Deloitte.

Regulatory & Compliance | July 2018

# The Source

## Regulatory updates for government contractors

### Federal Acquisition Regulation (FAR)/Other Agencies/Supplements Final/Interim Rules/Notices

- General Services Administration (GSA) Acquisition Final Rule; Unenforceable Commercial Supplier Agreement; 83 FR 7631; February 22, 2018
  - GSA amended the General Services Administration Acquisition Regulation (GSAR) to address common commercial supplier agreement terms that are inconsistent with or create ambiguity with Federal Law
  - Standard commercial supplier agreements contain terms and conditions that make sense when the purchaser is a private party but are inappropriate when the purchaser is the Federal Government
  - Discrepancies between commercial supplier agreements and Federal law or the Government's needs create recurrent points of inconsistency
  - As a result, industry and Government representatives must spend significant time and resources negotiating and tailoring commercial supplier agreements to comply with Federal law and to ensure both parties have agreement on the contract terms

# The Source

- The rule is intended to:
  - Decrease proposal costs associated with negotiating the identified unenforceable commercial supplier agreement terms;
  - Facilitate faster procurement and contract lead times, therefore decreasing the time it takes for contractors to make a return on their investment
  - Reduce administrative costs for companies that maintain alternate Federally compliant commercial supplier agreements
  - For small business concerns, level the playing field with larger competitors since negotiations will only be required if the commercial supplier agreements contain objectionable clauses outside of those already identified in the GSAR clause
  - Ensure consistent application and understanding of these unenforceable terms, potentially reducing unnecessary legal costs
- This final rule makes the following significant changes from the proposed rule:
  - GSAR 552.212–4(s)—Reverts the order of precedence to move ‘‘Addenda to the solicitation or contract, including any license agreements for computer software’’ back to number 4, and ‘‘Solicitation provisions of the solicitation’’ and ‘‘Other paragraphs of the clause’’ back to number 5 and 6, respectively. Additionally, language was added to clarify the Commercial Supplier Agreements—Unenforceable Clauses provision takes precedence over the commercial supplier agreement terms and conditions
  - GSAR 552.212–4(w)(1)(vi)—Deletes the requirement for providing full text terms with the offer, adds a definition of a material change, and adds clarification on when a commercial supplier agreement must be bilaterally modified in the contract

# The Source

- Office of Management and Budget, Office of Federal Procurement Policy (OFPP), Cost Accounting Standards (CAS) Board Final Rule; Cost Accounting Standards: Clarification of the Exemption from Cost Accounting Standards for Firm Fixed-Price (FFP) Contracts and Subcontracts Awarded without Submission of Certified Cost or Pricing Data; 83 FR 8634; February 28, 2018
  - The OFPP CAS Board, published, without change from the proposed rule, a final rule revising the exemption from CAS for FFP contracts and subcontracts awarded on the basis of adequate price competition without submission of cost or pricing data
  - This final rule clarified that the exemption applies to FFP contracts and subcontracts awarded on the basis of adequate price competition without submission of certified cost or pricing data
- National Air and Space Administration (NASA) Federal Acquisition Regulation Supplement Final Rule; Revised Voucher and Invoice Submission & Payment Process; 83 FR 13113; March 27, 2018
  - NASA issued a final rule amending its voucher and invoice submittal and payment process
  - The rule amends NASA Federal Acquisition Regulation Supplement (NFS) to ensure that NASA complies with Office of Management and Budget Memorandum M-15-19, which directs federal agencies to transition to electronic invoicing for federal procurements before the end of FY 2018
  - This rule revises NASA's submission-and-payment process requiring invoicing for fixed price contracts and fee vouchers for cost-type contracts to be submitted electronically
  - As of April 26, 2018, NASA will only process invoices and vouchers through an electronic eInvoicing Secure File Transfer (SFT)
  - The transition to exclusively processing invoices and vouchers through electronic eInvoicing SFT is predicted to save NASA $139,964 per year, in addition to creating cost savings for contractors
- General Services Administration Acquisition Final Rule; Government Accountability Office (GAO), Administrative

Practice and Procedure, Bid Protest Regulations, Government Contracts; 83 FR 13817; April 2, 2018

- This document amends the GAO's Bid Protest Regulations, promulgated in accordance with the Competition in Contracting Act of 1984 (CICA), to implement the requirements in sec. 1501 of the Consolidated Appropriations Act for Fiscal Year 2014, which was enacted on January 14, 2014
- These amendments implement the legislation's direction to establish and operate an electronic filing and document dissemination system for the filing of bid protests with GAO
- The amendments also include administrative changes to reflect current practice, to streamline the bid protest process, and to make clerical corrections

- FAR Final Rule; FAR Case 2017-007: Task- and Delivery-Order Protests; 83 FR 19145; May 1, 2018
  - The final rule amends FAR 16.505(a)(10) to raise the threshold for Department of Defense (DoD), NASA, and the Coast Guard from $10 million to $25 million and remove the sunset date of September 30, 2016 for the other civilian agencies
- FAR Final Rule; FAR Case 2015-039: Audit of Settlement Proposals; 83 FR 19149; May 1, 2018
  - The final rule amends FAR 49.907 to raise the dollar threshold requirement for the audit of prime contract settlement proposals and subcontract settlements from $100,000 to $750,000 align with the FAR 15.403–4(a)(1) threshold for obtaining certified cost or pricing data
- Defense Federal Acquisition Regulation Supplement (DFARS) Final Rule; DFARS Case 2016-D013: Amendments Related to Sources of Electronic Parts; 83 FR 19641; May 4, 2018
  - The DoD issued a final rule amending the DFARS to implement a section of the National Defense Authorization Act (NDAA) for Fiscal Year 2016 that makes contractors and subcontractors subject to approval (as well as review and audit) by appropriate DoD officials when identifying a contractor-approved supplier of electronic parts

  - The review, audit, and approval of contractor-approved suppliers by the Government will generally be in conjunction with a contractor purchasing system review (CPSR) or other surveillance of purchasing practices by the contract administration office, unless the Government has credible evidence that a contractor-approved supplier has provided counterfeit parts

- DFARS Final Rule; DFARS Case 2015-D030: Promoting Voluntary Post-Award Disclosure of Defective Pricing; 83 FR 19645; May 4, 2018
  - The DoD issued a final rule amending the DFARS to state that DoD contracting officers have discretion to request a limited-scope or full-scope audit, as appropriate for the circumstances, when contractors voluntarily disclose defective pricing after contract award
  - The requirement for submission of certified cost or pricing data does not apply to contracts at or below the simplified acquisition threshold or to commercial items, including commercially available off-the-shelf items

**FAR/ Other Agencies/Supplements/Proposed Rules**

- DFARS Proposed Rule; DFARS Case 2017-D016: Mentor-Protégé Program Modifications; 83 FR 19677; May 4, 2018
  - DoD is proposing to amend the DFARS to implement sections 1823 and 1813 of the NDAA for Fiscal Year 2017 that provide modifications to the DoD Pilot Mentor-Protégé Program
  - Section 1823 of the NDAA revises the definition and requirements associated with affiliation between mentor firms and their protégé firms
  - Both sections add new types of assistance for mentor firms to provide to their protégé firms
- FAR Proposed Rule; FAR Case 2017-006: Exception from Certified Cost or Pricing Data Requirements – Adequate Price Competition; 83 FR 27303; June 12, 2018
  - DoD, GSA, and NASA are proposing to amend the FAR to provide a separate standard for "adequate price competition" in the FAR, applicable only to DoD, NASA, and the Coast Guard, consistent with the requirements of section 822 of the NDAA for Fiscal Year 2017

- Section 822 of the NDAA limits the exception for price based on adequate price competition in circumstances in which there is adequate competition that results in at least two or more responsive and viable competing bids

**Defense Contract Audit Agency (DCAA) and Defense Contract Management Agency (DCMA) Audit Alert/ Guidance/Programs**

- DCAA MRD 18-PIC-001(R); Audit Alert on 2018 NDAA Section 803 Timeliness Requirement for Incurred Cost Adequacy Reviews and Audits; January 29, 2018
  - The memorandum was issued to confirm that Agency policy will be revised to require incurred cost submissions to be reviewed for adequacy within 60 days of receipt, as required by the 2018 NDAA enacted on December 12, 2017
  - The DCAA Contracts Audit Manual (CAM) will be updated to reflect this requirement
  - The memorandum emphasizes the NDAA requirement for DCAA to complete incurred cost assignments within 12 months of receiving a qualified submission after the date of enactment (December 12, 2017); to facilitate this requirement, the adequacy date needs to be correctly recorded
- DCAA MRD 18-PSP-002(R); Audit Alert on Auditing Long Term Agreements (LTAs); February 15, 2018
  - The purpose of this audit alert is to provide clarification that DCAA can perform an examination of a subcontractor proposal, submitted to support the award of a Long Term Agreement (LTA), prior to issuance of a Government Request for Proposal (RFP) when such an examination will benefit the Government and is requested by the Contracting Officer
  - Before initiating the audit, the following is required:
    - The subcontract proposal has been approved by the appropriate subcontractor management;
    - The prime contractor has submitted the subcontract proposal to the Government with an assertion from the prime contractor's management that it intends to award an LTA with the subcontractor and identifies the benefit of the LTA to the Government;

- The subcontract proposal is adequate for examination based on the requirements set forth in FAR Subpart 15.4, Contract Pricing; and
- The Contracting Officer has determined that subcontract audit support is required based on DFARS PGI 215.404-3 Subcontract pricing considerations

**Government Publications/Reports/Press Releases**

- Office of the Under Secretary of Defense (OUSD) for Acquisition & Sustainment; Class Deviation – Enhanced Postaward Debriefing Rights; March 22, 2018
  - On March 22, 2018, the DoD issued guidance enhancing post-award debriefing rights for unsuccessful offerors
  - Pursuant to the guidance, unsuccessful offerors may submit to the awarding agency additional questions relating to the contracting officer's debriefing
  - The questions must be submitted within two business days after receiving the debriefing
  - The awarding agency has five business days to respond, in writing, and the post-award debriefing will not be considered concluded until the agency delivers its written responses
  - The enhanced debriefing rights modify the GAO's protest timelines under FAR 33.104(c)
  - Contracting officers must now suspend contract performance or terminate the awarded contract upon receipt of a protest filed with the GAO within:
    - Ten days after the date of contract award;
    - Five days after a debriefing date offered to the protester under a timely request; or
    - Five days after the awarding agency delivers its written response to the additional questions submitted pursuant to this guidance, whichever is latest
- Bureau of Labor Statistics; Contractor Compensation Cap for Contracts Awarded on or after June 24, 2014; November 2017
  - Section 702 of the Bipartisan Budget Act of 2013 (BBA; Pub. L. 113-67, December 26, 2013) established a $487,000 cap on the reimbursement of compensation

costs for contractor employees, adjusted annually to reflect the change in the Employment Cost Index for all workers as calculated by the Bureau of Labor Statistics (BLS)

  - The following are the adjusted compensation cap amounts for costs incurred in 2015 and subsequent years:
    - 1/1/2018–12/31/2018: $525,000
    - 1/1/2017–12/31/2017: $512,000
    - 1/1/2016–12/31/2016: $500,000
    - 6/24/2014–12/31/2015: $487,000
  - Section 702 provides for a waiver of the BBA cap amount by the head of an executive agency
  - One or more narrowly targeted exceptions for scientists, engineers, or other specialists may be established upon a determination that such exceptions are needed to ensure that the executive agency has continued access to needed skills and capabilities
  - The Director of the Office of Management and Budget is required to report to Congress on any waivers of the BBA cap amounts that are in effect for the fiscal year

- DCAA; Report to Congress on FY 2017 Activities; March 31, 2018
  - DCAA submitted its Fiscal Year 2017 Annual Report to Congress on March 31, 2018, as required by 10 U.S.C. §2313a
  - The report highlights DCAA's audit performance, recommendations to improve the audit process, industry outreach activities, and key accomplishments
- Director of Defense Pricing/Defense Procurement and Acquisition Policy; Memorandum for Commanders/Assistant Secretaries/Directors of the Military Departments; Class Deviation – Threshold for Obtaining Cost or Pricing Data; April 13, 2018
  - The memorandum states that effective July 1, 2018, contracting officers use $2 million as the threshold for obtaining certified cost or pricing data, in lieu of the threshold of $750,000 at FAR 15.403-4
  - Section 811 of the NDAA for fiscal year 2018 increases the threshold for obtaining certified cost or pricing data

under IO U.S.C. 2306a (frequently referred to as "Truth in Negotiations Act") and 41 U.S.C. 3502 from $750,000 to $2,000,000 for contracts entered into after June 30, 2018

- Director of Defense Pricing/Defense Procurement and Acquisition Policy; Memorandum for Reducing Acquisition Lead Time by Eliminating Inefficiencies Associated with Cost or Pricing Data Submissions After Price Agreement ("Sweep Data"); June 7, 2018
  - The memorandum states that delays associated with contractor efforts to collect and submit cost or pricing data which should have been, but were not, provided to the Contracting Officer prior to agreement on price unnecessarily increase acquisition lead time
  - Effective June 7, 2018, for actions subject to the Truth in Negotiations Act (TINA), Contracting Officers shall request offerors execute the Certificate of Current Cost or Pricing Data as soon as practicable, but no later than five business days after the date of price agreement
  - Contracting Officers shall defer consideration of the impact of any cost or pricing data submitted by a contractor after price agreement is reached until after award of the contract action in order to avoid delays in the awarding of the contract

**Court Rulings**

- Appeal of Kellogg Brown & Root Services, Inc. (KBR); Armed Services Board of Contract Appeals; ASBCA No. 58175; March 15, 2018
  - KBR appealed the contracting officer's final decision denying its claim for subcontractor costs and asserting an $11,483,487 claim against it for subcontractor costs the government paid to KBR under a task order (TO) issued under the LOGCAP III indefinite-delivery, indefinite-quantity (IDIQ) contract with the U.S. Army for logistical support
  - KBR asked the Board to deny the government's claim and rule that KBR is entitled to the full amount challenged by the government, including the amount the government has already recouped
  - This appeal involved a government claim to recover unallowable DFAC costs it billed to the government in connection with Qaiyara Mosul West site H-3, after

KBR's receipt of the February Letter of Technical Direction (LOTD) reducing the headcount at the site

- The court determined that the costs KBR incurred due to its failure to reduce the site H-3 headcount in accordance with the LOTD and billed to the government were unreasonable, and therefore, KBR must reimburse the government for those costs
- KBR disputed DCMA's legal arguments that KBR's costs in contention were unreasonable and that the government was entitled to recoup those costs, and it disputed DCAA's independence and approach
- According to the court, KBR bears the burden to prove that the DFAC costs it billed to the government in connection with site H-3, after KBR's receipt of the February LOTD, were reasonable
- The court found that KBR made no effort to challenge the factual basis of DCMA's quantum calculations (the difference in costs KBR would have billed to the government had KBR reduced the site H-3 headcount in accordance with the February LOTD and the costs it actually billed to the government) and did not advance any quantum calculation of its own at the hearing
- The court found the weight of the evidence on the record supported DCMA's quantum calculations and therefore denied KBR's appeal

- Bechtel National, Inc. v. The United States of America; The United States Court of Federal Claims; No. 17-657C; April 3, 2018
  - Plaintiff Bechtel National, Inc. operated a nuclear waste treatment plant in the state of Washington, pursuant to a contract with the Department of Energy
  - In 2010 and 2012, two former Bechtel employees filed lawsuits against the company alleging, among other things, sexual and racial harassment and discrimination
  - Bechtel and the former employees settled the lawsuits out of court
  - Bechtel then sought reimbursement of its litigation costs from the Department of Energy under the contract
  - The Department of Energy provisionally approved Bechtel's request, but after further consideration, the Department disallowed the costs, relying, at least in

part, on the Federal Circuit's decision in Geren v. Tecom, Inc., 566 F.3d 1037 (Fed. Cir. 2009)

  - After the contracting officer issued a final decision upholding the disallowance, Bechtel filed a complaint in the United States Court of Federal claims alleging breach of contract
  - The Court found that the government did not breach its contract with Bechtel and that it is entitled to judgment as a matter of law
  - The court found that the costs at issue were incurred as a result of violations of the contract's anti-discrimination provision within the meaning of the Tecom case, which established that costs resulting from a breach of the FAR's non-discrimination provision are "otherwise unallowable" under a contract that contains such a provision
  - Accordingly, the court determined that the government is entitled to judgment as a matter of law as to Bechtel's claim that the Department of Energy violated the contract by disallowing the costs it incurred to defend and pay for the settlement of the two discrimination complaints at issue in this case

- United States ex rel. Hunt v. Cochise Consultancy, Inc.; United States Court of Appeals for the Eleventh Circuit; Case No. 16-12836; April 11, 2018
  - In the qui tam case, the relator claimed that two defense contractors defrauded the DoD when they allegedly conspired to oust and replace a subcontractor providing security services in support of a $60 million prime contract to clean up excess munitions
  - The relator alleged that the contractors bribed and/or manipulated multiple employees for the prime contractor and one US Army Corps of Engineers contracting officer, resulting in a series of rescinded awards, threatened firings and a fraudulent contract re-assignment
  - The contractors moved to dismiss the allegations, arguing that the claim was time barred under the six year limitations period in 31 U.S.C. § 3731(b)(1), and the relator had waited more than seven years after the fraud occurred to file suit

  - The relator responded that his claim was timely under the limitations period in § 3731(b)(2) because he had filed suit within three years of when the government learned of the fraud at his FBI interview and ten years of when the fraud occurred
  - Pursuant to 31 USC section 3731, an allegation of an FCA violation must be brought before the later of (i) six years after the date of the violation, or (ii) three years after the date when the facts giving rise to the action are known (or should have been known) to the government
  - The district court disagreed with the relator's position, concluding that § 3731(b)(2)'s limitations period had expired because it began to run when the relator learned of the fraud
  - The appeals court reversed the district court's decision, finding that the statute of limitations had not begun to run until the relator notified the government of the False Claims Act Violation
- Cunningham v. General Dynamics Information Technology; United States Court of Appeals for the Fourth Circuit; Case No. 17-1592; April 24, 2018
  - On April 24, 2018, the Fourth Circuit determined that General Dynamics Information Technology Inc. (GDIT) is immune to suit under contractor derivative sovereign immunity for using an autodialing system to provide consumers with health insurance eligibility information
  - The plaintiff alleged that GDIT violated the Telephone Consumer Protection Act when autodialing to inform consumers about health care
  - Government contractors are immune to suit if (i) the government authorized the contractor's actions and (ii) the government conferred the authorization while acting within its constitutional power
  - GDIT argued immunity because it was acting under a government authorized contract
  - The Fourth Circuit agreed with GDIT and held that GDIT was immune to suit for contractor sovereign immunity
  - The Court also added that contractor derivative sovereign immunity applies to both state and federal claims

# The Source

## Contacts


Mark Burroughs
Managing Director | Deloitte Risk and Financial Advisory
Deloitte & Touche LLP
+1 571 766 7062
mburroughs@deloitte.com

Asela Wijesiri
Senior Manager | Deloitte Risk and Financial Advisory
Deloitte & Touche LLP
+1 410 951 3141
awijesiri@deloitte.com

David King
Manager | Deloitte Risk and Financial Advisory
Deloitte & Touche LLP
+1 571 766 7006
davking@deloitte.com

Jason Popovic
Manager | Deloitte Risk and Financial Advisory
Deloitte & Touche LLP
+1 202 738 7921
jpopovic@deloitte.com

Matt Danner
Senior Consultant | Deloitte Risk and Financial Advisory
Deloitte & Touche LLP
+1 720 412 3897
madanner@deloitte.com





30 Rockefeller Plaza
New York, NY 10112-0015
United States