the Court of Federal Claims. It is only through this process that a prime contractor for the government can gain access to the judicial system for contractual breaches of other violations.

A common question is whether one should submit an REA or a claim. The answer to this question is fact-specific and can depend upon a host of factors. For example, if you have a good relationship with the Contracting Officer that has jurisdiction over your contract, you may want to consider an REA, rather than a claim. Why? Because there is a better chance that at an amicable resolution can be attained based upon the relationship between the parties. Also consider this: Once a claim is submitted the Office of General Counsel (OGC) of the agency becomes involved. Adding agency counsel to the mix presents a new and different dynamic to the equation. Sometimes it is absolutely necessary and essential; sometimes all that it does is add complexity. Carefully consider your situation when the time comes for REA or claim submission and consult with a professional prior to making a final decision.

The False Claims Act

The False Claims Act imposes liability on persons or companies that defraud the federal government. 31 U.S.C. 3729-3722. As part of the law, there is a qui tam (or "whistleblowing") provision that allows individuals (or "relators") to initiate actions on behalf of the government based upon their knowledge of fraudulent acts caused by others. Once a qui tam action is filed, the government has the option to step in and pursue the action itself.

The vast majority of actions pursued under the False Claims Act are in the health care industry. For example, in fiscal year 2017, the federal government entered into settlements totaling $3.7 billion for False Claims Act violations. Of that amount, $2.4 billion involved settlements with individuals and companies within the health care industry. The "health care industry" covers drug companies, hospitals, pharmacies, laboratories and doctors.

While most of the focus in FCA cases involves health care, construction contractors must be wary as well. The Justice Department will pursue claims or counterclaims against a construction contractor if the contractor pursues a claim or claims that is "false." For example, if a construction contractor is impacted by defective plans or specifications, immediately notifies the agency and projects the cost and time impact, that in and of itself is perfectly acceptable and responsible. If that notification must be later converted to a claim, however, be careful. While forward pricing and time estimates are fine from a notification standpoint, once the actual cost and time impacts are known, include the actual cost and time impacts in the claim. Simply cutting and pasting information from a notification into a claim could result in an allegation that the contractor violated the False Claims Act. Even if a mistake is innocent, such an allegation can be made, which could jeopardize an otherwise perfectly good claim.

Appendix One – List of FAR Clauses

- 52.203-3 - Gratuities
- 52.203-5 – Covenant Against Contingent Fees
- 52.203-7 – Anti-Kickback Procedures
- 52.203-13 – Contractor Code of Business Ethics and Conduct
- 52.203-16 – Preventing Personal Conflicts of Interest
- 52.203-19 – Prohibition on Requiring Certain Internal Confidentiality Agreements or Statements
- 52.203-98 – Prohibition on Contracting with Entities that Require Certain Internal Confidentiality Agreements-Representation
- 52.204-7 – System for Award Management
- 52.204-8 – Annual Representations and Certifications
- 52.204-10 – Reporting Executive Compensation and First-Tier Subcontract Awards
- 52.204-13 – System for Award Management Maintenance
- 52.204-18 – Commercial and Government Entity Code Maintenance
- 52.212-4 – Contract Terms and Conditions—Commercial Items
- 52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders – Commercial Items
- 52.215-2 – Audit and Records – Negotiation
- 52.217-8 – Option to Extend Services
- 52.219-3 – Notice of HUBZone Set-Aside or Sole Source Award
- 52.219-4 – Notice of Price Preference for HUBZone Small Business Concerns
- 52.219-6 – Notice of Total Small Business Set-Aside
- 52.219-8 – Utilization of Small Business Concerns
- 52.219-9 – Small Business Subcontracting Plan
- 52.219-14 – Limitations on Subcontracting
- 52.219-27 – Notice of Service Disabled Veteran-Owned Small Business Set-Aside
- 52.219-28 – Post Award Small Business Program Representation

- 52.219-29 – Notice of Set-Aside for Economically Disadvantaged Women-Owned Small Business Concerns
- 52.219-30 – Notice of Set-Aside for Women-Owned Small Business Concerns Eligible Under the Women-Owned Small Business Program
- 52.222-2 – Contract Work Hours and Safety Standards Act – Overtime Compensation
- 52.222-6 – Construction Wage Requirements
- 52.222-11 – Subcontracts (Labor Standards)
- 52.222-13 – Compliance with Construction Wage Rate Requirements and Related Regulations
- 52.222-17 – Nondisplacement of Qualified Workers
- 52.222-21 – Prohibition of Segregated Facilities
- 52.222-26 – Equal Opportunity
- 52.222-35 – Equal Opportunity for Veterans
- 52.222-36 – Equal Opportunity for Workers with Disabilities
- 52.222-37 – Employment Reports on Veterans
- 52.222-40 – Notification of Employee Rights Under the National Labor Relations Act
- 52.222-41 – Service Contract Act
- 52.222-42 – Statement of Equivalent Rates for Federal Hires
- 52.222-43 – Fair Labor Standards Act and Service Contract Act-Price Adjustment (Multiple Year and Option Contracts)
- 52.222-44 – Fair Labor Standards Act and Service Contract Labor Standards-Price Adjustment
- 52.222-50 – Combating Trafficking in Persons
- 52.222-54 – Employment Eligibility Verification
- 52.222-55 – Minimum Wages under Executive Order 13658
- 52.223-6 – Drug-Free Workplace
- 52.225-1 – Buy American – Supplies
- 52.225-5 – Trade Agreements
- 52.225-6 – Trade Agreements Certificate
- 52.225-11 – Buy American Act – Construction Materials Under Trade Agreements

- 52.232-25 – Prompt Payment
- 52.233-1 – Disputes
- 52.242-14 – Suspension of Work
- 52.242-15 – Stop Work Order
- 52.243-1 – Changes – Fixed Price
- 52.243-2 – Changes – Cost Reimbursement
- 52.243-3 – Changes – Time-and-Material and Labor-Hours
- 52.244-2 – Subcontracts
- 52.244-5 – Competition in Subcontracting
- 52.244-6 – Subcontracts for Commercial Items
- 52.249-1 – Termination for the Convenience of the Government
- 52.249-4 – Termination for Convenience of the Government (Services) (Short Form)
- 52.249-6 – Termination (Cost-Reimbursement)
- 52.203-3 – Gratuities

Appendix Two – Representations and Certifications

- FAR 52.203-2: Certification of Independent Price Determination
- FAR 52.204-3: Taxpayer Identification
- FAR 52.204-5: Women-Owned Business (Other Than Small Business)
- FAR 52.204-17: Ownership or Control of Offeror
- FAR 52.204-20: Predecessor of Offeror
- FAR 52.209-2: Prohibition on Contracting with Inverted Domestic Corporations-Representation
- FAR 52.209-5: Certification Regarding Responsibility Matters
- FAR 52.209-11: Representation by Corporations Regarding Delinquent Tax Liability or a Felony Conviction under any Federal Law
- FAR 52.212-3: Offeror Representations and Certifications -Commercial Items (Alternate I)
- FAR 52.214-14: Place of Performance - Sealed Bidding
- FAR 52.215-6: Place of Performance
- FAR 52.219-1: Small Business Program Representations (Alternate I)
- FAR 52.219-2: Equal Low Bids
- FAR 52.222-18: Certification Regarding Knowledge of Child Labor for Listed End Products
- FAR 52.222-22: Previous Contracts and Compliance Reports
- FAR 52.222-25: Affirmative Action Compliance
- FAR 52.222-38 Compliance with Veterans' Employment Reporting Requirements
- FAR 52.222-48: Exemption from Application of the Service Contract Labor Standards to Contracts for Maintenance, Calibration, or Repair of Certain Equipment-Certification
- FAR 52.222-52: Exemption from Application of the Service Contract Labor Standards to Contracts for Certain Services-Certification
- FAR 52.223-4: Recovered Material Certification
- FAR 52.223-9: Estimate of Percentage of Recovered Material Content for EPA-Designated Items (Alternate I)
- FAR 52.225-2: Buy American Certificate
- FAR 52.225-4: Buy American-Free Trade Agreements-Israeli Trade Act Certificate

- FAR 52.225-6: Trade Agreements Certificate
- FAR 52.225-20 Prohibition on Conducting Restricted Business Operations in Sudan-Certification
- FAR 52.225-25 Prohibition on Contracting with Entities Engaging in Certain Activities or Transactions Relating to Iran-Representation and Certification
- FAR 52.226-2: Historically Black College or University and Minority Institution Representation
- FAR 52.227-15: Representation of Limited Rights Data and Restricted Computer Software
- DFARS 252.209-7002: Disclosure of Ownership or Control by a Foreign Government
- DFARS 252.209-7003: Reserve Officer Training Corps and Military Recuriting on Campus-Representation
- DFARS 252.216-7008: Economic Price Adjustment-Wage Rates or Material Prices Controlled by a Foreign Government-Representation
- DFARS 252.225-7000: Buy American--Balance of Payments Program Certificate
- DFARS 252.225-7003 Report of Intended Performance Outside the United States and Canada-Submission with Offer
- DFARS 252.225-7020: Trade Agreements Certificate
- DFARS 252.225-7035: Buy American Act--Free Trade Agreements--Balance of Payments Program Certificate (Alternate I, II, III, IV & V)
- DFARS 252.225-7049: Prohibition on Acquisition of Commercial Satellite Services from Certain Foreign Entities–Representations
- DFARS 252.247-7022: Representation of Extent of Transportation by Sea

Appendix Three – Types of Small Business Programs

8(a) Disadvantaged Small Businesses

Section 8(a) of the Small Business Act established a program whereby the SBA would directly assist small businesses meeting certain socioeconomic requirements in contracting with the federal government. Under the 8(a) program, the SBA actually directly contracts with other agencies, and the 8(a) participants are awarded subcontracts for the actual performance of the contract requirements. This allows economically and socially disadvantaged contractors to have increased opportunities for federal prime contracts, assisting with their business development, while also giving the procuring agencies some cover as the SBA is guaranteeing performance.

Determination of whether a contractor is eligible to participate in the 8(a) program is 100% the responsibility of SBA. The eligibility of an 8(a) participant may not be challenged by any other party. Moreover, the size status of an 8(a) participant nominated for an 8(a) sole source award may not be protested by any other party. The only situation where a party may protest an 8(a) award, is to challenge the size status of an apparent successful offeror for a competitive 8(a) award. This size protest may only be initiated by the contracting officer, the SBA, or another offeror on the procurement that was not previously eliminated for reasons unrelated to size.

Whether a contract is initially offered into the 8(a) program is a cooperative process between the procuring agency and SBA. There are three ways that a contract may be offered into the 8(a) program: (1) SBA advises the procuring agency of an 8(a) participant's capabilities and requests the agency identify acquisitions to support the participant's business plans; (2) after a procuring agency has released a procurement, SBA reaches out to the agency regarding that specific requirement on behalf of one or more 8(a) participants, requesting that the procuring agency offer the acquisition to the 8(a) program; or (3) where a procuring agency independently, or through marketing of a specific 8(a) participant, identifies a requirement that could be offered to the 8(a) program.

After receiving an offer from a procuring agency to place an acquisition in the 8(a) program, SBA must review the requirement and determine whether to accept it into the 8(a) program. This applies whether the procurement is offered as a competitive 8(a) procurement (i.e., the procurement will be set-aside for 8(a) participants) or as a sole source award to a specific 8(a) participant. Once a procurement is accepted into the 8(a) program, it must stay in the 8(a) program for all follow-on work unless SBA gives permission to release it from the program. (FAR § 19.815(a).) Procurements may also be accepted into the 8(a) program on behalf of an *8(a) Joint Venture*.

Once an acquisition is accepted into the 8(a) program, the procuring agency is generally required to compete the award among eligible 8(a) participants if the *Rule of Two* is met, and the anticipated value of the contract will exceed $4 million (or if manufacturing, $7 million). (FAR § 19.805-1.) There is an exception to this rule that allows procuring agencies to accept an acquisition as a sole source 8(a) award of it will be accepted on behalf of a contractor owned by an Indian tribe or an Alaska Native Corporation. However, SBA is prohibited from accepting for negotiation any sole source 8(a) contract that exceeds $22 million, unless properly justified by the procuring agency. (FAR § 6.303-1.) In a competitive 8(a) acquisition, the procuring agency will request that SBA determine if the selected 8(a) participant is eligible for award. (13 C.F.R. §124.507.) If SBA determines that the selected 8(a) participant is ineligible for award, SBA will notify the procuring agency who will then move onto the next highest evaluated 8(a) participant for an eligibility determination.

Contractors are allowed to remain in the 8(a) program for up to nine years. Once a contractor exits the 8(a) program, it is no longer eligible to receive new 8(a) contracts. However, even after exiting the program, the contractor remains eligible to complete its existing 8(a) contracts, including any priced option periods. Moreover, a contractor may be awarded a competitive 8(a) contract even after it has exited the program, as long as it was an eligible 8(a) participant as of the date it submitted its initial offer including price in response to the solicitation.

8(a) Joint Ventures

An 8(a) participant may enter into a joint venture with other small businesses, whether or not they are 8(a) participants, for the purpose of performing on one or more specific 8(a) contracts. (13 CFR § 124.513.) In order for the joint venture to be eligible for an 8(a) award, the 8(a) participant must be a meaningful participant in the joint venture, and each member of the joint venture must be small under the NAICS code applicable to the procurement. If the joint venture is formed between an 8(a) participant and its SBA-approved mentor, through either of the SBA's Mentor-Protégé Programs, the mentor-protégé joint venture will be considered small as long as the 8(a) participant is small under the applicable NAICS code.

Every 8(a) joint venture agreement must contain certain provisions required by SBA regulations, including provisions stating: (1) the 8(a) participant is the managing venturer; (2) the 8(a) participant owns at least 51% of the joint venture; and (3) the 8(a) participant will receive profits from the joint venture commensurate with its performance. In all cases the SBA must approve an 8(a) joint venture agreement prior to the award of an 8(a) contract, as well as any amendments to the joint venture agreement. If an 8(a) joint venture has been selected for an award, but SBA has not yet approved the agreement, review of the joint venture agreement will become a part of SBA's eligibility determination. If SBA cannot approve the joint venture agreement within five days of the request for eligibility determination, and the procuring agency does not give SBA more time for the review, SBA will be unable to verify eligibility of the 8(a) joint venture prior to award which would make the 8(a) joint venture ineligible for the award. (13 CFR 124.507(b)(3).)

After the award of a small business set-aside contract, the 8(a) joint venture is required to meet the *Limitations on Subcontracting Rule*, and the 8(a) member of the joint venture must perform at least 40% of the work performed by the joint venture (which must be meaningful, i.e., cannot be merely administrative or ministerial). Under the rules of affiliation applying to joint ventures, an 8(a) joint venture may receive up to 3 contracts over a 2-year period (beginning with the date of the first award) before running into *affiliation* concerns. Thus, an 8(a) joint venture may create addendums to the joint venture agreement to account for the additional procurements. However, the SBA must approve the addendums prior to the award of any additional 8(a) set-aside contracts to the 8(a) joint venture.

Eligibility Requirements of the 8(a) Program

In order to be eligible for participation in the 8(a) program, a contractor must be (1) a small business; (2) demonstrating potential for success; (3) that is unconditionally owned and controlled by one or more socially and economically disadvantaged individuals; and (4) the socially and disadvantaged individuals upon whom participation is based are of good characters, are citizens of the United States, and reside in the United States. (13 C.F.R. § 124.101.)

- **Size Eligibility** – To be eligible, the applicant must qualify as a small business in its primary NAICS code. The participant must remain small in its primary NAICS code in order to retain eligibility to participate in the program. However, participants may apply to SBA to transition to a different NAICS code. (13 C.F.R. § 124.102.)
    - If an applicant is determined to be other than small, it must wait a year to reapply to the program, unless it requests a formal size determination from SBA and receives a favorable determination.
- **Social Disadvantage** – There is a rebuttable presumption that certain individual are socially disadvantaged, e.g., Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, Subcontinent Asian Americans. (13 C.F.R. § 124.103.)
    - The presumption of disadvantage may be overcome with credible evidence to the contrary.
    - Individuals not a member of one of the groups presumed to be socially disadvantaged must establish an individual social disadvantage by presenting corroborating evidence to support the claim that the individual has suffered social disadvantage that has negatively impacted his or her entry into or advancement in the business world.
- **Economic Disadvantage** – SBA will examine factors relating to the personal financial condition of the individual claiming economic disadvantage status, including income for the past 3 years, personal net worth, and the fair market value of all assets. (13 C.F.R. § 124.104.)
    - Any individual exceeding one of the following three thresholds will not be considered economically disadvantaged:
        - For an applicant, an individual with a net worth of $250,000 or more will not be considered economically disadvantaged. For continued 8(a) participation after admission to the program, that threshold increases to $750,000. Note, the calculation of net worth will not include ownership interest in the applicant company, the individual's equity in the primary personal residence, or funds invested in an official retirement account (e.g., an IRA) that are unavailable until retirement age without a significant penalty.
        - For an applicant, an individual with an adjusted gross income (averaged over the preceding three years) that exceeds $250,000 will be presumed to be not economically disadvantaged. For continued 8(a) participation after admission to the program, that threshold increases to $35,000.
        - For an applicant, an individual with assets (including primary residence and interest in the applicant company, but not funds invested in a qualified IRA account) with a fair market value of over $4 million will generally not be considered economically disadvantaged. For continued 8(a) participation after admission to the program, that threshold increases to $6 million.

    - SBA will consider the financial information of a spouse where the spouse has a role in the business, has lent money to the business, provided credit support for the business, or guaranteed a loan of the business.

- **Unconditional Ownership** – The applicant company must be at least 51% unconditionally and directly owned by one or more economically and disadvantaged individuals who are citizens of the United States, unless the applicant company is owned by an Indian tribe, an Alaskan Native Corporation ("ANC"), a Native Hawaiian Organization ("NHO"), or a Community Development Corporation ("CDC"). (13 C.F.R. § 124.105.)
    - An applicant concern cannot be owned by another business entity or irrevocable trust;
    - For a partnership, 51% of every class of partnership interest must be unconditionally owned by one or more economically and disadvantaged individuals;
    - For LLCs, at least 51% of every class of member interest must be unconditionally owned by one or more economically and disadvantaged individuals;
    - For corporations, at least 51% of every class of voting stock outstanding and 51% of the aggregate stock outstanding must be unconditionally owned by one or more economically and disadvantaged individuals;
    - A disadvantaged individual may not qualify if that individual has an immediate family member who is using or has used their disadvantaged status to qualify another concern for the 8(a) program. This may be waived by SBA, however there is a presumption against doing so if the second concern is in the same or similar line of business
    - There are restrictions on the amount that non-disadvantaged individuals may own in more than one 8(a) participant.
- **Control of a Participant** – SBA considers control of a participant company to include both the strategic policy setting exercised by boards of directors and the day-to-day management and administration of business operations. A participant's management and daily business operations must be conducted by one or more disadvantaged individuals, unless the applicant company is owned by an Indian tribe, an ANC, an NHO, or a CDC. (13 C.F.R. § 124.106.)
    - An applicant (or participant) must be managed on a full-time basis, during normal working hours, by one or more disadvantaged individuals with the experience of the extent and complexity needed to run the business.
    - The disadvantaged manager must hold the highest officer position in the company and be physically located in the United States.
    - One or more disadvantaged individuals must control the board of directors of a corporate applicant or participant.

- **Potential for Success** – An applicant must be in business in its primary industry classification (NAICS code) or at least two full years immediately prior to the date of its application for the 8(a) program. (13 C.F.R. § 124.107.)
  - This requirement can be waived by SBA under certain conditions.
  - In assessing potential for success, SBA considers the concern's access to credit and capital, as well as the technical and management experience of the company's managers, the company's operating history and past performance, and its financial capacity.
- **Good Character** – The applicant or participant, and all of its principals, must have good character. (13 C.F.R. § 124.108.)

If a concern is denied admission to the 8(a) program, it may not submit a new application to the program for 12 months after the date of the final SBA decision to decline (including reconsiderations and appeals of the denial). Once admitted to the program, participants are required to meet all of the above eligibility factors continuously in order to remain eligible for participation in the 8(a) program. 8(a) participants must inform SBA in writing of any changes in circumstances that may adversely affect its program eligibility, including, but not limited to, economic disadvantage, ownership, and control. In addition, 8(a) participants are required to submit an annual report with a certificate that it meets the eligibility criteria, and that there have been no changed circumstances which could adversely affect its eligibility for the program. Any participant that fails to meet the eligibility criteria after admission into the program may be subject to early termination or early graduation.

HUBZone Small Businesses

The purpose of the HUBZone program is to provide federal contracting opportunities for qualified small businesses with offices located in historically underutilized business zones in order to increase employment opportunities, investment, and economic development in those areas. Companies must *apply* to SBA for certification as a HUBZone. To assist in the development of certified HUBZone small businesses, SBA has a contracting program whereby procuring agencies may limit competition to only HUBZone small businesses, including *HUBZone joint ventures*, or make sole source awards directly to a HUBZone small business. Procuring agencies also have the ability to set aside orders under multiple-award contracts for competition only among HUBZone awardees. HUBZones also have the option to take advantage of a *price preference* when competing against large businesses in full and open competitions.

Unlike the other SBA socioeconomic programs, which only require the concern to be small as of the date it submits its initial offer, a HUBZone is required to be a qualified HUBZone small business both at the time of its initial offer and at the time of award. (13 CFR § 126.601.) A concern that is a certified HUBZone at time of initial offer and at time of award will generally be considered to be a qualified HUBZone throughout the life of the contract, unless a *recertification* exception applies.

With some exclusions (e.g., orders under FSS contracts), a contracting officer is required to consider a sole source award to a HUBZone small business, before considering a small business set-aside, if: (1) the contracting officer does not have a reasonable expectation that two or more HUBZone small businesses would submit offers; (2) the contract is not expected to exceed $4 million ($7 million for manufacturing NAICS code); (3) the requirement is not currently being performed by an 8(a) small business; (4) the acquisition is greater than the simplified acquisition threshold (currently $150,000, but will soon be $250,000); (5) the selected HUBZone small business is a responsible contractor; and (6) the award can be made at a fair market price. (FAR § 19.1306).

HUBZone Joint Ventures

A certified HUBZone small business may enter into a joint venture with other small businesses, whether or not they are also HUBZone small businesses, for the purpose of submitting offers on one or more specific HUBZone set-aside contracts. (13 CFR § 126.616.) The joint venture will qualify as a HUBZone small business as long as each member of the joint venture qualifies as small under the NAICS code applicable to the procurement. In addition, a HUBZone protégé may enter into a joint venture with its SBA-approved mentor, through either the SBA's All Small Mentor-Protégé Program or 8(a) Mentor-Protégé Program (if the HUBZone is also a certified 8(a) small business), for the purposes of submitting offers on HUBZone set-aside contracts. The mentor-protégé joint venture will be considered small for any procurement that the protégé qualifies as small under the applicable NAICS code.

Every HUBZone joint venture agreement must contain certain provisions required by SBA regulations, including provisions stating: (1) the HUBZone small business is the managing venturer; (2) the HUBZone owns at least 51% of the joint venture; (3) an employee of the HUBZone is the project manager for the contract; and (4) the HUBZone will receive profits commensurate with the work it performs. There is no requirement for the HUBZone joint venture to be separately certified as a HUBZone, the joint venture may rely upon the HUBZone member's status.

After the award of a small business set-aside contract, the HUBZone joint venture is required to meet the *Limitations on Subcontracting Rule*. For any joint ventures made up of all certified HUBZone small businesses, the aggregate of all HUBZone members to the joint venture must meet the applicable limitation on subcontracting requirement of 13 CFR § 125.6. For all other HUBZone joint ventures, the joint venture must meet the applicable limitation on subcontracting requirement, and the HUBZone member of the joint venture must perform at least 40% of the work performed by the joint venture (which must be meaningful, i.e., cannot be merely administrative or ministerial). Under the rules of affiliation applying to joint ventures, a HUBZone joint venture may receive up to 3 contracts over a 2 year period (beginning with the date of the first award) before running into *affiliation* concerns. Thus, a HUBZone joint venture may create addendums to the joint venture agreement to account for the additional procurements.

Eligibility for the HUBZone Program

To qualify for the HUBZone program, a concern must meet (1) small business requirement; (2) ownership requirement; (3) control requirement; (4) the principal office requirement; (5) the employee residence requirement; and (6) the contract performance requirement.

- **Small Business** – The company, together with its affiliates, must be small under the size standard corresponding to its primary NAICS code. The company must meet this size standard at the time of its application, and at the time of submission of any offer for a HUBZone set-aside contract. (13 CFR § 126.203.)
- **Ownership** – The company must be either at least 51% owned by U.S. citizens, owned by an Alaskan Native Corporation, owned by one or more Native Hawaiian Organization, owed by a Community

Development Corporation, owned by a small agricultural cooperative organized or incorporated in the U.S., or owned by one or more Indian Tribal Governments. (13 CFR § 126.200.)

- **Control** – If owned by individuals, the company must be controlled by persons who are U.S. citizens. Control means both the day-to-day management and the long-term decision-making authority for the company. This could include executive leadership (e.g., officers, directors, etc.) as well as key employees who possess important expertise or responsibilities. (13 CFR § 126.202.)
- **Principal Office** – The principal office of the company must be located within a HUBZone. See https://maps.certify.sba.gov/hubzone/map for information on location of HUBZones.
- **Employees** – At least 35% of the company's employees must reside in a HUBZone. An employee is any individual that is employed on a full-time, part-time, or other basis, that works a minimum of 40 hours per month. This also includes any owners that work at least 40 hours per month for the company. (13 CFR § 126.103.) The company must meet the employee residency requirement at the time it submits its offer up until the time of award. (13 CFR § 126.602(c).)
- **Contract Performance** – The company must represent in its application that it will "attempt to maintain" having 35% of its employees residing in a HUBZone during the performance of any HUBZone set-aside contract. "Attempt to maintain" means making substantive and documented efforts such as written offers of employment, published advertisements seeking employees, and attendance at job fairs. (13 CFR § 126.103.) For orders under ID/IQ contracts, the company must attempt to maintain the residency requirement during performance of each order that was set-aside for HUBZone small businesses. (13 CFR § 126.602(b).)

To be certified as a HUBZone small business, a company must submit an application to the SBA providing all required information relating to its eligibility. Applications are submitted through the SBA's website, https://eweb.sba.gov/gls, or they can be submitted in writing. (13 CFR § 126.303.) Determinations of HUBZone eligibility will generally be made by SBA within 90 days after the application is submitted. (13 CFR § 126.306.) Any company that is certified as a HUBZone by SBA must recertify every three years to SBA that it remains a qualified HUBZone small business.

HUBZone Price Evaluation Preference

Contracting officers for full and open competitions are generally required to incorporate into the solicitation FAR 52.219-4 (Notice of Price Evaluation Preference for HUBZone Small Business Concerns). This clause provides that HUBZone small business concerns are given a 10% price preference when competing against large business competitors. Specifically, FAR 52.219-4 provides that when the procuring agency is evaluating the prices of offerors, for the purposes of evaluation only, it will add 10% to the price of all offerors, except for (1) HUBZone offerors that did not waive the preference; and (2) otherwise successful small business offerors. Below are three examples to explain how the price evaluation preference would be applied.

Example 1:

In a **full and open competition** with the following offered prices:

- HUBZone SBC - $102

- Small Business - $98
- Large Business - $95

In this case the procuring agency would add 10% to the price of the Large Business ($95 + 10% = $104.50). In addition, unless the Small Business was the otherwise successful offeror, the agency would add 10% to its price, as well ($98 + 10 % = $107.80). As a result, the HUBZone would be the evaluated lowest priced offeror at $102. If price was the deciding factor, the HUBZone would receive the award. But because the price preference is only added for evaluation purposes, the award would be made at its offered price of $102.

Example 2:

Again, there are three offerors in a **full and open competition**, but the Small and Large Businesses prices are switched, resulting in offers of:

- HUBZone - $102
- Large Business - $98
- Small Business - $95

In this case the procuring agency would not apply the 10% price preference, because the Small Business is the lowest priced offeror. According to FAR52.219-4, the 10% factor is not added to otherwise successful small business offerors.

Example 3:

With the same three offerors in a **full and open competition** with the following offered prices:

- HUBZone - $105
- Small Business - $98
- Large Business - $95

In this case, the procuring agency would add 10% to both the Large Business ($95 + 10% = $104.50) and the Small Business ($98 + 10 % = $107.80). However, unlike Example 1 above, the HUBZone in this case is not the evaluated lowest priced offeror, because its offered price is not within 10% of the lowest priced offeror (Large Business’ evaluated price of $104.50 is still lower).

The price advantage for HUBZone SBCs is granted by FAR 52.219-4, but the regulation also gives HUBZone small businesses the ability to waive the preference. Where FAR 52.219-4 is incorporated into a solicitation, the full text of the clause should be included in the solicitation. FAR 52.219-4(c) provides a checkbox that allows HUBZones to elect to waive the price preference. This election should be made by checking the box in 52.219-4(c) when the HUBZone submits its offer in response to the solicitation. The question of whether to make the election to waive the HUBZone price evaluation preference essentially requires the HUBZone to weigh the price evaluation advantage versus the limitations on subcontracting requirements.

In procurements that are set aside for small businesses, including HUBZone set-asides, the awardee must adhere to the Limitation on Subcontracting clause (13 CFR 125.6), which requires at least 50% of the contract dollars to go to the small business awardee or similarly situated entities. In procurements that are not set aside for small businesses, and instead are conducted on a **full and open basis**, the Limitation on Subcontracting clause does not apply. However, within FAR 52.219-4, if a HUBZone **does not waive** the price evaluation preference, then the HUBZone will be subject to the same requirements as found in the Limitation on Subcontracting clause.

If the HUBZone checks the box in 52.219-4(c), then it essentially is competing as a non-HUBZone in the full and open competition. With the waiver in place, if the HUBZone is successful and receives the award, then the Limitations on Subcontracting rules do not apply, because it received the award through a full and open competition—not a small business set-aside. However, if the HUBZone does not elect to waive the price evaluation preference, then it gets a 10% price advantage over large businesses in the competition but must meet the requirements of the Limitation on Subcontracting clause.

Service-Disabled, Veteran-Owned Small Businesses

Unlike the other SBA socioeconomic contracting programs (i.e., 8(a), HUBZone, WOSB), the Service-Disabled Veteran-Owned Small Business ("SDVOSB") contracting program is actually two separate programs: one operated by the Department of Veterans Affairs, and the other overseen by SBA. Under the SBA program, which applies to all non-VA procurements, contractors are allowed to self-certify as an SDVOSB, and compete for and receive a contract set-aside for SDVOSBs. In contrast, VA procurements may be set aside for SDVOSBs or Veteran-Owned Small Businesses ("VOSB"), and contractors must be certified by the VA's Center for Veterans Enterprise ("CVE") as either an SDVOSB or a VOSB in order to receive a contract set aside by the VA for SDVOSBs or VOSBs, respectively.

Eligibility for SDVOSB Set-Asides

A Service-Disabled, Veteran-Owned Small Business ("SDVOSB") is a concern that: (1) is owned at least 51% by one or more service-disabled veterans; (2) one or more service-disabled veterans control the management and daily business operations of the company; and (3) is small under the applicable NAICS code. (13 CFR § 125.11.)

- **Service-disabled veteran** – A service-disabled veteran ("SDV") is a veteran with a disability that is service-connected, as defined by 38 U.S.C. § 101(16).
- **Ownership** – Under either program, an SDVOSB (or a VOSB under VA program) must be at least 51% owned by one or more SDVs (or if VOSB, one or more veterans). This ownership must be direct, which means that a company owned by a separate entity that is owned by one or more SDVs/veterans does not qualify as an SDVOSB/VOSB. In addition, ownership must be unconditional. Note that under the VA program, some SDVOBs may be owned and operated by an eligible surviving spouse of an SDV. (13 CFR § 125.12; 38 CFR § 74.3.)
- **Control** – Under either program, the management and daily business operations of an SDVOSB must be controlled by one or more SDVs. An SDV must hold the highest officer position in the company and must have sufficient management experience to run the company. In the case of a service-disabled veteran

with a permanent and severe disability, the spouse or permanent caregiver of the veteran may control the SDVOSB on the veteran's behalf. (13 CFR § 125.10; 38 CFR § 74.4.)

- **Small Business** – The company, together with its affiliates, must be small under the size standard corresponding to its primary NAICS code. The company must meet this size standard at the time of submission of any offer for an SDVOSB or VOSB set-aside contract. (13 CFR 125.14; 48 CFR § 819.7003.)

With some exclusions (e.g., orders under FSS contracts), a contracting officer is required to consider a sole source award to a Service-Disabled, Veteran-Owned Small Business ("SDVOSB"), before considering a small business set-aside, if: (1) the contracting officer does not have a reasonable expectation that two or more SDVOSBs would submit offers; (2) the contract is not expected to exceed $4 million ($6.5 million for manufacturing NAICS code); (3) the requirement is not currently being performed by an 8(a) small business; (4) the selected SDVOSB is a responsible contractor; and (6) the award can be made at a fair and reasonable price. (FAR § 19.1406).

SDVOSB Joint Ventures

An SDVOSB small business may enter into a joint venture with other small businesses, whether or not they are also SDVOSBs, for the purpose of submitting offers on one or more specific SDVOSB set-aside contracts. (13 CFR § 125.18.) The joint venture will qualify as an SDVOSB as long as each member of the joint venture qualifies as small under the NAICS code applicable to the procurement. In addition, an SDVOSB protégé may enter into a joint venture with its SBA-approved mentor, through either the SBA's All Small Mentor-Protégé Program or 8(a) Mentor-Protégé Program (if the SDVOSB is also a certified 8(a) small business), for the purposes of submitting offers on SDVOSB set-aside contracts. The mentor-protégé joint venture will be considered small for any procurement that the protégé qualifies as small under the applicable NAICS code.

Every SDVOSB joint venture agreement must contain certain provisions required by SBA regulations, including provisions stating: (1) the SDVOSB small business is the managing venturer; (2) the SDVOSB owns at least 51% of the joint venture; and (3) an employee of the SDVOSB is the project manager. For SDVOSB joint ventures seeking a VA contract, the joint venture agreement must also provide that an SDVOSB member of the joint venture (or an aggregate of SDVOSB members) will receive at least 51% of the profits of the joint venture. For all non-VA procurements, the joint venture agreement must provide that the SDVOSB will receive profits commensurate with the work it performs. SDVOSB joint ventures seeking VA contract awards are required to be certified by the VA CVE and be listed in the VA's Vendor Information pages. For non-VA procurements, the joint venture may rely upon the SDVOSB member's status, as there is no requirement for the SDVOSB joint venture to be separately certified as an SDVOSB by SBA.

After the award of a small business set-aside contract, an SDVOSB joint venture is required to meet the *Limitations on Subcontracting Rule*. For any joint ventures made up of all SDVOSBs, the aggregate of all SDVOSB members to the joint venture must meet the applicable limitation on subcontracting requirement of 13 CFR § 125.6. For all other SDVOSB joint ventures, the joint venture must meet the applicable limitation on subcontracting requirement, and the SDVOSB member(s) of the joint venture must perform at least 40% of the work performed by the joint venture (which must be meaningful, i.e., cannot be merely administrative or ministerial). Under the rules of affiliation applying to joint ventures, an SDVOSB joint venture may receive up to 3 contracts over a 2 year period (beginning with the date of the first award) before running into *affiliation* concerns. Thus, an SDVOSB joint venture may create addendums to the joint venture agreement to account for the additional procurements.

Woman-Owned Small Businesses

In 2011, SBA implemented a government contracting assistance program for Women-Owned Small Businesses ("WOSB"). The purpose of the program was to ensure that WOSBs have an equal opportunity to participate in federal contracting. Unlike the other SBA socioeconomic contracting programs, which are available in all industries, SBA has identified only certain industries where WOSBs are underrepresented in federal procurement. As long as a procurement is in one of these identified industries, contracting officers are allowed to limit a procurement to competition among WOSBs (or Economically Disadvantaged Women-Owned Small Businesses ("EDWOSB")), or award sole source contracts to WOSBs/EDWOSBs.

With some exclusions (e.g., orders under FSS contracts), a contracting officer is required to consider a sole source award to a WOSB/EDWOSB, before considering a small business set-aside, if: (1) the acquisition has a NAICS code the SBA has determined WOSBs are underrepresented in Federal procurement; (2) contracting officer does not have a reasonable expectation that two or more WOSBs/EDWOSBs would submit offers; (3) the contract is not expected to exceed $4 million ($6.5 million for manufacturing NAICS code); (4) the selected WOSB/EDWOSB is a responsible contractor; and (6) the award can be made at a fair and reasonable price. (FAR § 19.1506).

Certification under the WOSB/EDWOSB program is conducted differently than the other SBA socioeconomic contracting programs. Similar to the other programs, a WOSB/EDWOSB must be registered as such in the SAM database. Also, like the SDVOSB program, WOSBs and EDWOSBs are allowed to self-certify as to their status as a WOSB/EDWOSB. However, the WOSB/EDWOSB program has a couple of unique wrinkles. First, WOSBs and EDWOSBs are required to provide certain required documents (e.g., birth certificates, corporate organizational documents, signed WOSB program certification) to the WOSB Program Repository. If the WOSB Program Repository is unavailable, the WOSB/EDWOSB is required to submit those required documents to the contracting officer (if selected for award). The second unique aspect of the WOSB/EDWOSB program, is that SBA has approved certain entities to provide third-party certification for WOSBs and EDWOSBs. While using a third-party certifier is not required, it is an option for WOSBs/EDWOSBs. If a WOSB or EDWOSB uses a third-party certifier, it must submit the third-party certification to the WOSB Program Repository (or the contracting officer).

Eligibility for the WOSB Program

To qualify as a WOSB, a concern must be (1) a small business under the applicable NAICS code; (2) at least 51% unconditionally and directly owned by one or more women who are US citizens; and (3) controlled by one or more women who are US citizens. To qualify as an EDWOSB, a concern must be (1) a small business under the applicable NAICS code; (2) at least 51% unconditionally and directly owned by one or more economically-disadvantaged women who are US citizens; and (3) controlled by one or more economically-disadvantaged women who are US citizens.

- **Small Business** – The company, together with its affiliates, must be small under the size standard corresponding to its primary NAICS code. The company must meet this size standard at the time of submission of any offer for an WOSB or EDWOSB set-aside contract. (13 CFR 127.200.)
- **Ownership** – A WOSB must be at least 51% owned by one or more women, and an EDWOSB must be at least 51% owned by one or more economically-disadvantaged women. Under either program, the women owners must also be US citizens. In addition, ownership must be direct, which means that a company owned by a separate entity that is owned by one or more women/economically-disadvantaged women does not qualify as a WOSB/EDWOSB. In addition, ownership must be unconditional. (13 CFR § 127.201.)
- **Control** – The management and daily business operations of a WOSB/EDWOSB must be controlled by one or more women/economically-disadvantaged women. A woman (or for an EDWOSB, an economically-disadvantaged woman) must hold the highest officer position in the company, and must have sufficient management experience to run the company. In addition, the woman who holds the highest officer position in the company must manage it on a full-time basis and devote full time to the business during normal working hours. (13 CFR § 127.202.)

Eligibility for the EDWOSB Program

In addition to the general requirements for the WOSB program, there are specific requirements that women-owners must meet in order for the company to qualify as an EDWOSB. The women owner(s) must be able to demonstrate that her ability to compete in the free enterprise has been impaired due to diminished capital and credit opportunities as compared to others in the same line of business. The personal financial condition of the woman claiming economic disadvantage will be considered, including her personal income for the past 3 years, her personal net worth, and the fair market value of all of her assets. (13 CFR 121.203.)

- **Personal Income** – A woman will be presumed to be not economically disadvantaged if her adjusted gross income, averaged over the 3 previous years, exceeds $350,000.
- **Net Worth** – To qualify as economically-disadvantaged, a woman's personal net worth may not exceed $750,000 (does not include interest in the company, primary personal residence, or certain retirement accounts).
- **Fair Market Value of All Assets** – A woman will generally not be considered economically disadvantaged if the fair market value of all her assets (excluding only certain retirement accounts) exceeds $6 million.

WOSB Joint Ventures

An WOSB or EDWOSB may enter into a joint venture with other small businesses, whether or not they are also WOSBs/EDWOSBs, for the purpose of submitting offers on one or more specific WOSB/EDWOSB set-aside contracts. (13 CFR § 127.506.) The joint venture will qualify as a WOSB or EDWOSB as long as each member of the joint venture qualifies as small under the NAICS code applicable to the procurement, and the WOSB/EDWOSB is designated as such in the SAM database. In addition, the joint venture agreement is required to

(1) designate the WOSB/EDWOSB as the managing venturer; (2) designate an employee of the WOSB/EDWOSB as the project manager responsible for the contract; (3) state that not less than 51% of the net profits earned by the joint venture will be distributed to the WOSB/EDWOSB; (4) and state that the WOSB/EDWOSB will receive profits from the joint venture commensurate with work performed. Contracts may be awarded in the name of either the WOSB/EDWOSB or the joint venture. In either case, the joint venture must provide a copy of the joint venture agreement to the contracting officer.

In addition, an WOSB/EDWOSB protégé may enter into a joint venture with its SBA-approved mentor, through either the SBA's All Small Mentor-Protégé Program or 8(a) Mentor-Protégé Program (if the WOSB/EDWOSB is also a certified 8(a) small business), for the purposes of submitting offers on WOSB or EDWOSB set-aside contracts. The mentor-protégé joint venture will be considered small for any procurement that the protégé qualifies as small under the applicable NAICS code. Every WOSB or EDWOSB joint venture under an approved mentor-protégé agreement must contain certain provisions required by SBA regulations, including provisions stating: (1) the WOSB/EDWOSB is the managing venturer; (2) the WOSB/EDWOSB owns at least 51% of the joint venture; and (3) an employee of the WOSB/EDWOSB is the project manager. These WOSB/EDWOSB joint ventures between a protégé and mentor are subject to the *Limitations on Subcontracting Rule*, and the WOSB/EDWOSB member(s) of the joint venture must perform at least 40% of the work performed by the joint venture (which must be meaningful, i.e., cannot be merely administrative or ministerial)

After the award of any small business set-aside contract, including set-asides for WOSBs or EDWOSBs, any WOSB/EDWOSB joint venture is required to meet the applicable limitation on subcontracting requirement. Under the rules of affiliation applying to joint ventures, an WOSB/EDWOSB joint venture may receive up to 3 contracts over a 2 year period (beginning with the date of the first award) before running into *affiliation* concerns. Thus, an WOSB/EDWOSB joint venture may create addendums to the joint venture agreement to account for the additional procurements.

Appendix Four – Public-Private Partnerships

Public-Private Partnerships have risen in popularity over the years, as state and local governments have sought alternative means by which to build needed facilities and infrastructure. Unfortunately, unlike the experience in other developed countries in the world, the United States has lagged behind when it comes to national PPPs, at least in the traditional sense. That said, there have been instances where the federal government has teamed with private industry to advance policy initiatives and goals. One prime example is the federal government's use of the Low-Income Housing Tax Credit (LIHTC).

The LIHTC was created by the Tax Reform Act of 1986 and provides state and local agencies what amounts to approximately $8 billion a year in tax credits that can be used for the acquisition and construction of low-income housing. As reported by the United States Department of Housing and Urban Development, this program has made it possible to complete over 1,400 projects that have added over 108,000 housing units to underserved markets.

Another area where the federal government and private industry have made a collective impact through a type of public-private partnership is research and development. Through the use of vehicles such as Federally Funded R&D Centers, the government has teamed with private industry for the purpose of advancing important initiatives, primary pertaining to defense and health. From a construction standpoint, we still have a long way to go, but the trend has certainly been moving toward more robust use of PPPs.

Appendix Five – Davis Bacon Act (the "Act")

For any construction contractor that intends to perform on a federal project, it is extremely important to understand Davis Bacon. The Act applies to contractors and subcontractors performing on federally funded contracts in excess of $2,000 for the construction, alteration, or repair of public buildings or public works. It stands for the proposition that contractors and subcontractors performing work on such projects must pay certain of their employees the locally prevailing wages and fringe benefits for the same type of work on similar projects in the area. It is the job of the Department of Labor to determine the requisite wage rates and those wage rates are typically published in those contracts covered by the Act.

To provide a mechanism by which a federal agency can determine whether the Act is being followed, there is a requirement that contractors and subcontractors submit certified payroll on a weekly basis. That payroll information must set forth the actual wages and fringe benefits paid to covered workers. Moreover, the wage determination set forth in the contract being performed must be posted on the job site so that workers know the appropriate rate for the work they are performing. This provides yet another way to assure that the department of Labor's wage rate determination is being followed.

There are very serious ramifications if companies refuse to follow the Act, or do not fully understand its application. To the extent that you have any questions, you should consult with a professional.

Appendix Six – Safety and Health Considerations

FAR Clause 52.236-13, Accident Prevention

The Army Corps of Engineers' manual (EM 385-1-1), referenced in this contract clause, sets forth specific requirements pertaining to thirty-four (34) different aspects, or potential aspects, of a construction project, including, but not limited to project management; sanitation; medical and first aid; personal protective and safety equipment; lighting; hand and power tools; material handling, storage and disposal; concrete, masonry, roofing and residential construction; and steel erection. It is a comprehensive document of over nine hundred (900) pages that a construction contractor must familiarize himself or herself with as part of any project performed for the USACE, or any other federal agency that procures construction services.

As prescribed in 36.513, insert the following clause: ACCIDENT PREVENTION (NOV 1991)

(a) The Contractor shall provide and maintain work environments and procedures which will— (1) Safeguard the public and Government personnel, property, materials, supplies, and equipment exposed to Contractor operations and activities; (2) Avoid interruptions of Government operations and delays in project completion dates; and (3) Control costs in the performance of this contract.

(b) For these purposes on contracts for construction or dismantling, demolition, or removal of improvements, the Contractor shall— (1) Provide appropriate safety barricades, signs, and signal lights; (2) Comply with the standards issued by the Secretary of Labor at 29 CFR Part 1926 and 29 CFR Part 1910; and (3) Ensure that any additional measures the Contracting Officer determines to be reasonably necessary for the purposes are taken.

(c) If this contract is for construction or dismantling, demolition or removal of improvements with any Department of Defense agency or component, the Contractor shall comply with all pertinent provisions of the latest version of **U.S. Army Corps of Engineers Safety and Health Requirements Manual**, EM 385-1-1, in effect on the date of the solicitation.

(d) Whenever the Contracting Officer becomes aware of any noncompliance with these requirements or any condition which poses a serious or imminent danger to the health or safety of the public or Government personnel, the Contracting Officer shall notify the Contractor orally, with written confirmation, and request immediate initiation of corrective action. This notice, when delivered to the Contractor or the Contractor's representative at the work site, shall be deemed sufficient notice of the noncompliance and that corrective action is required. After receiving the notice, the Contractor shall immediately take corrective action. If the Contractor fails or refuses to promptly take corrective action, the Contracting Officer may issue an order stopping all or part of the work until satisfactory corrective action has been taken. The Contractor shall not be entitled to any equitable adjustment of the contract price or extension of the performance schedule on any stop work order issued under this clause.

(e) The Contractor shall insert this clause, including this paragraph (e), with appropriate changes in the designation of the parties, in subcontracts.

Alternate I (NOV 1991). If the contract will involve (a) work of a long duration or hazardous nature, or (b) performance on a Government facility that on the advice of technical representatives involves hazardous materials or operations that might endanger the safety of the public and/or Government personnel or property, add the following paragraph (f) to the basic clause:

(f) Before commencing the work, the Contractor shall –

(1) Submit a written proposed plan for implementing this clause. The plan shall include an analysis of the significant hazards to life, limb, and property inherent in contract work performance and a plan for controlling these hazards; and

(2) Meet with representatives of the Contracting Officer to discuss and develop a mutual understanding relative to administration of the overall safety program.