



# Effective Management, Litigation, and Resolution of Complex Claims

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# Introduction

- Basics of the Contract Disputes Act (CDA)
- Strategic considerations in resolving complex claims





# Overview of the CDA

- Claim dispute resolution process
- Initial administrative claims reviewed by the Contracting Officer (CO)
- If claim is denied, appeal to:
  - The Boards of Contract Appeals (BCAs) or
  - The Court of Federal Claims (COFC)





# Overview of the CDA (Cont'd)

- Historically each agency had its own board of contract appeals.
- Today:
  - Civilian Board of Contract Appeals (CBCA)
  - Armed Services Board of Contract Appeals (ASBCA)
  - Other unique forums





# Basics of a CDA Claim

- Claim Requirements:
  - A demand for payment
  - In writing
  - Submitted to the CO
  - Seeking as a matter of right
  - The payment of a sum certain, and
  - A request for a final decision





# Requests for Equitable Adjustment

- Important differences between Requests for Equitable Adjustment (REA) and CDA claims
- REAs
  - Compensable preparation costs
  - Government not on clock to respond
  - No need to certify (DOD exception)
- CDA Claims
  - Those over \$100,000 must be certified
  - Start the clock on accrual of interest
  - Government on the clock to respond





# REA or Certified Claim?

- Speed
- Relationship with CO/COR
- Legal fees v. CDA interest





# Timing for Filing Claim?

- CDA provides six years after claim accrues to file claim with CO
- Filing quickly
  - Government on the clock
  - CDA interest accrues
  - Not precluded from updating damages on appeal
  - Cash flow considerations
- Waiting to file
  - Maintain relationship with contracting personnel
  - Resolution may be easier once time passes





# Jurisdictional Strategy

- If claim is denied, decision on forum is important
- Several pros and cons for both Court of Federal Claims and Boards of Contract Appeals





# Boards of Contract Appeals

- Pros
  - Best suited for smaller dollar value claims
  - Streamlined settlement process
  - May be quicker and less expensive if settlement is viable
- Cons
  - Board decisions can take years
  - Recent decisions trend pro-government
  - Litigation can be as costly as COFC





# Boards of Contract Appeals (Cont'd)

- Other items of note:
  - BCA disputes are much less formal
  - Process is more difficult if dispute is very contentious
  - Accelerated procedures for sub-\$100,000 claims
  - ADR procedures assist early resolution





# Court of Federal Claims

- Pros

- DOJ lawyers bring fresh perspective to facts
- Judges enforce schedule
- Decisions may be rendered six to 12 months quicker
- DOJ attorneys have authority to settle cases without agency approval

- Cons

- Large/complex claim litigation is typically expensive
- DOJ electronic discovery can be onerous, expensive
- Unsuitable to small dollar value claims litigation





# Fraud Counterclaims

- Only COFC can hear government fraud-related counterclaims
- Myth: BCAs are safer option because government cannot assert fraud-related counterclaims
  - DOJ needs to make internal referral to assert such claims
  - Filing at the BCAs will not prevent agency from asserting fraud claims in appropriate forum





# FY 2019 Statistical Trends

- COFC Trends:
  - Fewer case filings (down 25%) but increasingly complex, matters of national significance
- BCA Trends:
  - Fewer appeals for five consecutive years
  - Sustain rate lowest since 1997 (variable, 2018 was near highest sustain rate)
    - ASBCA (2019): 154 cases heard on the merits. 47.7% sustain rate. 352 cases dismissed (primarily due to settlement).





# Alternative Dispute Resolution Options

- ADR at BCAs
  - Pre-appeal mediation
  - Traditional mediation
    - ASBCA (2019): 76 cases elected mediation, 68 settled
  - Summary proceeding with binding decision
  
- ADR at COFC
  - Traditional mediation – Court of Federal Claims Judge
  - DOJ hesitant to engage in mediation before discovery concludes





# Contractor Performance Assessment Rating System (CPARS)

- Submit comments in accordance with FAR 42.15
- If comments process unsuccessful, contractors may challenge negative past performance evaluations
  - Must first submit claim to the Contracting Officer
  - If denied, may appeal to the BCAs or COFC
  - Boards and court can issue declaratory judgment that government acted improperly, but cannot direct government to change evaluation
  - Declaratory judgment can be used to explain away negative past performance evaluation





# Questions?



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# Federal Affirmative Action and Equal Employment Opportunity Requirements

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# Introduction

- **Overview of Topics To Be Covered**
  - Annual Requirements for Federal Contractors
    - EEO-1 FORM Filing Requirements
    - Recent Developments & Issues
    - Affirmative Action Plans and Office of Federal Contractor Compliance (OFCCP)
    - Update/Recent Developments & Issues





# EEO-1 Form Filing Requirements

- History/Purpose of the EEO-1
- Component 1/Component 2
- Penalties for Non-Compliance





# EEO-1 Form History

- Employers are required to: Make, keep and preserve records “relevant to the determination of whether unlawful employment practices have been or are being committed,” and to produce reports as mandated by the Equal Employment Opportunity Commission (EEOC).
  - Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-8(c)(1)-(3) (Title VII) and Title 29 CFR 1602.7
- EEO-1 required since 1966





# Use of EEO-1 Component 1 Data

- The data is used by:
  - EEOC
    - To support civil rights enforcement
    - To analyze employment patterns, such as the representation of female and minority workers within companies, industries or regions
    - To determine areas where there are patterns and practices of discrimination
  - The OFCCP to select companies for compliance reviews of their affirmative action plans
    - EEO-1 data shows OFCCP who is a federal contractor and how many facilities that can be audited
    - EEO-1 data may show likelihood of systemic discrimination





# Covered Employers

- All private employers subject to Title VII with 100 or more employees, but not including state and local governments, primary and secondary school systems, higher education institutions, Indian tribes and tax exempt private membership clubs other than labor organizations
- All private employers subject to Title VII who have fewer than 100 employees if the company at issue is owned or affiliated with another company, or there is centralized control or management (such as central control of personnel policies and labor relations) so that the group legally falls into a single enterprise, and the entire enterprise employs 100 or more employees
  - Parent/subsidiary
  - “Single Entity” test





# Covered Employers (Cont'd)

- “Single Entity” test
  - Common ownership between the companies
  - Common directors and/or officers
  - Parent has de facto control over the subsidiary
  - Unity of personnel policies
  - Dependency of operations
- All federal contractors that have 50 or more employees and are prime contractors or first-tier subcontractors, and have a contract, subcontract or purchase order amounting to \$50,000 or more
  - Contract means any government contract or federally assisted construction contract
- Serve as a depository of federal government funds in any amount
- Is a financial institution that is an issuing/payment agent for U.S. savings bonds/notes





# EEO-1 Component 1

- Component 1 requests employee data as to gender in five race/ethnicity categories and 10 basic job groups
  - Job groups are used to group jobs that require similar skills, promotional opportunities and wages
- Covered employers must report all full- and part-time employees who are on the payroll during the selected “Workforce Snapshot period”
  - Employers are required to select a payroll period between October and December of the prior calendar year as the “Workforce Snapshot Period” by the end of March 31
    - In 2019 this period was extended to May 31 due to the government shutdown
    - In 2020 this period was extended to the spring of 2021 due to the COVID-19 pandemic





# Data Collected for EEO-1

- Include all full and part-time employees
  - Employed during the selected payroll period
  - Working in establishments in the 50 states and D.C.
    - Telecommuters should be included in the facility where they report
- Except do NOT include:
  - Employees hired on a casual basis or for a specified time
  - Temporary employees hired through an employment agency
  - Foreign based employees such as U.S. protectorates or overseas





# Collecting Data for the EEO-1

- Voluntary self-identification is the preferred method of collection
- If an employee fails to self identify, employer can visually identify race and ethnicity
- All employees must be reported. No unknowns or others
- Employers can use sample self-identification forms published on the EEOC website or create their own





**Equal Employment Advisory Council  
Revised Alternative "Suggested Employee Questionnaire"  
for Self-Identification of Race/Ethnicity**

**INSTRUCTIONS**

PLEASE READ ALL INSTRUCTIONS CAREFULLY BEFORE COMPLETING THIS FORM

**Anti-Discrimination Notice.** It is an unlawful employment practice for an employer to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to that individual's terms and conditions of employment, because of such individual's race, color, religion, sex, or national origin.

This employer is subject to certain nondiscrimination and affirmative action recordkeeping and reporting requirements which require the employer to invite employees to voluntarily self-identify their race/ethnicity. Submission of this information is voluntary and refusal to provide it will not subject you to any adverse treatment. The information obtained will be kept confidential and may only be used in accordance with the provisions of applicable federal laws, executive orders, and regulations, including those which require the information to be summarized and reported to the Federal Government for civil rights enforcement purposes.

If you choose not to self-identify your race/ethnicity at this time, the federal government requires this employer to determine this information by visual survey and/or other available information.

For civil rights monitoring and enforcement purposes only, all race/ethnicity information will be collected and reported in the seven categories identified below. The definitions for each category have been established by the federal government. If you choose to voluntarily self-identify, you may mark only one of the boxes presented below.

**INVITATION TO SELF-IDENTIFY**

PLEASE ANSWER THE FOLLOWING QUESTION

What is your race/ethnicity? Please mark the **one box** that describes the race/ethnicity category with which you primarily identify.

- Hispanic or Latino:** a person of Cuban, Mexican, Chicano, Puerto Rican, South or Central American, or other Spanish culture or origin, regardless of race.
- White:** a person having origins in any of the original peoples of Europe, the Middle East, or North Africa.
- Black or African American:** a person having origins in any of the black racial groups of Africa.
- Asian:** a person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam.
- Native Hawaiian or Other Pacific Islander:** a person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands.
- American Indian or Alaska Native:** a person having origins in any of the original peoples of North and South America (including Central America), and who maintains tribal affiliation or community attachment.
- Two or More Races:** a person who primarily identifies with two or more of the above race/ethnicity categories.

DISCUSSION DRAFT ONLY

**Applicant Affirmative Action Program  
Self Identification Form**

**Required Information**

**Name:** \_\_\_\_\_ **Date of Application:** \_\_\_\_\_

**Position(s) for which you are applying:** \_\_\_\_\_

**Voluntary Information**

NEMA is a government contractor and to comply with the regulations for equal employment opportunity and affirmative action (EEO/AA), we must track our applicants by gender and race/ethnicity and the position they applied for to the government. We are an organization that values diversity and encourages women and minorities to apply. For this reason, we invite you to indicate your gender and race/ethnicity below. This information is kept separate from your application.

Submission of this information is voluntary and refusal to provide it will not subject you to any adverse treatment. Responses will remain confidential within the Human Resources Department; and will be used only for the necessary information to include in our Affirmative Action Program and reporting requirements to the government. When reported, data will not identify any specific individuals.

**Gender:**  Male  Female

**Definitions of race/ethnicity are on the next page (as defined by the Equal Employment Opportunity Commission).**

**Race/Ethnic Identification (check one):**

**Are you Hispanic or Latino?**  Yes  No

**If you answered "Yes" you have completed this form. If you answered "No" please select a race from the options below.**

- White (Not Hispanic or Latino)**
- Black or African American (Not Hispanic or Latino)**
- Native Hawaiian or Other Pacific Islander (Not Hispanic or Latino)**
- Asian (Not Hispanic or Latino)**
- American Indian or Alaska Native (Not Hispanic or Latino)**
- Two or More Races (Not Hispanic or Latino)**
- I do not wish to disclose.**



# EEO-1 Job Group Categories

- Executive/Sr. Level Officials
- First/Mid-Level Officials and Managers
- Professionals
- Technicians
- Sales Workers
- Administrative Support Workers
- Craft Workers
- Operatives
- Laborers & Helpers
- Service Workers
- See EEO-1 Job Classification Guide and/or definitions in EEO-1 Instruction booklet, which describes job duties, responsibilities and education/experiences levels.





# Completing EEO-1 Component 1

- Register the company online at <http://www.eeoc.gov/eeo1survey>
- First-time users will be provided with a login and password
- Web-based, no software to download or install
- Data should be sent in via EEO-1 Online Filing System as an electronically transmitted data file in ASCII/Text or CSV/XML format
- No paper filings
- Returning filers: Information pre-filled from prior year
- Up to 10 years worth of EEO-1 data available





Joint Reporting Committee

- Equal Employment Opportunity Commission
- Office of Federal Contract Compliance Programs (Labor)

## EQUAL EMPLOYMENT OPPORTUNITY

### EMPLOYER INFORMATION REPORT EEO-1

Standard Form 100  
REV. 01/2008

D.M.S.No. 3008-0017  
FORM APPROVAL: www.eplinfo.gov/public/eeo/eeo100  
240-214

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**Section A—TYPE OF REPORT**  
Refer to instructions for number and type of reports to be filed.

1. Indicate by marking in the appropriate box the type of reporting unit for which this copy of the form is submitted (MARK ONLY ONE BOX).

<p>(1) <input type="checkbox"/> Single-establishment Employer Report</p>	<p>(2) <input checked="" type="checkbox"/> Consolidated Report (Required)</p> <p>(3) <input checked="" type="checkbox"/> Headquarters Unit Report (Required)</p> <p>(4) <input type="checkbox"/> Individual Establishment Report (submit one for each establishment with 50 or more employees)</p> <p>(5) <input checked="" type="checkbox"/> Special Report</p>
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2. Total number of reports being filed by this Company (Answer on Consolidated Report only) \_\_\_\_\_

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**Section B—COMPANY IDENTIFICATION** (To be answered by all employers)

	OFFICE USE ONLY
<b>1. Parent Company</b>	
a. Name of parent company (owns or controls establishment in item 2) omit if same as label	a.
Address (Number and street)	b.
City or town	c.
State	d.
ZIP code	e.
<b>2. Establishment for which this report is filed.</b> (Omit if same as label)	
a. Name of establishment	d.
Address (Number and street)	e.
City or Town	f.
County	
State	
ZIP code	
b. Employer identification No. (IRS 9-DIGIT TAX NUMBER)	
c. Was an EEO-1 report filed for this establishment last year? <input type="checkbox"/> Yes <input type="checkbox"/> No	

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**Section C—EMPLOYERS WHO ARE REQUIRED TO FILE** (To be answered by all employers)

<p><input type="checkbox"/> Yes <input type="checkbox"/> No</p>	<p>1. Does the entire company have at least 100 employees in the payroll period for which you are reporting?</p>
<p><input type="checkbox"/> Yes <input type="checkbox"/> No</p>	<p>2. Is your company affiliated through common ownership and/or centralized management with other entities in an enterprise with a total employment of 100 or more?</p>
<p><input type="checkbox"/> Yes <input type="checkbox"/> No</p>	<p>3. Does the company or any of its establishments (a) have 50 or more employees AND (b) is not exempt as provided by 41 CFR 80-1.5, AND either (1) is a prime government contractor or first-tier subcontractor, and has a contract, subcontract, or purchase order amounting to \$50,000 or more, or (2) serves as a depository of Government funds in any amount or is a financial institution which is an issuing and paying agent for U.S. Savings Bonds and Savings Notes?</p> <p>If the response to question C-3 is yes, please enter your Dun and Bradstreet identification number (if you have one): _____</p>

NOTE: If the answer is yes to questions 1, 2, or 3, complete the entire form, otherwise skip to Section G.



**Section D-EMPLOYMENT DATA**

Employment at this establishment - Report all permanent full- and part-time employees including apprentices and on-the-job trainees unless specifically excluded as set forth in the instructions. Enter the appropriate figures on all lines and in all columns. Blank spaces will be considered as zeros.

Job Categories	Number of Employees (Report employees in only one category)															Total Col A - M
	Race/Ethnicity															
	Hispanic or Latino		Not-Hispanic or Latino													
	Male	Female	Male					Female								
White			Black or African American	Native Hawaiian or Other Pacific Islander	Asian	American Indian or Alaska Native	Two or more races	White	Black or African American	Native Hawaiian or Other Pacific Islander	Asian	American Indian or Alaska Native	Two or more races			
	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	
Executive/Senior Level Officials and Managers 1.1																
First/Mid-Level Officials and Managers 1.2																
Professionals 2																
Technicians 3																
Sales Workers 4																
Administrative Support Workers 5																
Craft Workers 6																
Operatives 7																
Laborers and Helpers 8																
Service Workers 9																
<b>TOTAL 10</b>																
<b>PREVIOUS YEAR TOTAL 11</b>																

1. Date(s) of payroll period used: \_\_\_\_\_ (Omit on the Consolidated Report.)

**Section E - ESTABLISHMENT INFORMATION (Omit on the Consolidated Report)**

1. What is the major activity of this establishment? (Be specific, i.e., manufacturing steel castings, retail grocer, wholesale plumbing supplies, title insurance, etc. Include the specific type of product or type of service provided, as well as the principal business or industrial activity.)

**Section F - REMARKS**

Use this item to give any identification data appearing on the last EEO-1 report which differs from that given above, explain major changes in composition of reporting units and other pertinent information.

**Section G - CERTIFICATION**

Check 1  All reports are accurate and were prepared in accordance with the instructions. (Check on Consolidated Report only)  
 one 2  This report is accurate and was prepared in accordance with the instructions.

Name of Certifying Official	Title	Signature	Date
Name of person to contact regarding this report	Title	Address (Number and Street)	
City and State	Zip Code	Telephone No. (including Area Code and Extension)	Email Address



# Completing EEO-1 Component 1 (Cont'd)

- Different forms depending on the number/type of facilities
  - Type 1-8
- Section A: Seeks the number of facilities
  - Single (Type 1) or
  - Multi-establishment employer (more than 1 facility)
- An establishment is an economic unit that produces goods or services, such as a factory, office, store or mine
- Units that are different physical locations, even though engaged in the same kind of business operation, must be reported separate establishments
  - However, some dispersed industrial activities (construction, transportation, gas/oil fields etc.) can be listed at the main location they report to or are based





# Completing EEO-1 Component 1 (Cont'd)

- A **multi-establishment** employer (if more than 1 facility) must file:
  - A report covering the principal or headquarters office (Type 3)
  - A separate report for each establishment employing 50 or more persons other than the HQ report (“Establishment Report – Type 4)





# Completing EEO-1 Component 1 (Cont'd)

- Either:
  - A separate report (Type 8) for each establishment employing fewer than 50 employees; OR
  - An Establishment List (Type 6) showing the name, address and total employment for each establishment employing fewer than 50 persons; and
- A Consolidated report (Type 2) which includes all employees from all facilities.
  - For companies that use Type 8 reports, all data will automatically transfer to populate the Consolidated Report.
  - For companies using the Establishment List reports (Type 6), they must enter all employment data into the Consolidated (Type 2) report. (manual adjustment)





# Completing EEO-1 Component 1 (Cont'd)

- TIP – The total number of employees indicated on the HQ report and the Establishment reports and list of establishments with fewer than 50 employees must equal the total number of employees on the Consolidated reports.





# Completing EEO-1 Component 1 (Cont'd)

- **Section B: Company Identification**

- Name/address of the parent company
  - Parent company refers to any corporation which owns all or the majority of the stock of another corporation so that the latter relates to it as a subsidiary
- IRS - Employer Identification Number; and
- Whether EEO-1 data was filed the previous year





# Completing Section C: Employers Required to File

- Does the entire company have at least 100 employees in the payroll period for which you are reporting?
- Is your company affiliated through common ownership and/or centralized management with other entities in an enterprise with a total of employment of 100 or more?
- Does the company meet the definition of a federal contractor?
- If yes to any of the foregoing questions, then add Dun and Bradstreet identification number and have to complete rest of sections





# Completing EEO-1 Component 1 (Cont'd)

- **Section D:** Employment Data
  - Employees broken into job categories, race/ethnicity and gender
  - Payroll period dates
- **Section E:** Establishment information – Type of business activity (for greatest number of employees)
- **Section F:** Remarks
  - Explain any identification data that differs from prior report; any major changes in composition of units; and other pertinent information
- **Section G:** Certification





# Gender: Reporting Non-Binary Employees

- Non-binary employees may be added in the comment box on the Certification Page – Section F
- Preface this data with the phrase “Additional Employee Data:”
- Examples:
  - Additional Employee Data: 1 non-binary gender employee working 2,040 hours in Job Category 4, Salary Pay Band 5, Race/ethnicity non-Hispanic White.
  - Additional Employee Data: 3 non-binary gender employees; combined work hours 5,775; in Job Category 5, Salary Pay Band 8; Race/ethnicity: Employee 1 – Non-Hispanic Black, Employee 2 – Hispanic, Employee 3 – Two or more races.





# EEO-1 Component II: Pay Data Collection

- In September 2016, pay data collection announced through the EEO-1 Component 2 form commencing with the 2017 reporting cycle and that it had to be filed by March 31, 2018.
- Pay data to be used
  - To improve EEOC investigations of possible pay discrimination
  - To develop policies aimed at closing the gender and race wage gaps
- EEOC decided not to collect this data as of September 11, 2019.





# Penalties For False Statements

- The making of willfully false statements on Report EEO-1 is a violation of the U.S. Code, Title 18, section 1001, and is punishable by fine or imprisonment as set forth therein. 29 CFR §1602.
  - This includes filing incomplete information





# Penalties for Failure to File

- For federal contractors, the OFCCP during an audit will ask for copies of the filed EEO-1s
  - The OFCCP will compare the number of employees on the EEO-1 versus the number of employees on the AAP snapshot date. If there are significant differences, be prepared to justify
- Penalties for federal contractors only:
  - The OFCCP can cancel, terminate or suspend all or a portion of any federal contract
  - Contractors may be temporarily or permanently debarred





# Penalties for Failure to File (Cont'd)

- **For all employers:**
  - Court order compelling the employer to file. 29 C.F.R. § 1602.9
  - *E.E.O.C. v. Menard, Inc.*, 2005 WL 1266458 (W.D. Wis. May 26, 2005)
  - *E.E.O.C. v. VIP Home Nursing & Rehabilitation Service, LLC*, 2016 WL 1644068 (M.D. Tenn. April 26, 2016)
    - The EEOC did not request an order compelling the defendant to file, only declaratory relief
- Problem: Once the deadline closes, there is no way to file electronically





# AAP and OFCCP Update

- AAP Overview
- Three general sources of law:
  - Executive Order 11246, as amended, (EO 11246)
  - Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §793, (Section 503)
  - Vietnam Era Veterans Readjustment Assistance Act of 1974, as amended, 38 U.S.C. §4212 (VEVRAA) a.k.a. Jobs for Veterans Act
- Purpose of all 3 laws is to eliminate discrimination and to encourage employment and advancement of protected groups in the workplace.





# AAP Source of Law: E.O. 11246

E.O. 11246 and its implementing regulations, see *41 CFR Parts 60-1 through 60-40*

- Prohibits discrimination on basis of race, color, national origin, religion and gender
- Requires equal employment opportunity for all terms and conditions of employment:
  - Recruitment, hiring, compensation, promotion, training, etc.
- Requires affirmative action to employ and advance in employment minorities and women
- Requires covered contractors to produce an AAP
- Note, E.O. 11246 amended by Executive Order 11478 to include sexual orientation and gender identity





# AAP Source of Law: Section 503

Section 503 and its implementing regulations, see 41 CFR Part 60-741

- Prohibits discrimination on the basis of an individual's disability
- Requires equal employment opportunity for all terms and conditions of employment:
  - Recruitment, hiring, compensation, promotion, training, etc.
- Requires affirmative action to employ and advance in employment qualified persons with disabilities
- Requires covered contractors to prepare an AAP
  - AAP requirements are different from E.O. 11246





# AAP Source of Law: VEVRAA

VEVRAA, and its implementing regulations, *see 41 CFR Part 60-300 (contracts entered on or modified after December 1, 2003)*

- Prohibits discrimination on the basis of protected veteran status
  - Protected veterans are: disabled veterans, recently separated veterans, active duty wartime or campaign badge veterans or Armed Forces Service medal veterans
- Requires equal employment opportunity for all terms and conditions of employment
- Requires covered contractors to prepare an AAP
  - Recruitment, hiring, compensation, promotion, training, etc.
- AAP requirements are different from E.O. 11246





# When Are Organizations Required to Have an AAP?

- Must have a “government contract” or “subcontract,” as defined in OFCCP’s regulations, not a grant
- See 41 CFR 60-1.3 (EO 11246); 60-250.2, 60-300.2 (VEVRAA); & 60-741.2 (Section 503)
- Must be a “government contract” with a “contracting agency”, as defined in OFCCP’s regulations
- Government contract or subcontract must meet minimum dollar thresholds under OFCCP’s laws. (Can’t aggregate except for indefinite contracts & purchase orders.)
- Government contract or subcontract must be current during the period of OFCCP review or when the alleged discrimination occurred (where it involves a complaint investigation). See, OFCCP v. Priester Construction Co., 1983 WL 411026 (Secretary Decision & Order, 78-OFC-11, Feb. 23, 1983)





# When Are Organizations Required to Have an AAP? (Cont'd)

- A “government contract” is defined as:
  - Any agreement or modification thereof between any contracting agency and any person for the purchase, sale or use of personal property or nonpersonal services. The term “personal property,” includes supplies, and contracts for the use of real property (such as lease arrangements), unless the contract for the use of real property itself constitutes real property (such as easements). The term “nonpersonal services” includes, but is not limited to, the following services: Utilities, construction, transportation, research, insurance, and fund depository.





# When Are Organizations Required to Have an AAP? (Cont'd)

- The term “government contract” does not include:
  - Agreements in which the parties stand in the relationship of employer and employee
  - Federally assisted construction contracts
- The term “contracting agency” is defined as any department, agency, establishment or instrumentality in the executive branch of the U.S. government, including any wholly owned government corporation which enters into contracts.





# When Are Organizations Required to Have an AAP? (Cont'd)

- Under Executive Order 11246, nonconstruction (supply and service) contractors and subcontractors are required to develop and maintain a written affirmative action program (AAP) for each of its establishments, if:
  - The contractor has 50 or more total employees (not per establishment) AND
  - Has a contract of \$50,000 or more or;
    - For EO 11246 and Section 503
    - \$150,000 for VEVRAA
  - Has government bills of lading which in any 12-month period can reasonably be expected to total \$50,000 or more; or
  - Serves as a depository of federal funds in any amount; or
  - Is a financial institution that is an issuing and paying agent for U.S. savings bonds and savings notes in any amount





# When Are Organizations Required to Have an AAP? (Cont'd)

- A subcontractor must prepare an AAP if it holds a covered “subcontract.”
  - Note, can’t contract away coverage
- A “subcontract” is: *Any agreement or arrangement between a federal contractor and any person, not in an employer/employee relationship:*
  - For the purchase, sale or use of personal property or non-personal services which, in whole or in part, is necessary to the performance of a contract, or
  - Under which any portion of the federal contractor’s obligation under the contract is performed, undertaken or assumed. 41 CFR 60-1.3.





# When Are Organizations Required to Have an AAP? (Cont'd)

- Key Questions:
  - Does the contract between the prime contractor and the second company require the second company to provide any of the actual products or services that the prime agreed to provide to the government?
  - Both the prime contractor and the subcontractor must satisfy the \$10,000 contract amount requirement for EEO clause compliance (41 C.F.R. § 60-1.5(a)(1)) and the 50-employee and \$50,000 contract amount requirement for AAP coverage. (41 C.F.R. § 60-2.1(b)).





# When Are Organizations Required to Have an AAP? (Cont'd)

- Once it has been determined that a business or organization has a federal contract, then all parts of that same business or organization (*i.e.*, divisions, branches, establishments or facilities) are required to comply with OFCCP's laws, regardless of whether the particular facility scheduled has the federal contract.
  - See Board of Governors of Univ. of N. Carolina v. DOL, 917 F.2d 812, 813 (4<sup>th</sup> Cir. 1990); Trinity Industries v. Herman, 173 F.3d 527 (4th Cir. 1999)
  - See OFCCP's FAQ "For Employers"





# When Are Organizations Required to Have an AAP? (Cont'd)

- OFCCP coverage can extend to businesses or organizations that do not directly hold a federal contract or subcontract, provided they are considered a “single entity” with a separately incorporated related business or organization that holds such a contract (e.g., parent-subsidary corporate relationship).
  - Traditional labor law “single employer” test
  - See OFCCP v. MBNA, 1999-OFC-2, ALJ Order (Sept. 7, 1999)





# When Are Organizations Required to Have an AAP? (Cont'd)

- Single Entity – Five-Factor Test  
*Ernst-Theodor Arndt*, 52 Comp. Gen. 145 (1972)
  - Common ownership
  - Common directors and/or officers
  - De facto exercise of control
  - Unity of personnel policies
  - Dependency of operations





# When Are Organizations Required to Have an AAP? (Cont'd)

- A covered contractor or subcontractor must develop an AAP for each facility employing 50 or more employees unless a different AAP framework is approved by the national office or a waiver is obtained. This requirement applies even though particular divisions or facilities of the corporation may not be involved in the performance of a federal contract or subcontract.





# AA/EEO Obligations of Federal Contractors/Subcontractors

- Provide equal employment opportunity and take affirmative action to employ and advance minorities/women/veterans and disabled.
- Develop an AAP and maintain appropriate records
- Display EEO poster and/or notices
- Provide reasonable accommodations for employees and applicants





# AA/EEO Obligations of Federal Contractors/Subcontractors (Cont'd)

- Comply with VEVRAA requirements
  - File Vets 4212 Report
  - Referral of all jobs except executive and top management positions, positions filled within the Company and positions lasting three days or less to the state employment agency.
- Permit OFCCP access during compliance reviews
- File an annual EEO-1 Report





# AA/EEO Obligations of Federal Contractors/Subcontractors (Cont'd)

- Annual basis must analyze workforce and hiring/promotion/termination and compensation decisions to determine whether contractor is engaging in discriminatory practices
  - Two separate statistical measures used:
    - Utilization/Availability analysis
    - Impact Ratio Analysis
  - Compensation is also analyzed to determine whether pay decisions are discriminatory





# AA/EEO Obligations of Federal Contractors/Subcontractors (Cont'd)

- Utilization/Availability analysis for E.O. 11246
  - To determine utilization must analyze race, ethnicity and gender of existing workforce by job title and job group
  - Compare minorities v. non-minorities and males v. females
  - To determine availability examine geographic area from which you recruit, using census data, and pool that employer promotes from
  - If utilization is 80% or less of availability, must establish goals to correct disparity and engage in good faith outreach and recruitment efforts to achieve same.
- Goals are not quotas





# AA/EEO Obligations of Federal Contractors/Subcontractors (Cont'd)

- How should contractors count employees who do not identify as binary gender:
  - Contractors are required to invite all applicants and employees to voluntarily self-identify their gender (as well as their race and ethnicity). OFCCP has not mandated a particular method for a contractor to obtain information about a person's gender. If an employee or applicant chooses to self-identify as non-binary, or as a gender other than male or female, the contractor must still include the individual in its AAP submission. However, the contractor may exclude that individual's data from the gender-based analyses required by OFCCP's regulations. OFCCP's FAQs specify that a contractor may not ask applicants or employees for documentation to prove their gender identity or transgender status.





# AA/EEO Obligations of Federal Contractors/Subcontractors (Cont'd)

- Utilization/availability analysis for disability and protected veteran status
  - To determine utilization must analyze disability and protected veteran status of existing workforce by job title and job group
  - Determination of underutilization is based on
    - 7% goal for individuals with disabilities established by OFCCP
    - 5.7% benchmark for protected veterans established periodically by OFCCP





# AA/EEO Obligations of Federal Contractors/Subcontractors (Cont'd)

- Impact Ratio analysis – used to analyze whether hiring, promotional and termination decisions are having a disparate adverse impact on minorities and women
- Adverse impact exists if the IRA finds that a contractor's hiring/firing/promotional decisions are more than two standard deviations (SD) from the expected outcome
- 66% of all outcomes fall with one SD and 95% of all outcomes fall with two SDs of the average
- If an outcome is more than two SDs from the expected outcome, the courts deem this statistically significant and sufficient to demonstrate a prima facie case that the employer is engaging in discriminatory activities





# AA/EEO Obligations of Federal Contractors/Subcontractors (Cont'd)

## Additional AAP Requirements

- Designation of Individual Responsible for Implementation (60-2.17(a))
- Identification of Problem Areas (60-2.17(b))
- Action-Oriented Programs (60-2.17(c))
- Outreach and Recruitment
- Periodic Internal Audits (60-2.17(d))
- Contractors must maintain and make available documentation of their compliance with 41 CFR 60-2.11 to 2.17





# OFCCP Audits of AAPs

- OFCCP has right to investigate a contractor or audit contractor's AAP
  - Investigations generated by the filing of a discrimination complaint with OFCCP
  - Compliance Evaluations randomly scheduled
  - Compliance Review (3 stages – desk audit, on-site review and, if necessary, off-site analysis)
- 2019 – OFCCP began conducting focused reviews under Section 503 and VEVRAA





# Section 503 Focused Review

- In a Section 503 focused review, a compliance officer will review policies and practices of a contractor related solely to Section 503 compliance. The review will include interviews with managers responsible for equal employment opportunity and Section 503 compliance as well as employees affected by those policies. OFCCP would also seek to evaluate hiring and compensation data, as well as the handling of accommodation requests, to ensure that individuals with disabilities are not being discriminated against in employment.





# Section 503 Focused Review (Cont'd)

## The Scheduling Letter:

- A copy of your current Executive Order 11246 Affirmative Action Program (AAP) prepared in accordance with the requirements of 41 CFR §§ 60-1.40 and 60-2.1 through 60-2.17
- A copy of your current Section 503 AAP prepared in accordance with the requirements of 41 CFR §§ 60-741.40 through 60-741.47
- Results of the evaluation of the effectiveness of outreach and recruitment efforts that were intended to identify and recruit qualified individuals with disabilities as described in 41 CFR § 60-741.44(f)
- Documentation of the computations or comparisons described in 41 CFR § 60-741.44(k) for the immediately preceding AAP year and, if you are six months or more into your current AAP year when you receive this letter, provide the information for at least the first six months of the current AAP year





# Section 503 Focused Review (Cont'd)

- The utilization analysis evaluating the representation of individuals with disabilities in each job group, or, if appropriate, evaluating the representation of individuals with disabilities in the workforce as a whole, as provided in 41 CFR § 60-741.45. If you are six months or more into your current AAP year on the date you receive this letter, please also submit information that reflects current year progress.
- A copy of your collective bargaining agreement(s), if applicable. Include any other documents you prepared, such as policy statements, employee notices or handbooks, etc. that implement, explain, or elaborate on the provisions of the collective bargaining agreement.
- Copies of reasonable accommodation policies, and documentation of any accommodation requests received and their resolution, if any.
- Your most recent assessment of your personnel processes, as required by 41 CFR § 60-741.44(b), including a description of the review and any actions taken or changes made as a result of the assessment.
- Your most recent assessment of physical and mental qualifications, as required by 41 CFR § 60-741.44(c), including the schedule for the review and any actions taken or changes made as a result of the assessment.





# VEVRAA Focused Review

- In a VEVRAA focused review, a compliance officer will review policies and practices of a contractor related solely to VEVRAA compliance. The review will include interviews with managers responsible for equal employment opportunity and VEVRAA compliance as well as employees affected by those policies. OFCCP would also seek to evaluate hiring and compensation data, as well as the handling of accommodation requests, to ensure that protected veterans are not being discriminated against in employment.





# VEVRAA Focused Review (Cont'd)

## The Scheduling Letter:

- A copy of your current Executive Order 11246 Affirmative Action Program (AAP) prepared in accordance with the requirements of 41 CFR §§ 60-1.40 and 60-2.1 through 60-2.17 [\[1\]](#)
- A copy of your current VEVRAA AAP prepared in accordance with the requirements of 41 CFR §§ 60-300.40 through 60-300.45
- Results of the evaluation of the effectiveness of outreach and recruitment efforts that were intended to identify and recruit qualified protected veterans as described in 41 CFR § 60-300.44(f)
- Documentation of the computations or comparisons described in 41 CFR § 60-300.44(k) for the immediately preceding AAP year and, if you are six months or more into your current AAP year when you receive this letter, provide the information for at least the first six months of the current AAP year
- As required by 41 CFR § 60-300.44(c), including the schedule for the review and any actions taken or changes made as a result of the assessment





# VEVRAA Focused Review (Cont'd)

- Documentation of the hiring benchmark adopted, including the methodology used to establish it if using the five factors described in § 60-300.45(b)(2)
- A copy of your collective bargaining agreement(s), if applicable. Include any other documents you prepared, such as policy statements, employee notices or handbooks, etc. that implement, explain, or elaborate on the provisions of the collective bargaining agreement
- Copies of reasonable accommodation policies, and documentation of any accommodation requests received and their resolution, if any
- Your most recent assessment of your personnel processes, as required by 41 CFR § 60-300.44(b), including a description of the review and any actions taken or changes made as a result of the assessment
- Your most recent assessment of physical and mental qualifications, as required by 41 CFR § 60-300.44(c), including the schedule for the review and any actions taken or changes made as a result of the assessment





# Consequences of Not Being in Compliance

- Resolving Disputes with OFCCP
  - Conciliation Agreements
  - Litigation before federal ALJ, Solicitor General's Office represents OFCCP
  - Subject to DOL final decision
  - Federal court appeal
  - Enforcement/damages, debarment, suspension, injunctive relief
  - Optional court route for enforcement, rarely used





# Recent Developments

- OFCCP issued its Courtesy Scheduling Announcement List on September 11, 2020
  - 2,250 establishments on the audit list.
- On September 22, 2020, Trump Administration Issues Significant Executive Order: “Combating Race and Sex Stereotyping”
  - The Executive Order will impact federal contractors, federal agencies and federal grant recipients in certain key ways including: (1) prohibiting employment training that implicates race or sex stereotyping, “scapegoating” or “divisive concepts” like unconscious bias; (2) implementing new notice and posting requirements; (3) instructing the OFCCP to create a complaint hotline for violations of the order; and (4) instructing the Agency to initiate a process for collecting employee training materials and related information used by contractors relating to diversity and inclusion efforts. While the Order is effective immediately, the key provisions that impact federal contractors will only be applicable to contracts signed after November 22, 2020.




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# **Federal Contract Ethics & Compliance Program Requirements: How to Improve Your Program**

Diana Lyn C. McGraw & Ronni Two

October 6, 2020



# Agenda

- Coronavirus Aid, Relief, and Economic Security (CARES) Act
- The False Claims Act
- The Code of Business Ethics and Conduct
- FAR Flowdown Provisions
- General Recommendations for Federal Contractors





# The CARES Act

- \$2.2 trillion stimulus package – record-breaking, largest stimulus package in U.S. history
- Nearly triple the initial \$830 million cost of the American Recovery and Reinvestment Act of 2009 (ARRA) enacted in response to the Great Recession
- Government spending will, and has always, spurred unprecedented scrutiny of how funds are disbursed, spent and accounted for





# The CARES Act: Key Provisions

- Support hospitals and health care workers (\$150 billion)
- Expand unemployment benefits (receive an additional \$600 per week)
- Checks to individuals (refundable tax credits)
- Aid state and local governments (\$150 billion fund to supplement their budgets and prevent the reduction of essential services)
- Support for small businesses
- Loans to distressed industries, cities and states (\$500 billion available in loans to airlines and other large businesses severely impacted by coronavirus crisis)





# Paycheck Protection Program and Health Care Enhancement Act

- Provides small businesses with funds to pay up to eight weeks of payroll costs including benefits. Funds can also be used to pay interest on mortgages, rent and utilities
- Funds are provided in the form of loans that will be fully forgiven when used for payroll costs, interest on mortgages, rent and utilities – (due to likely high subscription, at least 75% of the forgiven amount must have been used for payroll). Loan payments will also be deferred for six months. No collateral or personal guarantees are required. Neither the government nor lenders will charge small businesses any fees
- Forgiveness is based on the employer maintaining or quickly rehiring employees and maintaining salary levels. Forgiveness will be reduced if full-time headcount declines, or if salaries and wages decrease





# Paycheck Protection Program and Health Care Enhancement Act (Cont'd)

## Summary of PPP Approved Lending

Loan Count	Net Dollars	Lender Count
4,885,388	\$521,483,817,756	5,461

Lender Size	Lender Count	Loan Count	Net Dollars	% of Amount
>\$50 B in Assets	34	1,639,892	\$189,773,791,634	36%
\$10 B to \$50 B in Assets	89	739,912	\$100,724,547,553	19%
<\$10 B in Assets	5,338	2,505,584	\$230,985,478,569	44%

SOURCE: U.S. SMALL BUSINESS ADMIN., PAYCHECK PROTECTION PROGRAM (PPP) REPORT: APPROVALS THROUGH 08/08/2020 2,8 (2020)



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# Paycheck Protection Program and Health Care Enhancement Act (Cont'd)

## Industry by NAICS Sector

NAICS Sector Description	Loan Count	Net Dollars	% of Amount
Health Care and Social Assistance	506,263	\$67,356,500,071	12.92%
Professional, Scientific, and Technical Services	638,221	\$66,430,801,754	12.74%
Construction	466,221	\$64,568,137,994	12.38%
Manufacturing	229,591	\$54,002,922,769	10.36%
Accommodation and Food Services	367,502	\$42,099,336,178	8.07%
Retail Trade	450,181	\$40,355,657,949	7.74%
Other Services (except Public Administration)	531,572	\$31,145,678,051	5.97%
Wholesale Trade	167,237	\$27,726,783,463	5.32%
Administrative and Support and Waste Management and Remediation Services	240,947	\$26,482,972,198	5.08%
Transportation and Warehousing	191,609	\$17,088,399,318	3.28%
Real Estate and Rental and Leasing	245,697	\$15,631,026,225	3.00%

SOURCE: U.S. SMALL BUSINESS ADMIN., PAYCHECK PROTECTION PROGRAM (PPP) REPORT: APPROVALS THROUGH 08/08/2020 2,8 (2020)



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# Funds Distributed Under the CARES Act Will Be Subject to Strict Oversight

## Recent Public Statements by the Department of Justice:

- March 16, 2020: U.S. Attorney General William Barr issued a Memorandum directing all U.S. Attorneys to “prioritize the detection, investigation, and prosecution of all criminal conduct related to the current pandemic.”  
*Source: <https://www.justice.gov/ag/page/file/1258676/download>*
- March 19, 2020: Deputy Attorney General Jeffrey Rosen directed each U.S. Attorney to appoint a Coronavirus Fraud Coordinator to serve as the legal counsel for the federal judicial district on matters relating to the Coronavirus, direct the prosecution of Coronavirus-related crimes and to conduct outreach and awareness activities
- March 20, 2020: Attorney General Barr issued a press release urging the public to report suspected fraud schemes related to COVID-19  
*Source: <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-urges-american-public-report-covid-19-fraud>*





# False Claims Act Recoveries

Some of the largest FCA recoveries occurred after the government stimulated the economy following the financial crisis of 2008:

- More than \$3 billion in settlements and judgments for FY 2019
- More than \$62 billion in recoveries since 1986 with more than \$37 billion occurring in the last 10 years
- More than 600 New Relator (*qui tam*) suits (cases brought by whistleblowers) filed in FY 2019, and recovered over \$2.1 billion from these and earlier filed suits in FY 2019
- More than \$265 million paid to whistleblowers in FY 2019

Source: <https://www.justice.gov/opa/press-release/file/1233201/download>



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# The False Claims Act

1. Civil False Claims Act, 31 U.S.C. 3729 *et seq.*
2. Criminal False Claims Act
  - False Claims - 18 U.S.C. 287
  - False Statements - 18 U.S.C. 1001

Both cover same types of conduct: Civil FCA is government's primary tool, but criminal investigations may be increasing.

Applies when even \$1 of federal money is used to fund the project.  
*U.S. v. Custer Battles*, 562 F.3d 295 (4th Cir. 2009)





# Civil False Claims Act (31 U.S.C. § 3729)

1. **Direct False Claim:** Knowingly submitting a false claim to the government or causing another to do so
2. **False Statement:** Knowingly making, using or causing to be made or used a false record/statement material to payment
3. **Reverse False Claim:** Knowingly concealing or decreasing an obligation to pay money to government
4. **Conspiracy** to commit 1, 2 or 3 above





# Civil False Claims Act (31 U.S.C. § 3729) (Cont'd)

- **Claim** – means any request for money or property
  - Multiple requests = multiple false claims
- **Knowingly** – means a contractor that:
  - Has actual knowledge of falsity
  - Acts in deliberate ignorance of truth/falsity
  - Acts in reckless disregard of truth/falsity
- **Method of presenting to the government is irrelevant**
  - Sufficient that claim reaches government funds





# What You Can't Do

- Submit false invoices/claims
- Conceal rebate or credit
- Double bill
- Illegitimately front load invoices
- Submit inflated material/personnel/equipment costs
- Substitute non-conforming materials
- Conceal defective/non-conforming work
- Submit false certifications – SBA certifications
- Collude on bid/proposal prices
- Conspire with anyone else to do the same





# Civil False Claims Act (31 U.S.C. § 3729)

## Penalties (what happens if you get caught)

- **Civil Penalties**

- Current penalty range (after June 19, 2020): \$11,665 to \$23,331 for each false claim
- Treble damages – 3x the amount of damages sustained by the government
- Costs of litigation
- Forfeit legitimate claims
- Suspension/debarment from federal contracting

- **Criminal Penalties**

- Jail time
- Criminal fines





# Fraud Enforcement and Recovery Act of 2009 Impacts on False Claims Act

FERA was enacted three months after the American Recovery & Reinvestment Act of 2009 and it amended the False Claims Act in three significant ways:

- **Intent and Materiality:** Overturned *Allison Engine*. Liability attaches if a person “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval” or “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim”
- **Presentment:** Liability can attach to a claim presented to a prime contractor so long as the money claimed “is to be spent or used on the government’s behalf or to advance a Government program or interest”
- **Civil Investigative Demands:** Attorney General may delegate authority to issue CIDs. Moreover, the Attorney General may share the information obtained under a CID with any *qui tam* plaintiff if it is determined “necessary” as part of any FCA investigation. The potential for abuse of this power and testimony and documentation obtained through CIDs is enormous





# “Individual Accountability for Corporate Wrongdoing” (the Yates Memo)

The government is committed to holding bad actors responsible for their actions.

Under the guidance of the Memorandum issued by Deputy Attorney General Sally Quillian Yates on September 15, 2015, the U.S. Department of Justice focuses on identifiable culpable individuals in cases of corporate fraud under the FCA.





# Do Companies Make Bad Decisions or Do Individuals Make Bad Decisions?

In 2019, the former CEO of a company paid \$20 million in damages, and his general counsel paid \$225,000:

Luke Hillier, the majority owner and former Chief Executive Officer of Virginia-based defense contractor ADS, Inc., paid \$20 million to settle allegations that he fraudulently obtained federal set-aside contracts reserved for small businesses that his company was ineligible to receive. The government alleged that Hillier caused ADS to falsely represent that it qualified as a small business concern and that, as a result of Hillier's representations, his company was awarded numerous small business set-aside contracts for which it was ineligible.

The government previously resolved related claims against ADS for \$16 million and Charles Salle, the former general counsel of ADS, for \$225,000.

**Source:** DOJ Office of Public Affairs, Former CEO of Virginia-Based Defense Contractor Agrees to Pay \$20 Million to Settle False Claims Act Allegations Related to Fraudulent Procurement of Small Business Contracts (Aug. 20, 2019)



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*“Government business shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct.”*

FAR 3.101-1



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# Big Issues Contractors Should Be Concerned About: FAR 52.203-13

**FAR 52.203-13 Contractor Code of Business Ethics and Conduct:** Within 30 days after contract award, establish a written code of business ethics and conduct (Code) and make it available to each employee engaged in the performance of the contract.

On federal contracts, contractors must:

- Exercise due diligence to prevent and detect criminal conduct
- Promote an organization culture that encourages ethical conduct and commitment to compliance with the law
- Disclose timely in writing any “credible evidence” of violation of criminal law involving fraud, conflict of interest, bribery or gratuity violations and violations of the civil FCA





# Business Ethics Awareness and Compliance Program

If the contractor is a large business, contractor shall establish the following within 90 days:

- An ongoing business ethics awareness and compliance program
- An internal control system

This doesn't apply to contracts for the acquisition of commercial items as defined in FAR 2.101.





# Business Ethics Awareness and Compliance Program (Cont'd)

U.S. Department of Justice, Criminal Division has identified three fundamental questions:

- Is the corporation's compliance program well designed?
- Is the program adequately resourced and empowered to function effectively?
- Does the corporation's compliance program work in practice?

*Source: U.S. Department of Justice, Criminal Division Evaluation of Corporate Compliance Programs (Updated June 2020)*





# Internal Control System

- Assignment of responsibility and adequate resources to ensure effectiveness
- Periodic reviews of company business practices, procedures and policies
- Reasonable efforts not to include an individual as a principal, whom due diligence would have exposed as having engaged in conduct that is in conflict with the contractor's code of business ethics and conduct
- Internal reporting mechanism that allow anonymity or confidentiality and encourages employees to make such reports
- Disciplinary action for improper conduct or for failing to take reasonable steps to prevent and detect improper conduct
- Timely disclosure of “credible evidence”
- Full cooperation with any audits, investigations or corrective actions





# Big Issues Contractors Should Be Concerned About: FAR Flow-Down Provisions

## Additional Obligations Triggered by Federal Funds: FAR Flow-Down Provisions

- Small Business Utilization
- Executive Compensation/FFATA
- Affirmative Action/Diversity/EEO
- Wage and Labor Requirements
- Davis Bacon and Related Acts
- Buy American/Buy America
- Hotline Posters





# FAR 52.219-8 (Utilization of Small Business Concerns)

- Must create and submit to the Contracting Officer, a small business subcontracting plan for any contract or subcontract that is over \$1.5 million
- Must “flow down” requirements to subcontractors and reasonably oversee compliance by lower tiers if contractor is:
  - Large business
  - Subcontract value exceeds \$1.5 million
- Falsely claiming to be a small business or to have a subcontract with a qualified small business can result in FCA violations
- Providing false reporting or information on the size of one’s business or a subcontractor’s business can result in FCA liability





# Small Business Utilization

## Socioeconomic Businesses Covered by FAR 52.219-8 Policy:

- **Small disadvantaged business:** At least 51% owned by one or more socially disadvantaged U.S. citizens those who claim an economic disadvantage must have a net worth not exceeding \$750,000
- **Women-owned small business:** At least 51% owned by one or more women and whose management/daily business operations are controlled by one or more women
- **Service-disabled veteran-owned businesses:** Business with not less than 51% ownership by one or more service disabled veterans and which have management/daily business operations controlled by a service-disabled veteran
- **Veteran-owned small business:** At least 51% owned by one or more veterans with management/daily operations controlled by one or more veterans





# Executive Compensation/FFATA

**FAR 52.204-10, Reporting Executive Compensation and First-Tier Subcontract Awards:** Large contractors must annually report on SAM.gov the names and total compensation of each of its five most highly compensated executives.

- A “large” federal contractor is a contractor who received 80% or more of its revenue from federal contracts and whose annual gross revenue from those contracts is \$25 million or more
- Disclosure of “total compensation” includes cash and noncash values, including: salary and bonus; stock awards, options and rights; earnings for services under non-equity incentive plans; changes in pension value; above market earnings on deferred compensation that is not tax qualified; life insurance payments; and any other forms of compensation





# Executive Compensation/FFATA

Contractors must also report similar subcontractor information for all first-tier subcontracts with a value of \$30,000 or more.

- Or if the subcontractor qualifies as a “large” contractor, meaning it has received over 80% of its annual gross revenue from federal contracts in the preceding fiscal year and its annual gross revenues amount to \$25 million or more

Contractors must be sure that the information reported is accurate. Any false statement or certification can be the basis for a *qui tam* FCA suit. Failure to comply with reporting will also result in a notation on a contractor’s performance information.





# Affirmative Action/Diversity/EEO

**FAR 52.222-26, Equal Opportunity** is included in all federal contracts greater than \$10,000.

- Will even be included in contracts worth less than \$10,000 if the aggregate value of all contracts awarded to a contractor in any 12-month period can reasonably be expected to exceed \$10,000

Prohibits discrimination against potential or current employees on the grounds of race, color, religion, sex, national origin, sexual orientation or gender identity.





# Affirmative Action/Diversity/EEO (Cont'd)

The federal antidiscrimination policy applies to the following employment decisions:

- Recruitment or recruitment advertising
- Hiring
- Determining rates of pay or other compensation
- Promoting
- Demoting
- Layoffs or termination
- Transferring
- Selection for training and other advancement programs

Contractors must also disseminate the equal opportunity policies to employees and job applicants by incorporating it in manuals and posting the information in a conspicuous places available to employees and applicants.





# Affirmative Action/Diversity/EEO (Cont'd)

**FAR 52.222-26(c)(8)** requires contractors to provide a notice of its compliance with federal equal opportunity obligations and file Standard Form 100 (EEO-1) tracking employment data with the Department of Labor on an annual basis.

- **Contracts of \$150,000 or more:** contractors annually report the number of workers who qualify as protected veterans
- **Contract valued at \$50,000 or greater and contractor has more than 50 employees:** maintain employment records with respect to individuals with disabilities
- **Non-construction contractors with 50 or more employees and a contract valued at \$50,000 or more:** maintain records of employment decisions connected to women and minority employees and applicants

Falsification of any of records may serve as the basis for an FCA violation.





# Wage and Labor Requirements

The Davis Bacon Act sets forth prevailing wage and labor requirements covering laborers and mechanics working on federal construction projects.

Prevailing wage provisions are also present in approximately 60 other statutes, which together, are referred to as “Related Acts” to the Davis Bacon Act.





# Wage and Labor Requirements: Davis Bacon and Related Acts

## **All solicitations and contracts for construction over \$2,000 include:**

- FAR 52.222-6, Construction Wage Rate Requirements
- FAR 52.222-7, Withholding of Funds
- FAR 52.222-8, Payrolls and Basic Records
- FAR 52.222-9, Apprentices and Trainees
- FAR 52.222-10, Compliance with Copeland Act Requirements
- FAR 52.222-11, Subcontracts (Labor Standards)
- FAR 52.222-12, Contract Termination-Debarment
- FAR 52.222-13, Compliance with Construction Wage Rate Requirements and Related Regulations
- FAR 52.222-14, Disputes Concerning Labor Standards
- FAR 52.222-15, Certification of Eligibility





# Wage and Labor Requirements: Davis Bacon and Related Acts (Cont'd)

- **FAR 52.222-6, Construction Wage Rate Requirements:** Requires contractors to pay all laborers and mechanics at least weekly and in full, (with Copeland Act permitted payroll deduction exceptions)
- **FAR 52.222-8, Payrolls and Basic Records:** Requires contractors to maintain and submit weekly payrolls and related records for three years for all laborers and mechanics working on a federal construction project
- A breach of any of the FAR 22.407(a) clauses listed above or breach of FAR 52.222-4, Contract Work Hours and Safety Standards-Overtime Compensation, may be punishable by contract termination





# Wage and Labor Requirements: Davis Bacon and Related Acts (Cont'd)

**A recent 2019 FCA settlement** involved a contractor, NAGAN Construction, Inc., submitting monthly reports requesting payment for work that misclassified the wage rate applicable to the laborers on the project.

- NAGAN “regularly submitted false certified payroll reports that misclassified thousands of hours of skilled work as ‘laborer’ work” leading to 20 employees being underpaid
- As part of the settlement agreement in the civil fraud case, NAGAN agreed to pay \$435,000, with \$242,375 going to the current and former workers who were underpaid

**Source:** DOJ Office of Public Affairs, Manhattan U.S. Attorney Announces Settlement With Construction Company For Underpaying Workers And Submitting False Payroll Reports On Two Federally Funded Projects (Aug. 5, 2019)





# Wage and Labor Requirements: Service Contract Labor Standards

- **FAR 52.222-41, Service Contract Labor Standards** is inserted into contracts over \$2,500 that are subject to the Service Contract Labor Standards statute
- Multi-year fixed price, time and materials, or labor-hour service contracts are supplemented with FAR 52.222-43, Fair Labor Standards Act and Service Contract Labor Standards-Price Adjustment (Multi Year and Option Contracts)
- The Service Contract Labor Standards clause imposes substantially the same requirements as set forth in FAR clauses implementing the Davis-Bacon and Related Acts





# Buy American/Buy America

- Buy American Act requires the use of domestic supplies in performing most government contracts (including service contracts that “involve the furnishing of supplies”) FAR § 25.1
- Trade Agreements Act authorizes the use of supplies made in certain foreign countries that have entered into free trade agreements with the U.S. FAR § 25.4
- The Trade Agreements Act can override the Buy American Act
- “Read into” covered contracts
- Must include in FAR flowdown requirements to subcontractors





# Buy American/Buy America (Cont'd)

Requirement to use “domestic construction material”

- “**Construction material**” means anything brought to the site for incorporation into the building/work
- “**Domestic construction material**” means:
  - Unmanufactured material mined or produced in the U.S. or
  - Manufactured material if: (1) the cost of components mined or produced in the U.S. exceeds 50% of the cost of all components and (2) the material is manufactured in the U.S.





# Buy American/Buy America (Cont'd)

This direction to maximize BAA principles and to more heavily scrutinize contractor compliance, coupled with the CARES Act's unprecedented spending, makes it likely that agencies will be especially vigilant of contractor certificates of BAA compliance orders, or sub-awards.

- **April 2017 Executive Order 13788**, “Buy American and Hire American” directed every agency to “scrupulously monitor, enforce, and comply with Buy American Laws ... and minimize the use of waivers.”
- **January 2019 Executive Order 13858**, “Strengthening Buy-American Preferences for Infrastructure Projects” seeks to “maximize the use of” iron, aluminum, steel, cement and other U.S.-manufactured products in “contracts, sub-contracts, purchase orders, or sub-awards that are chargeable against Federal financial assistance awards for infrastructure projects”





# Buy American/Buy America (Cont'd)

New proposed rule issued September 14, 2020 by FAR Council to implement requirements of Executive Order 13881 and prior related EOs. 85 FR 56558.

- Increases domestic content requirements
  - Domestic content requirement for iron and steel end products increased from 50% to 95%
  - All other products, domestic content requirement increased from 50% to 55% of the cost of all components
- Increases price preferences for domestic products and construction materials
  - Price preference for large businesses increased from 6% to 20%
  - Price preference for small business increased from 12% to 30%
- Comment period ends November 13, 2020.





# Trade Agreements Act

The TAA essentially provides that the government may acquire only “U.S.-made or designated country end products.” The act requires contractors to certify that each end product meets the applicable requirements.

- “**End products**” are defined as “those articles, materials and supplies to be acquired for public use.” FAR 25.003
- “**Designated countries**” are Caribbean Basin countries, World Trade Organization Government Procurement Agreement countries, Free Trade Agreement Countries, and certain “least developed” countries as listed in FAR 52.225-5

The TAA essentially requires that end products from designated countries be treated the same as U.S.-made products for government procurement purposes, and prohibits the acquisition of end products from other, non-designated countries.





# Hotline Posters

**FAR 52.203-14, Display of Hotline Posters:** requires contractors and subcontractors to display information on where fraud may be reported safely, examples of which are provided by the Office of Inspector General (OIG):

1. Agency fraud hotline posters
2. Department of Defense (DoD) fraud, waste, and abuse hotline poster
3. Department of Homeland Security posters

Contractors are required to flow this provision down to any subcontracts that exceed \$5.5 million.





# General Recommendations for Federal Contractors

- Review your Code regularly to ensure it is effective
- Provide specific training for supervisors/managers
- Conduct routine audits to determine if there are any gaps in your program
- For mega projects, designate a project-specific ethics and compliance officer
- Ask questions, especially if you have concerns about your contractual obligations, your company's program or how it is implemented





# General Recommendations for Federal Contractors

## Conduct Internal Investigations When Necessary

- May help contractors identify key witnesses and evidence, highlight flaws in the contractor's internal controls and protect documents created during the course of the internal investigation from discovery in the event of litigation
- *In re Kellogg Brown & Root* (D.C. Cir. 2014): documents produced through an organization's internal investigation are privileged, even when "conducted pursuant to company compliance program required by statute or regulation," so long as a significant purpose of the investigation was to obtain or provide legal advice






# Voluntary vs. Mandatory Disclosures

**Mandatory Disclosures:** Must timely disclose “credible evidence” of improper conduct, in writing, to the agency Office of the Inspector General, with a copy to the contracting officer involving:

- Criminal Violations including:
  - Fraud
  - Bribery
  - Gratuities
- Violations of the civil False Claims Act






# Voluntary vs. Mandatory Disclosures (Cont'd)

- **Voluntary Disclosures:** Are encouraged and even rewarded by the DOJ, but not required
- **Updated DOJ Manual:** Contractors under investigation who make “proactive, timely, and voluntary self-disclosure” about misconduct “will receive credit during the resolution of a FCA case”
- **Voluntary Cooperation includes:** Identifying individuals involved in misconduct, disclosing relevant facts, preserving and disclosing relevant documents, disclosing non-privileged information collected during an independent internal investigation, disclosing potential misconduct of third-party entities, admitting liability or accepting some responsibility for wrongdoing, and assisting in the determination and recovery of losses suffered by the government





# Voluntary vs. Mandatory Disclosures (Cont'd)

When determining the **value of voluntary disclosures**, agency attorneys consider the following factors:

- Timeliness and voluntariness of assistance
- Completeness, truthfulness, and reliability of disclosed information
- Nature and extent of contractor assistance
- Significance of the contractor's cooperation to the government. The government will also consider whether a contractor has taken remedial measures in response to an FCA violation

Entities making voluntary disclosures have the opportunity to earn **partial or maximum credit**, which is usually reflected by a reduction in penalties or the damages multiple sought by the government.





# Recommendations for Federal Contractors: Train Personnel Annually

- According to a study performed by Gartner, Inc. last year, “Nearly 60 percent of all misconduct that is observed in the workplace is never reported”
- All employees should have an understanding of the organization’s internal controls and standards of business ethics.
- Annual training ensures the ethics policies and relevant regulations stay fresh in the minds of employees, helping to create a **culture of compliance**

**Source:** *Gartner Says Just 41 Percent of Workplace Misconduct Is Reported*, GARTNER: NEWSROOM (Mar. 12, 2019).



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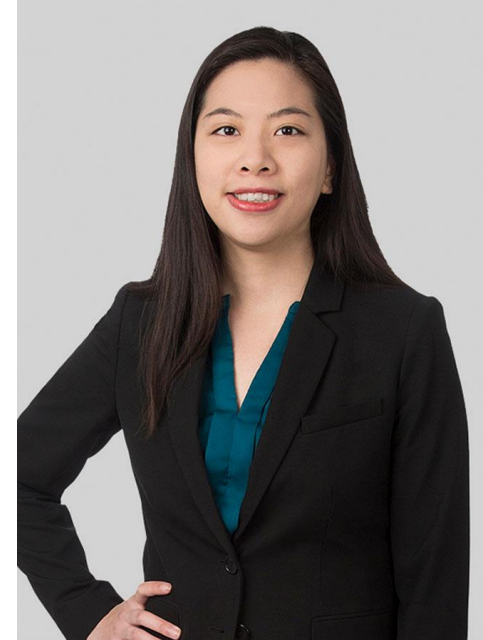
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# **Agency Counsel's Perspective: How to Communicate Effectively and Resolve Disputes With Government Customers**

Erin Masini, Sara Falk, Craig Barrett  
October 6, 2020



# Today's Goals

- Understanding types of disputes government contractors encounter with federal agencies
- Takeaway: Practical strategies for dispute resolution





# General Role of Procurement Agency Counsel

- Provides legal advice and representation in the areas of procurement and fiscal law
- Duties include:
  - Representing the Department in bid protests, contract appeals and disputes, claims
  - Reviewing of pre- and post-award contracting documents and actions for legal sufficiency and compliance with all aspects of contract law, regulations, and decisional precedent
  - Providing substantial legal advice on the full range of contract matters.





# Agency Contracting Personnel

- Contracting Officers (CO)
- Contracting Specialists (CS)
- Contracting Officer Representatives (COR)
- Supervisors
- The Head Contract Authority (HCA)
- Political Appointees





# Day-to-Day Agency Counsel Interactions With Contracting Personnel

- Who is the Agency Counsel's client?
- Overall day-to-day interactions
- Because of their relative scarcity, Agency Counsel tends to get involved in contract matters when:
  - Something goes wrong
  - Something costs a lot of money
  - Something is politically sensitive
  - Contracting personnel are pursuing an unusual or non-standard procurement vehicle





# Agency Counsel Role in Non-Litigation

- Most agency government contracts shops operate on a “cradle-to-grave” or general contracts practitioner model
- Although certain attorneys within a given shop may develop certain area specialties—so-and-so as the go-to construction counsel, another attorney as a major systems acquisition expert—most will have a practice that involves much more than formal dispute resolution





# Agency Counsel Role in Non-Litigation – Discussions Before Formal Issues Arise

- Relationship dependent with Contracting Officer
- Contracting Officer's Final Decisions and other substantive writing
- Depending upon the individual Contracting Officer, informal discussions may be going on without Agency Counsel's knowledge, let alone with their participation
  - **Tip:** Contractors should try to have as best of a relationships as possible with CO (they hold most of the power)
- If informal discussions are not productive, escalation may trigger Agency Counsel's involvement





# Agency Counsel Role in Non-Litigation – Request for Equitable Adjustment

- Requests for Equitable Adjustments (REA) are considered “less” serious than submitting a claim whereas the contractor seeks a written demand for the payment of money due to a change arising from the terms of the contract
- In our experience, Agency Counsel involvement with REAs will likely be similar to their engagement level with certified claims
- It is entirely possible, however, that internal agency guidelines may treat non-certified REAs with less formality than certified claims, and that Agency Counsel involvement may be elective, rather than mandatory





# Agency Counsel Role in Non-Litigation – Claims

- Agency Counsel will almost certainly be involved in the claims process under the Contracts Disputes Act (CDA)
- Agencies may have internal requirements for when Agency Counsel must be involved—any claim above \$100,000, for instance—or they may simply have a blanket requirement for contracting personnel to secure Agency Counsel approval before issuing a Contracting Officer’s Final Decision (COFD)
- Drafting and review of COFDS





# Agency Counsel Role in Non-Litigation – Agency Level Bid Protests

- Agency-level protests are governed by Federal Acquisition Regulation (FAR) 33.103 and applicable agency FAR supplements
- The agency should provide for inexpensive, informal, procedurally simple, and expeditious resolution of these protests (within 35 days)
- Agency Counsel role in reviewing and drafting response
- Who else in the Agency involved?
- **Tip** – Use for clear and simple procurement errors (low-hanging fruit)





# Agency Counsel Role in Litigation – Bid Protests at GAO

- Filing a bid protest at the GAO is a popular choice among contractors.
  - Cost
  - Decision within 100 days
  - Automatic Competition in Contract Act automatic stay (CICA Stay)
- Agency counsel solely handles bid protests at GAO





# Agency Counsel Role in Litigation – Bid Protests at GAO (Cont'd)

- In the majority of cases, Agency Counsel will not be familiar with the contracting issue(s) subject to the protest until the protest is filed
- **Provides a great opportunity for contractors to lay out issues clearly and concisely**





# Agency Counsel Role in Litigation – Bid Protests at GAO (Cont'd)

- Agency counsel reviews the protest:
  - Immediate cause for Motion to Dismiss
  - Merit
  - Litigation risk (corrective action?)
  - Discussions with contracting personnel
  - Discussion with supervisors and potentially political appointees
- **Tip** – As this is most likely the first time Agency Counsel will be apprised of these issues, it is important to clearly and concisely point out all the errors.





# Agency Counsel Role in Litigation – Bid Protests at GAO (Cont'd)

- Draft Agency Report
  - **Tip** - If goal is corrective action, want to get Agency to agree before Agency Report is due (30 days after protest is filed)
- Intervenors
  - **Tip** – Feed arguments to Agency Counsel
- Supplemental Protests – great tool for the protestor to bring forward additional procurement errors to the Agency's attention
- Once GAO reaches a decision, if it is in the protestor's favor, Agency Counsel will be instrumental in advising the agency on how to implement GAO's recommendations





# Agency Counsel Role in Litigation – Bid Protests and Claims at the COFC

- Contractors may also file bid protests and claims at the Court of Federal Claims (COFC)
- Role of DOJ when representing Agency
- DOJ and Agency Counsel interactions/roles
- Agency Counsel as conduit between DOJ and contracting personnel and leadership at the Agency
- Temporary Restraining Order/ Preliminary Injunctions/ Voluntary Stays





# Agency Counsel Role in Litigation – Bid Protests and Claims at the COFC (Cont'd)

- Administrative Record Collection
- Briefing
- Oral Argument
- Settlement?





# Agency Counsel Role in Litigation – Bid Protests and Claims at the COFC (Cont'd)

## TIPS

- Agency Counsel more familiar with facts of the case, especially if it is a protest that was previously litigated at GAO
- Conduit between DOJ and the agency and are a crucial link to contracting officials and decision makers in the Agency in determining if the Agency should take corrective action or settle





# Agency Counsel Role in Litigation – Claims at Contract Boards

- After receiving a Contracting Officer's Final Decision, a claimant may file an appeal to an administrative board of contract appeals
- Similar to protests at GAO, Agency Counsel will handle the case before the respective board
- Full discovery – **Tip:** This provides appellant's counsel multiple opportunities to communicate with Agency Counsel. In order to facilitate amicable resolution of discovery disputes, it is crucial to have a positive relationship with Agency Counsel.





# Agency Counsel Role in Litigation – Claims at Contract Boards (Cont'd)

- As the case progresses and discovery continues, Agency Counsel will be reviewing all the materials and make recommendations to contracting officials on both the strategy of the case and settlement options
- Consequently, because cases at the Board tend to be much more intensive than any other litigation agency procurement counsel may handle, agency counsel may be more willing to try to resolve the case prior to depositions and/or motions for summary judgment are filed





# Agency Counsel Role in Suspension and Debarment

- The suspension and debarment process protects the federal government from fraud, waste and abuse by avoiding doing business with non-responsible contractors. (FAR § 9.4)
- Agency Counsel is heavily involved in the process before a contractor is suspended or debarred
- Agency Counsel role with Suspension and Debarment Official (SDO)





# Agency Counsel Role in Suspension and Debarment (Cont'd)

- Potential interaction between Agency Counsel and Office Inspection General
- Prior to the issuance of a Notice of Suspension or Proposed Notice of Debarment, Agency Counsel should be integrally involved with the decision by the SDO to issue a notice and will also help draft the notice
- After the notice is issued, the contractor will have an opportunity to submit, in person, in writing, or through a representative, information and argument in opposition to the proposed suspension or debarment.

**TAKE ADVANTAGE OF THIS**





# Agency Counsel Role in Suspension and Debarment (Cont'd)

- Agency Counsel will analyze information submitted by the contractor against applicable regulations and discuss with the SDO if the proposed suspension or debarment should move forward
- **Tip:** It is very important that the contractor's submission is clear and concise and raises genuine disputes over facts





# Agency Counsel Role in Suspension and Debarment (Cont'd)

- In actions not based upon a conviction or civil judgment, if it is found that the contractor's submission in opposition raises a genuine dispute over facts material to the proposed suspension or debarment, agencies shall afford the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses and confront any person the agency presents. **TAKE ADVANTAGE OF THIS**





# Agency Counsel Role in Suspension and Debarment (Cont'd)

- Apart from the SDO's final decision, this is the area where Agency Counsel is most involved during the suspension and debarment process
- If the hearing includes questioning of agency witnesses by opposing counsel, Agency Counsel will prepare the witnesses prior and sit with the witnesses during this proceeding





# Agency Counsel Role in Suspension and Debarment (Cont'd)

- Because suspension and debarments are not extremely common, SDOs tend to rely heavily on Agency Counsel to ensure compliance with the law in making their final decision
- **Tip:** While the SDO is the ultimate decision maker, contractors should be cognizant that an attorney will be reviewing all the submitted materials and advising the SDO.





# Conclusion

- Although Agency Counsel are in an adversarial position to contractors, this does not mean they cannot be a useful resource if contractors are having a difficult time gaining traction in their interactions with contracting personnel alone
- While the decision-making authority does not rest with the agency counsel, they do wield a great deal of influence on the final decision
- Contractors should tailor their REAs, claims and protests to the Agency with the mindset that a lawyer will be reviewing it





# Questions?



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