USA

Law and Practice

Contributed by:
Daniel P. Graham, Dave Johnson, Jamie Tabb and Elizabeth Krabill McIntyre
Vinson & Elkins LLP ***see p.11***

Contents

1. General p.2
- 1.1 Legislation Regulating Procurement of Government Contracts p.2
- 1.2 Entities Subject to Procurement Regulation p.2
- 1.3 Type of Contracts Subject to Procurement Regulation p.2
- 1.4 Openness of Regulated Contract Award Procedure p.3
- 1.5 Key Obligations p.3

2. Contract Award Process p.4
- 2.1 Prior Advertisement of Regulated Contract Award Procedures p.4
- 2.2 Preliminary Market Consultations by Awarding Authority p.5
- 2.3 Tender Procedure for Award of Contract p.5
- 2.4 Choice/Conditions of Tender Procedure p.5
- 2.5 Timing for Publication of Documents p.6
- 2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders p.6
- 2.7 Eligibility for Participation in Procurement Process p.6
- 2.8 Restriction of Participation in Procurement Process p.6
- 2.9 Evaluation Criteria p.6

3. General Transparency Obligations p.6
- 3.1 Obligation to Disclose Bidder/Tender Evaluation Methodology p.6
- 3.2 Obligation to Notify Interested Parties Who Have Not Been Selected p.7
- 3.3 Obligation to Notify Bidders of Contract Award Decision p.7
- 3.4 Requirement for Standstill Period p.7

4. Review Procedures p.7
- 4.1 Responsibility for Review of Awarding Authority's Decisions p.7
- 4.2 Remedies Available for Breach of Procurement Legislation p.7
- 4.3 Interim Measures p.8
- 4.4 Challenging Awarding Authority's Decisions p.8
- 4.5 Time Limits for Challenging Decisions p.8
- 4.6 Length of Proceedings p.8
- 4.7 Annual Number of Procurement Claims p.8
- 4.8 Costs Involved in Challenging Decisions p.8

5. Miscellaneous p.9
- 5.1 Modification of Contracts Post-award p.9
- 5.2 Direct Contract Awards p.9
- 5.3 Recent Important Court Decisions p.9
- 5.4 Legislative Amendments Under Consideration p.10

1. General

1.1 Legislation Regulating Procurement of Government Contracts

Federal public procurement in the USA is governed by multiple statutes, executive orders, the Federal Acquisition Regulation (FAR) and agency regulations that implement or supplement the FAR. The key legislation governing federal government contracting is codified in Title 41 of the United States Code, and, with respect to the Department of Defense (DoD), the National Aeronautics and Space Administration (NASA) and the Coast Guard (an agency within the Department of Homeland Security), Title 10 of the United States Code. Within these Titles, the principal statutes governing federal procurement are:

- the Anti-Kickback Act, 41 U.S.C. ch. 87;
- the Buy American Act, 41 U.S.C. ch. 83 (as well as the Trade Agreements Act, 19 U.S.C. ch. 25);
- the Competition in Contracting Act (CICA), codified throughout several titles of the U.S.C.;
- the Contract Disputes Act, 41 U.S.C. ch. 71;
- the Federal Acquisition Streamlining Act, codified throughout 41 U.S.C.;
- the Procurement Integrity Act, 41 U.S.C. ch. 21;
- the Service Contract Act, 41 U.S.C. ch. 67;
- the Truth in Negotiations Act (known as "TINA", but now captioned "Truthful Cost or Pricing Data" in the U.S.C.), 41 U.S.C. ch. 35; and
- the Walsh-Healey Public Contracts Act, 41 U.S.C. ch. 65.

Other important statutes include the Brooks Architect-Engineer Act, 40 U.S.C. ch. 11; the Clinger-Cohen Act, 40 U.S.C. ch. 111; the Contract Work Hours and Safety Standards Act, 40 U.S.C. ch. 37; the Davis-Bacon Act, 40 U.S.C. ch. 81; the Miller Act, 40 U.S.C. ch. 31; and the Small Business Act, 15 U.S.C. ch. 14A.

1.2 Entities Subject to Procurement Regulation

The FAR generally governs acquisitions by federal "executive agencies", which are defined as executive departments, military departments, independent establishments of the federal executive branch, as defined in 5 U.S.C. §§ 101, 102, and 104(1), and wholly owned federal government corporations within the meaning of 31 U.S.C. § 9101. The US Postal Service, the Federal Aviation Administration and the Federal Deposit Insurance Corporation are not subject to the FAR, but have procurement regulations that are similar to the FAR in many respects. Federal legislative and judicial branch agencies may choose to adopt the FAR, or elect to be governed by requirements similar to those contained in the FAR. The FAR does not apply to state or local governments.

1.3 Type of Contracts Subject to Procurement Regulation

The FAR applies to acquisitions by contract, with funds appropriated by Congress, of supplies or services, including construction. Contracts with the federal government can take a variety of forms, including bilateral instruments; awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. The FAR does not apply to federal grants, co-operative agreements, or "other transactions", which are special agreements used for research, prototypes and follow-on production.

The value of a contract and whether the contract is for "commercial items" dictate the specific provisions of the FAR that apply. Commercial items are supplies that are customarily used by the general public or by non-government entities for purposes other than government purposes, or services sold competitively in substantial quantities in the commercial marketplace based on established catalogue or market prices for specific tasks performed. Commercial item contracts are governed by FAR Part 12, which establishes acquisition policies more closely resembling those of the commercial marketplace.

Government purchases under USD10,000 (the micro-purchase threshold) are also subject to simplified regulatory requirements as outlined in FAR Subpart 13.2. Purchases under USD250,000 (the simplified acquisition threshold) are subject to streamlined regulatory requirements as outlined in FAR Subpart 13.3. Purchases of commercial items up to USD7 million may also utilise simplified acquisition procedures as governed by FAR Subpart 13.5.

FAR Part 16 describes types of contracts that the federal government uses to acquire supplies and services, depending primarily on what the government is acquiring and how the risks of performance are allocated. The main types of contracts used by the government include fixed-price; cost-reimbursement; time-and-materials or labour-hour; indefinite-delivery, indefinite-quantity (IDIQ); and commercial item contracts.

A fixed-price contract provides a set price that is not subject to further adjustment. If the cost of performance exceeds the fixed price, the contractor must absorb the overrun. The use of fixed-price contracts is governed by FAR Subpart 16.2. Conversely, in a cost-reimbursement contract, the government reimburses the contractor's allowable incurred costs. As part of a cost-reimbursement contract, the government may choose one of several fee structures, including a fixed fee, award fee, incentive fee, or performance-based incentive fee. Cost-reimbursement contracts often present greater risk to the government, but are

used when the cost of the performance cannot be estimated with certainty. Cost-reimbursement contracts are governed by FAR Subpart 16.3. A time-and-materials or labour-hour contract provides for fixed labour rates plus the cost of materials, if applicable. These contracts are appropriate for labour-intensive efforts where it is not possible to accurately estimate the work to be performed. These contracts are governed by FAR Subpart 16.6.

An IDIQ contract allows the government to place one or more orders for supplies (a delivery order) or services (a task order) on an as-needed basis. The use of IDIQ contracts is governed by FAR Subpart 16.5.

1.4 Openness of Regulated Contract Award Procedure

CICA requires federal agencies to promote and provide for full and open competition to the maximum extent practicable; however, CICA permits the use of other than full and open competition in the following circumstances:

- when the supplies or services required by the agency are available from only one responsible source, or, for DoD, NASA and the Coast Guard, from only one or a limited number of responsible sources, and no other type of supplies or services will satisfy agency requirements;
- when the agency's need for the supplies or services is of such an unusual and compelling urgency that the government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals;
- when it is necessary to award the contract to a particular source or sources in order to maintain a facility, producer, manufacturer, or other supplier in case of a national emergency or to achieve industrial mobilisation, or to establish or maintain an essential engineering, research or development capability;
- when full and open competition is precluded by the terms of an international agreement or a treaty;
- when a statute expressly authorises or requires that an acquisition be made through another agency or from a specified source, or when the agency's need is for a brand name commercial item for authorised resale;
- when the disclosure of the agency's needs would compromise the national security; and
- when the agency head determines that full and open competition is not in the public interest in the particular acquisition concerned.

Use of any exception must be supported by a written justification and approval, which often must be published. When an agency invokes the first exception, the agency generally must publish a notice of intent to negotiate with only one source, and must consider any statements received from other contractors claiming to be an alternative responsible source.

Absent the invocation of an exception to CICA, procurements are generally open to all "presently responsible" contractors, regardless of the jurisdiction in which the contractor resides. To be determined responsible, a contractor must have adequate financial, organisational and operational resources or the ability to obtain them; be able to comply with the proposed delivery or performance schedule; and have a satisfactory record of performance, integrity and business ethics. The FAR establishes a process by which contractors deemed not presently responsible can be suspended or debarred from receiving federal contracts. For most procurements, contractors must also be registered in the System for Award Management (SAM) (www.sam.gov), which requires the contractor to complete representations and certifications.

Agencies may place reasonable jurisdictional and other limitations on particular procurements. For example, contracts involving access to classified national security information may only be awarded to contractors with the necessary security clearances. Agencies may also require that some or all performance take place in the USA or at a specific location, and may prohibit the storing or transmission of certain information outside of a specific facility or territory. Agencies may also require specific qualifications, certifications, or licences that may be unavailable to firms in certain jurisdictions. The bid protest process discussed in **4 Review Procedures** can be used to challenge unreasonable restrictions that unnecessarily limit competition.

1.5 Key Obligations

The statutory and regulatory scheme governing federal public procurement includes the following key obligations and requirements.

Competition, Fairness and Integrity

CICA requires executive agencies to maximise competition in the acquisition of supplies and services. To ensure meaningful competition, procurement statutes and regulations contain a number of requirements to promote fairness and integrity, prohibit improper business practices, and avoid conflicts of interest on the part of both government officials and contractors.

Preference for the Acquisition of Commercial Items

The Federal Acquisition Streamlining Act (FASA) establishes a preference for purchasing commercial items on standard commercial terms to satisfy requirements.

Fair and Reasonable Pricing
Federal procurement law principally relies on competition and the promotion of commercial item acquisitions to ensure that executive agencies acquire goods and services at fair and reasonable prices. The FAR provides extensive guidance to agencies on the evaluation of price in individual contract actions. For many contract actions, the FAR also requires agencies to evaluate the separate cost elements and profit margin that comprise the price. When applicable, the Cost Principles in FAR Part 31 prohibit the reimbursement of a variety of costs. For many contract actions over USD2 million, TINA requires contractors to provide certified cost or pricing data to assist the government in determining whether contract prices are fair and reasonable. The Cost Accounting Standards (CAS), which regulate how contractors estimate and account for their costs, may also apply to contracts over USD2 million, and contractors holding large-value CAS-covered contracts may be required to disclose their accounting practices to the government.

Transparency, Disclosure and Accountability
The FAR contains extensive requirements that agencies document the rationales for a broad range of procurement decisions, including decisions regarding what supplies and services to purchase, what procurement methods to use, how much competition is practicable, and the selection of contractors. The FAR requires agencies to publicise contract actions and provides for administrative or judicial review of procurement decisions and contract disputes. The FAR also imposes a variety of disclosure obligations on contractors, from general requirements that all contractors register in the SAM and make a host of representations and certifications regarding their business, to more specific disclosure regimes such as TINA.

Promoting Small and Disadvantaged Businesses
The Small Business Act, regulations issued by the Small Business Administration, and FAR Part 19 seek to maximise opportunities at both the prime and subcontractor level for small businesses, veteran-owned small businesses, service-disabled veteran-owned small businesses, historically underutilised business zone (HUBZone) small businesses, small disadvantaged businesses and women-owned small businesses.

Labour
A number of statutes, regulations issued by the Department of Labor, and FAR Part 22 govern the relationship between federal prime and subcontractors and their employees, including matters related to safety, health and sanitation, maximum hours and minimum wages, equal employment opportunity, discrimination, and eligibility for employment under US immigration laws.

Foreign Acquisition
The Buy American Act and FAR Part 25 restrict the purchase of certain supplies, that are not domestic end products, for use within the USA and require, with some exceptions, the use of only domestic construction materials in contracts for construction in the USA. The Trade Agreements Act authorises the executive branch to waive the Buy American statute and other discriminatory provisions for eligible products from countries that have signed an international trade agreement with the USA, or that meet certain other criteria.

2. Contract Award Process

2.1 Prior Advertisement of Regulated Contract Award Procedures

The FAR prescribes formal processes for advertising the federal government's requirements for supplies and services, and for soliciting proposals for those supplies and services from prospective government contractors. For most federal opportunities, FAR Part 5 governs the publication of procurements. As a matter of policy, federal procurements are publicised to (i) increase competition, (ii) broaden industry participation in meeting government requirements, and (iii) assist small and disadvantaged businesses to obtain contracts and subcontracts. Contracting officers will generally publicise contract actions on an online opportunities database that is accessible to the public. That database previously was known as Federal Business Opportunities (FBO), but in the past year, the government has moved all publicised contract actions to a new website, Beta.SAM.gov, as part of a government-wide effort to consolidate acquisition information.

Each publicised contract action will describe in detail the procedures and requirements associated with each contract action, including the nature and specifications of the solicitation, applicable dates and points of contact, etc. Such processes will vary based on the posted opportunity, but each published notice must conform to the requirements of the FAR and any other applicable federal laws. Interested parties can then search the database of posted opportunities using a variety of search criteria – such as key words, date ranges, soliciting organisation, North American Industry Classification Systems (NAICS) codes and performance location – to identify procurements in which they might be interested.

Notably, FAR Subpart 16.5 permits agencies to enter into multiple-award IDIQ contracts. As the name implies, these are contracts awarded to multiple firms for supplies and/or services when the exact times and/or exact quantities of future deliveries are not known at the time of contract award. Solicitations and awards of these IDIQ contracts are generally subject to the pub-

lication requirements of FAR Part 5; however, those publication requirements do not apply to solicitations and awards of orders against these contracts. When placing orders for supplies and services against these contracts, agencies generally must give all awardees of the multiple-award IDIQ contract a fair opportunity to be considered for each order. The specific procedures for ordering are established in the multiple award contract and FAR Subpart 16.5.

2.2 Preliminary Market Consultations by Awarding Authority

FAR Part 7 describes the policies and procedures that federal agencies follow in performing acquisition planning. Acquisition planning is meant to promote and provide for the acquisition of commercial items to the extent such items are available, full and open competition, selection of an appropriate contract type, and consideration of using pre-existing contracts, including interagency and intra-agency contracts, to fulfil the agency's requirement, before making the decision to award new contracts.

FAR Part 10 prescribes the policies and procedures for conducting market research to arrive at the most suitable approach to acquiring, distributing and supporting supplies and services. The FAR generally requires agencies to conduct market research appropriate to the circumstances before they develop new requirements documents and before they solicit offers and award contracts.

2.3 Tender Procedure for Award of Contract

As discussed above, CICA requires that agencies promote and provide for full and open competition. The two principal sets of procedures that satisfy the requirement for full and open competition are sealed bidding under FAR Part 14 and competitive negotiation under FAR Part 15. Agencies generally are required to solicit sealed bids if (i) time permits; (ii) the contract award will be made on the basis of price and other price-related factors; (iii) it is not necessary to conduct discussions with the responding offerors about their bids; and (iv) there is a reasonable expectation of receiving more than one sealed bid. Sealed bidding typically involves the following stages: publication of an invitation for bids (IFB); submission of bids by an established deadline; evaluation of bids following a public bid opening; and award to most advantageous bid, based solely on price or price-related factors.

If sealed bids are not appropriate under the above criteria, executive agencies are required to request competitive proposals under FAR Part 15 or use competitive procedures established in other Parts of the FAR. Unlike sealed bidding, the procedures in FAR Part 15 allow agencies to consider a variety of price and non-price factors in awarding a contract, and further allow agencies to define the relative importance of those factors. Whereas sealed bidding requires agencies to award to the lowest responsive bid, FAR Part 15 allows agencies to make trade-offs among the evaluation factors and award to a more expensive, technically superior proposal. FAR Part 15 also permits agencies to engage in discussions with contractors about their proposals and to allow contractors to revise their proposals during those negotiations.

FAR Part 15 generally requires agencies to issue a solicitation that identifies the criteria that will be used to evaluate proposals and the relative importance of those criteria, and requires that agencies evaluate proposals solely on the basis of the identified criteria. FAR Part 15 also provides guidance on the manner in which proposals are evaluated, discussions are held, award is made, and contractors are notified of the award decision.

FAR Parts 12 and 13 prescribe simplified procedures that are used in conjunction with FAR Parts 14 and 15 for the acquisition of commercial items (Part 12) and supplies and services under the simplified acquisition threshold (Part 13). Also, procedures for ordering against multiple-award IDIQ contracts are established in the relevant multiple-award contract and FAR Subpart 16.5.

Finally, FAR Part 8 encourages agencies to use a variety of existing government-wide or multi-agency IDIQ contracts to acquire supplies and services before conducting procurements on the open market. There are a number of such programmes, including the General Services Administration's Federal Supply Schedule programme, and a list of these programmes is available at https://www.contractdirectory.gov/contractdirectory/. These programmes allow agencies to order specified supplies and services from pre-qualified contractors at pre-negotiated prices or rates. Procedures for qualifying for these programmes and receiving a contract from which orders can be placed are established by the agency that manages the programme. Agencies generally place orders from contract holders using the procedures in the IDIQ contracts, FAR Subpart 16.5 and, in the case of the Federal Supply Schedules, FAR Subpart 8.4.

2.4 Choice/Conditions of Tender Procedure

The FAR provides criteria for determining which of the various procedures in FAR Parts 8, 12, 13, 14 and 16 apply to a particular procurement. Application of these criteria, however, involves a number of highly discretionary determinations, such as whether an award will be based solely on price and price-related factors using sealed bidding under FAR Part 14, or a combination of price and non-price factors using competitive negotiation under Part 15. Similarly, agencies enjoy discretion in performing market research to determine whether commercial items are available to satisfy their needs, such that FAR Part 12 would apply.

2.5 Timing for Publication of Documents

The FAR does not impose specific requirements regarding the timing for publication of solicitations. As discussed below, solicitations must generally provide sufficient time for interested contractors to respond; however, agencies enjoy broad discretion in determining what constitutes sufficient time.

2.6 Time Limits for Receipt of Expressions of Interest or Submission of Tenders

For procurements of commercial items in an amount greater than USD25,000 or procurements under the simplified acquisition threshold, agencies must establish a solicitation response time that will afford potential offerors a reasonable opportunity to respond to each proposed contract action. The FAR does not define "reasonable response time," but it does instruct contracting officers to consider the circumstances of the individual acquisition – such as the complexity, commerciality, availability and urgency – when establishing the solicitation response time.

For those procurements expected to exceed the simplified acquisition threshold (except for those involving commercial items), contracting officers generally must allow at least a 30-day response time from the date of the issuance of the solicitation. This provision sets a minimum time limit, however, and the response time can be longer. Additionally, an agency may adjust the deadline for the submission of proposals throughout the course of the procurement in response to changes in the terms of the solicitation or answers to offerors' questions.

2.7 Eligibility for Participation in Procurement Process

As discussed in **1.4 Openness of Regulated Contract Award Procedure**, the federal government can only contract with "presently responsible" contractors. To be determined responsible, a contractor must have adequate financial, organisational and operational resources and a satisfactory record of performance, integrity and business ethics. Contractors must also be registered in the SAM.

Although agencies are required by CICA to promote full and open competition to the maximum extent practicable, agencies may reasonably require specific qualifications, certifications, or licences based on the circumstances of individual procurements, and these requirements may preclude certain firms from competing. These requirements must be disclosed in the solicitation, and the bid protest process discussed below can be used to challenge unreasonable restrictions that unnecessarily limit competition.

2.8 Restriction of Participation in Procurement Process

1.4 Openness of Regulated Contract Award Procedure lists the exceptions to CICA's requirement for full and open competition. When one or more of these exceptions are properly invoked, agencies may limit competition to less than all responsible sources. Even when an exception is invoked, however, an agency still must solicit offerors from as many potential sources as is practicable under the circumstances. Also, agencies may reserve acquisitions exclusively for participation by small business concerns. FAR Part 19 and the regulations issued by the Small Business Administration (SBA) outline the criteria for participation in these "small business set asides."

More and more frequently, agencies are procuring supplies and services by ordering them under multiple-award IDIQ contracts, or government-wide or multi-agency acquisition contracts. Only firms that have been awarded one of these contract vehicles are eligible to be considered for such orders.

Federal procurement law does not provide for a minimum number of offerors in a procurement.

2.9 Evaluation Criteria

FAR Part 14 establishes the criteria that are used to award contracts by sealed bidding. Agencies must make award to the responsible bidder whose bid, conforming to the solicitation, is the lowest price.

By contrast, when using the competitive negotiation procedures in FAR Part 15, agencies must evaluate proposals based solely on the evaluation criteria set forth in the solicitation. FAR Part 15 solicitations must also notify offerors of the relative importance of the evaluation criteria and the extent to which the agency will make trade-offs among price and non-price factors. Agencies must follow the evaluation scheme set forth in the solicitation when selecting an offeror for award.

3. General Transparency Obligations

3.1 Obligation to Disclose Bidder/Tender Evaluation Methodology

When using the sealed bidding procedures in FAR Part 14, the agency will publicly open all timely bids received, prepare an abstract of the bids for public inspection, and notify all offerors of the awardee. As noted in **2.3 Tender Procedure for Award of Contract** and **2.9 Evaluation Criteria**, awards under FAR Part 14 are made to the responsible bidder whose bid, conforming to the solicitation, is most advantageous to the government in terms of price.

FAR Part 15 solicitations must disclose the evaluation criteria that the agency will use to evaluate proposals, the relative importance of those criteria, and the extent to which the agency will make trade-offs among price and non-price factors. Agencies must follow the evaluation scheme set forth in the solicitation when selecting an offeror for award. As discussed in **3.3 Obligation to Notify Bidders of Contract Award Decision**, contractors that are not selected for award may request a debriefing that provides a summary of the rationale for award.

3.2 Obligation to Notify Interested Parties Who Have Not Been Selected

CICA generally requires agencies to solicit offers from all responsible sources, unless the agency invokes one of the exceptions discussed in **1.4 Openness of Regulated Contract Award Procedure**. Agencies must generally provide notice of their intent to use other than full and open competition.

Also, when using the competitive negotiation procedures in FAR Part 15, an agency may decide to eliminate contractors from the competition after an initial evaluation of proposals. This process of establishing the "competitive range" is intended to allow agencies to efficiently conduct negotiations with only those contractors submitting the most highly rated proposals. As discussed in **3.3 Obligation to Notify Bidders of Contract Award Decision**, agencies must notify contractors when they are eliminated from the competitive range.

3.3 Obligation to Notify Bidders of Contract Award Decision

Agencies must provide written notification to each offeror that was not selected for award within three days of the date of award. Agencies must also promptly notify offerors that are eliminated from FAR Part 15 competitions prior to award.

When FAR Part 15 procedures are used, offerors are entitled to request a debriefing that provides a summary of the rationale for the award or the elimination of the offeror from the competition. Post-award debriefings will typically disclose the agency's evaluation of the significant weaknesses or deficiencies in the offeror's proposal, the overall cost/price and technical rating of the offeror and the awardee, and the overall ranking of the offerors. Post-award debriefings will not include a point-by-point comparison of offerors, and pre-award debriefings will only provide information regarding the agency's evaluation of the eliminated offeror's proposal.

Debriefings must be requested within three days, and the date when the debriefing concludes usually starts the time period for filing a bid protest. Debriefings can occur orally, in writing, or by any other method acceptable to the contracting officer. Debriefings may also take the form of iterative questions and answers that occur over several days.

3.4 Requirement for Standstill Period

There is no requirement for a "standstill period" between the contract award decision and the commencement of contract performance. As discussed in **4.3 Interim Measures**, agencies may be required to suspend performance of a new contract pending the resolution of a bid protest, and agencies may therefore wait to see if a protest is filed before commencing performance.

4. Review Procedures

4.1 Responsibility for Review of Awarding Authority's Decisions

There are several venues that are responsible for adjudicating protests of a contracting agency's award decisions. First, an unsuccessful offeror can file a protest with the contracting agency itself. Such agency-level protests are typically decided by the agency contracting officer or the contracting officer's supervisor. Second, an unsuccessful offeror can file a protest with the Government Accountability Office (GAO), an independent agency within the legislative branch. GAO has a staff of attorneys who are responsible for adjudicating such protests. Third, a protest can be filed at the US Court of Federal Claims (COFC), a federal court located in Washington, DC.

An agency's decision in response to an agency-level protest is not appealable, but the protester may be able to follow the agency protest with a new protest at GAO or the COFC. GAO decisions are also not appealable, but a protester can request that GAO reconsider its decision if the protester believes the decision includes an error of fact or law, or if it wishes to present information not previously considered. Under some circumstances, a protester can also file a new protest at the COFC if it receives an unfavourable GAO decision. Decisions of the COFC are appealable to the US Court of Appeals for the Federal Circuit (the "Federal Circuit").

4.2 Remedies Available for Breach of Procurement Legislation

If an unsuccessful offeror is able to convince an adjudicator that the contracting agency has violated a procurement law or regulation, or otherwise failed to follow the evaluation criteria set forth in the solicitation, the typical remedy is for the agency to take "corrective action" to eliminate the violation. The nature and extent of the corrective action depends on the specific violation, but common corrective actions include re-evaluating the proposals, amending the solicitation, re-opening discussions or negotiations with the offerors, requesting revised proposals,

or simply making a new award decision. In rare cases, such as those involving organisational conflicts of interest (OCI), an agency may decide to exclude an offeror from the competition. In addition to obtaining corrective action, in some circumstances a successful protester is able to recover the costs incurred in litigating the protest, or the costs incurred in preparing its proposal.

Note that GAO does not have the power to order agencies to take corrective action. Instead, GAO can only provide recommendations, which agencies typically follow. The COFC, on the other hand, has the authority to issue an injunction prohibiting the agency from moving forward with the awarded contract, which in effect forces the agency to take corrective action.

4.3 Interim Measures

If an unsuccessful offeror files an agency-level protest or a GAO protest within five calendar days after the debriefing date offered to the offeror (when the debriefing is requested and required), or within ten calendar days of award, the contracting agency must suspend performance of the contract while the protest is pending. Also, a pre-award agency-level or GAO protest of the terms of the solicitation prevents the contracting agency from making an award while the protest is pending. Under certain circumstances, an agency may override these "automatic stays", but such override decisions are subject to challenge at the COFC.

Protests filed at the COFC do not trigger an automatic stay. Instead, the protester may request that the court issue a preliminary injunction in which the contracting agency is ordered to suspend contract performance or hold off on making an award. However, it can be difficult for a protester to satisfy the legal test to obtain a preliminary injunction.

In addition, contracting agencies sometimes decide to voluntarily suspend contract performance or delay making an award, even if not legally required.

4.4 Challenging Awarding Authority's Decisions

In order to file a protest, a company must qualify as an "interested party", which is defined as an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. This standard is used for agency-level protests, GAO protests and COFC protests.

4.5 Time Limits for Challenging Decisions

The deadline to file a protest depends on several variables, such as the type of protest. For example, protests challenging the terms of the solicitation (ie, pre-award protests) must be filed before bid opening or the closing date for receipt of proposals. This is the case whether filing an agency-level protest, a GAO protest, or a COFC protest.

For all other protests, including post-award protests, the deadline depends on the venue. Agency-level protests and GAO protests generally must be filed within ten calendar days after the basis of the protest is known or should have been known. However, for protests challenging a procurement conducted on the basis of competitive proposals under which debriefing is requested and required, GAO has a special rule that extends the deadline until ten calendar days after the date on which the debriefing is held. This GAO rule also prohibits the filing of a protest prior to the debriefing date offered to the protester. There is no strict deadline for filing post-award protests at the COFC, but most protesters file quickly with the hope of stopping performance of the awarded contract, or at least obtaining a decision from the court before a large portion of the contract has been performed.

Finally, there is a unique timeliness rule for GAO protests that follow an agency-level protest. Such protests must be filed at GAO within ten days of the offeror having actual or constructive knowledge of "initial adverse agency action", defined as any action or inaction by the agency that is prejudicial to the position taken in the agency-level protest.

4.6 Length of Proceedings

The length of proceedings depends upon the venue where a protest is filed. Federal agencies are required to make their best efforts to resolve agency-level protests within 35 calendar days, but this is not a strict deadline. GAO, on the other hand, has a statutory requirement to issue a decision on a protest within 100 calendar days after it is filed. GAO also offers an "express option" under which it decides cases within 65 days. There is no statute or regulation limiting the amount of time for a protest at the COFC, but the court typically issues protest decisions on an expedited basis in order to avoid a substantial interruption of the procurement process.

4.7 Annual Number of Procurement Claims

On average, 2,566 protests were filed at GAO each year between 2015 and 2019. During that time period, GAO sustained 12-23% of the protests filed in a given year. The COFC does not officially report the number of protests received or sustained, but unofficial information suggests that the COFC receives approximately 100 protests annually.

4.8 Costs Involved in Challenging Decisions

The costs involved in protesting an award decision at any forum include attorneys' fees, consultant fees and filing fees. Attorneys' fees vary greatly from one protest to another; however, protests are relatively less expensive than many complex civil litigation

matters because protests are generally decided on an expedited schedule, and decisions are based on an administrative record without substantial discovery. Factors driving cost include the number and complexity of the issues, the size and complexity of the administrative record, and whether GAO or the COFC believes that a hearing is necessary. Protests before the COFC are generally more expensive than protests before GAO, as the procedures applied by the COFC more closely resemble traditional rules of civil procedure.

5. Miscellaneous

5.1 Modification of Contracts Post-award

Federal contracts can be modified through bilateral agreement; however, the competition requirements in CICA have been interpreted to prohibit modifications that materially alter the scope of the contract. In those circumstances, agencies must conduct a new procurement for the modified requirement.

Standard contract terms in most federal contracts also permit agencies to make unilateral changes within the general scope of the contract, including changes to the contract specifications, description of services to be performed, the method and manner of performance, the time or place of performance, or the time within which performance must occur. These standard contract terms generally provide that, if such a change causes an increase or decrease in the cost or the time required for performance of the work, the contract price and/or schedule shall be adjusted.

5.2 Direct Contract Awards

As discussed in **1.4 Openness of Regulated Contract Award Procedure**, CICA generally requires full and open competition to the maximum extent practicable; however, CICA permits the use of other than full and open competition, including the issuance of sole source contract awards, in certain circumstances.

5.3 Recent Important Court Decisions

The past year saw several important court decisions for federal contractors.

- In National Government Services Inc. v United States, 923 F.3d 977 (2 May 2019), the Federal Circuit held that CICA prohibits agencies from imposing blanket policies applicable to all solicitations for a particular good or service that effectively exclude offerors from competing, without documenting the need for such action in light of a particular contract or a particular offeror. National Government Services involved a bid protest in which the protester challenged a limit imposed by an agency in solicitations for certain administrative services. The limit precluded an offeror from winning a contract with a workload that, when added to the offeror's existing contract workloads, would cause it to exceed an award limit. The Federal Circuit ruled that, by imposing the award limit, the agency did not provide for full and open competition as required by CICA. The Federal Circuit further ruled that, because the award limit was imposed for all solicitations for the particular services and was not tailored to a particular solicitation, the limit did not comply with CICA's procedures for full and open competition after the exclusion of particular sources.
- In Raytheon Company v Secretary of Defense, 940 F.3d 1510 (2019), the Federal Circuit ruled that salary costs for lobbying activities are "expressly unallowable" under FAR Part 31 despite the fact that the FAR does not expressly list such salary costs as unallowable. This case is important because the FAR imposes penalties when contractors seek reimbursement of "expressly unallowable" costs. The Federal Circuit's rationale has the potential to significantly broaden the scope of what costs can be considered expressly unallowable because it gives short shrift to the "expressly" part of the equation.
- In Acetris Health, L.L.C. v United States, 949 F.3d 719 (Fed. Cir. 2020), the Federal Circuit clarified how supplies delivered to the government can qualify as "US-made end products" under the contract clauses implementing the Trade Agreements Act (TAA). The court held that "[a] product need not be wholly manufactured or substantially transformed in the United States to be a 'US-made end product.'" The court explained that "[i]nstead, such products may be... 'manufactured' in the United States from foreign-made components." The court rejected the government's contention that the manufacturing process must involve a "substantial transformation" to be considered a US-made end product. Rather, "under the FAR, a 'US-made end product' may either be (i) 'manufactured in the United States'; or (ii) 'substantially transformed in the United States.'"
- In Office Design Group v United States, __ F.3d __, 2020 WL 1070028 (6 March 2020), the Federal Circuit adopted the standard applied by the lower COFC for protests alleging that the procuring agency failed to treat offerors fairly and impartially as required by the FAR. A protester alleging that it was treated unequally must show that the agency evaluated a feature of its proposal differently from a "substantively indistinguishable" feature of another offeror's proposal.
- In NetCentrics Corp. v United States, 145 Fed. Cl. 158 (2019), the COFC found reasonable an agency's decision to disqualify an offeror from a procurement because the offeror made a material misrepresentation in its proposal about the availability of one of its proposed key personnel. The court adopted other decisions of the COFC and GAO holding that an offeror can be disqualified for material misrepresentations even if it did not intend to deceive the agency,

reasoning that an inadvertent material misrepresentation also "undermines the agency's ability to make well-reasoned procurement decisions that serve the public interest." NetCentrics reminds contractors that they have a duty to notify an agency of material changes to their proposals while those proposals are under evaluation, which may take many months in certain procurements.

- The Supreme Court in Cochise Consultancy, Inc. v United States ex rel. Hunt, 139 S. Ct. 1507 (2019), clarified the application of the statute of limitations to certain claims under the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733. The FCA permits a private person, known as a relator, to bring a qui tam civil action in the name of the federal government against "any person" who, inter alia, "knowingly presents... a false or fraudulent claim for payment" to the government or to certain third parties acting on the government's behalf (31 U.S.C. §§ 3729, 3730). The government may choose to intervene in the action. Civil actions under the FCA must be brought within either six years after the statutory violation occurred, or three years after "the official of the United States charged with responsibility to act in the circumstances" knew or should have known the relevant facts, but not more than ten years after the violation. In Cochise Consultancy, the Supreme Court held that the latter "government knowledge" period applies to a relator-initiated action where the government does not intervene. As a result, a relator can bring a qui tam action up to ten years after an alleged violation, so long as the action is brought within three years of the government's knowledge of the violation.
- Finally, in another FCA decision, a federal District Court in California ruled that knowing false statements by a contractor regarding compliance with cybersecurity regulations in the DoD FAR Supplement may support liability under the FCA (United States ex rel. Markus v Aerojet Rocketdyne Holdings, Inc., 81 F. Supp. 3d 1240 (8 May 2019)). The relator in this case, who was the defendants' former director of Cyber Security, Compliance, and Controls, alleged that the defendants entered into multiple prime contracts and subcontracts subject to the DoD cybersecurity requirements despite knowing that they did not satisfy these cybersecurity requirements. The relator further alleged that, when the defendants did disclose the non-compliance to the government, those disclosures did not fully explain the extent of the defendants' non-compliance. In ruling that the relator had alleged sufficient facts that, if assumed to be true, state a plausible claim under the FCA, the court highlighted the substantial liability risk that defence contractors face as they struggle to meet the government's cybersecurity standards.

5.4 Legislative Amendments Under Consideration

At any given moment, there are a dozen or more procurement-related bills under consideration by Congress and dozens of amendments to the FAR and agency FAR supplements under consideration by the executive branch. The annual National Defense Authorization Act (NDAA) typically includes a variety of important procurement-related provisions. For example, the 2020 NDAA included several provisions reinforcing FASA's commitment to acquiring commercial items on customary terms and conditions in the commercial marketplace; required DoD to develop a cybersecurity framework that includes standards for assessing the cybersecurity of individual contractors; strengthened requirements that contractors provide information to enable the government to determine that proposed prices are fair and reasonable; required agencies to provide additional information to disappointed offerors in competitions for certain orders under IDIQ contracts; and made important changes to small business contracting programmes.

As of the submission of this chapter, there are bills pending in Congress that would codify the government's current programme for assessing and authorising cloud computing solutions, instigate a variety of new cybersecurity initiatives, provide for the reimbursement of costs incurred by contractors during lapses in appropriations, attempt to avoid future lapses, and make further changes to several small business programmes. Given the current political environment, it is difficult to predict which of these bills will be enacted into law.

Vinson & Elkins LLP has a top-tier government contracts practice with deep experience and knowledge on how government procurement works in Washington and in state capitals across the country. The firm represents clients from a wide variety of industries on all aspects of federal, state and local government contracts. V&E has well-recognised experience in bid protests, claims preparation and litigation, and compliance, fraud, waste and abuse investigations. In addition to protests and claims, V&E handles complex cost accounting matters, mergers and acquisitions, subcontract negotiation and prime/subcontractor litigation, suspension and debarment proceedings, export controls and economic sanctions matters, False Claims Act suits and Foreign Corrupt Practices Act investigations. This multidisciplinary approach leverages the V&E's deep bench of attorneys from across the firm to address issues arising for government contractors.

Authors

Daniel P. Graham is a partner and vice-chair of Vinson & Elkins' Government Contracts practice group and serves as the hiring partner for V&E's Washington, DC office. Highly regarded in government contracts litigation, Dan has nearly two decades of experience assisting clients on bid protests, Contract Dispute Act appeals, prime and subcontractor disputes and commercial litigation for clients across industry sectors. Dan has litigated cases before the US Court of Federal Claims (COFC), the US Court of Appeals for the Federal Circuit, the Government Accountability Office (GAO) and the Boards of Contract Appeals, as well as before Federal District Courts and Courts of Appeals across the country.

Dave Johnson is a partner at Vinson & Elkins and leads the Government Contracts and National Securities practices. He works with companies of all sizes and in all industries to resolve contract disputes with the government and to manage legal complications that may arise from exports as well as inbound foreign investment. Dave has served as lead counsel on matters involving an array of government agencies. He prepared one of the largest claims ever prosecuted against the US Air Force and has handled matters listed in the Government Accountability Office's "Significant GAO Bid Protest Decisions" guide. His extensive government contracts experience also includes counselling on compliance and financial assistance agreements.

Jamie Tabb is a partner in Vinson & Elkins' government contracts practice. Jamie represents contractors in bid protests, contract disputes and other litigation. Jamie also counsels contractors on regulatory and contractual compliance issues. He advises clients on the Federal Acquisition Regulation (FAR) and other agency-specific procurement regulations, the Small Business Administration (SBA) regulations, and statutes applicable to federal contracting, including the Buy American Act and the Trade Agreements Act. He provides guidance to clients participating in mergers and acquisitions involving government contractors and assists companies with the process of mitigating Foreign Ownership, Control or Influence (FOCI) to obtain or retain a facility security clearance. In addition, Jamie assists clients in conducting internal investigations and responding to government fraud investigations and presenting responsibility inquiries.

Elizabeth Krabill McIntyre is a senior associate at Vinson & Elkins. Elizabeth's principal areas of practice are government contracts, export controls and economic sanctions. Elizabeth represents clients from various industries in contract claims against federal government agencies and in bid protests as protesters and intervenors. She advises clients on compliance with the Federal Acquisition Regulation (FAR), the Defense FAR Supplement and other federal regulations relevant to government contractors. Elizabeth also regularly assists clients from various industries with economic sanctions compliance, export control regulation compliance, voluntary disclosures, export licensing requirements and applications, and related issues.

Vinson & Elkins LLP

2200 Pennsylvania Ave. NW
Suite 500 West
Washington
DC 20037

Tel: 202-639-6652
Email: danielgraham@velaw.com
Web: www.velaw.com

Vinson&Elkins LLP