

K&L GATES

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Introduction to Government Procurement

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WHAT IS GOVERNMENT CONTRACTS LAW?



WHAT DO WE DO?

- Government Contracts Counseling
- Government Contracts Compliance
- Bid Protests, dispute resolution, claims, and litigation
- Mandatory disclosures and internal investigations, False Claims Act defense, and White Collar criminal representation
- Due diligence in mergers and acquisitions involving government contractors

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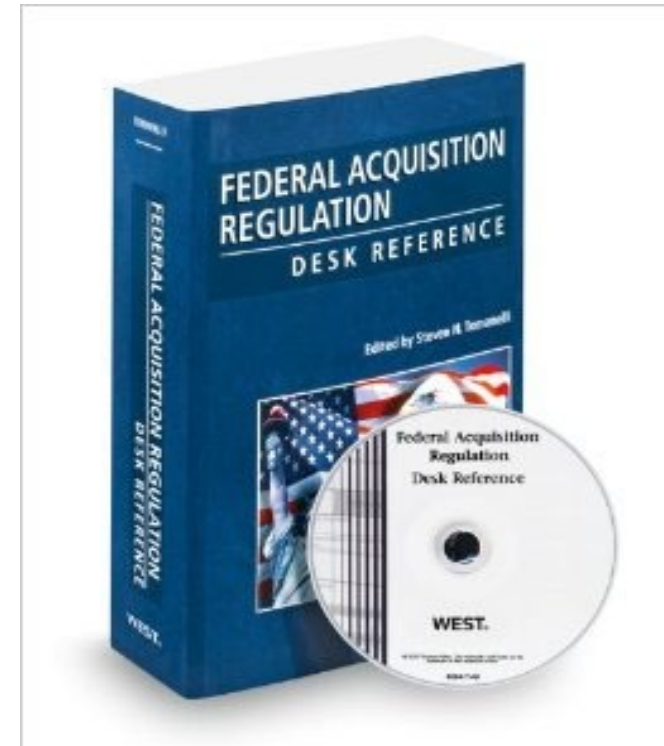
Basics of Government Contracts

WHAT ARE YOU SELLING?

- Commercial products and services
- Non-commercial products and services
- Time and Materials/Labor Hour
- Research and development
- Public Purpose

TYPES OF CONTRACTING INSTRUMENT

- FAR-based contracts subject to the Federal Acquisition Regulation (FAR)
- Non-procurement Agreements
- CRADAs and OTs
- State and Local Contracts



COMMERCIAL PRODUCTS AND SERVICES

- Same or very similar to products and services sold to commercial customers for non-governmental purposes
- Sold to the government under terms and conditions similar to those offered in the commercial marketplace
- Not subject to some of the most onerous government contracting requirements such as “cost accounting standards” or “certified cost or pricing data”
- Generally sold on a fixed-price basis
- Limited audits
- GSA/VA Multiple Award Schedule Contracts

NON-COMMERCIAL PRODUCTS AND SERVICES

- Uniquely government products and services
- Subject to a wide range of FAR clauses
- Cost accounting standards
- Certified cost or pricing data
- Can be fixed-price or cost reimbursement with various incentives
- Generally subject to audits – especially if cost reimbursement or sole source

TIME AND MATERIALS/LABOR HOUR

- Labor Qualifications
- Service Contract Labor Standards
- E-Verify
- Federal Minimum Wage
- Paid Sick Leave

RESEARCH AND DEVELOPMENT

- Use FAR-based contract when principal purpose of R&D is of direct benefit to the government.
- Use grant or cooperative agreement when the principal purpose of the R&D has another public purpose.
- Consider of Other Transaction is appropriate
 - More flexible
 - Not subject to FAR
 - Easier to protect IP rights
- Can be cost reimbursement or fixed-price.

STATE AND LOCAL BID PROTEST

State and Local Bid Protest

Losing the Award

- **To Protest or Not to Protest?**
 - **Every State and Local Government Has Different Procedures**
 - **Speed – Fast Statute of Limitations**
 - **Law or RFP/Bidding Document**
 - **Very Few Exceptions if You Miss the Deadline**
 - **Need to make quick business Decision if You Lose**
 - **Need to have counsel ready to go**
 - **Often Do Not Know Grounds for Protest Before Statute of Limitation Expires**

State and Local Bid Protest

- **Business Factors to Consider**

- How big is the Contract?
- How important is the Contract to my Organization?
- Is my Company the incumbent?

Protest = Profit

Automatic Stay/Injunction

Government/Winner will Stop

- Which Competitor won the Contract?
- Does the government like or have a good relationship with my company?

State and Local Bid Protest

- **File Freedom of Information Act Request Immediately**
 - This should always be done:
 1. Supports protest; and/or
 2. Obtain Competitive Information for future use
- **If the Government provides documents before bid protest deadline, determine if you have a protest and, if meritorious, file**
 - Generally, we can find a mistake in the process
 - Should not argue we are better than the winner

State and Local Bid Protest

- **If the Government does not provide documents, file a place holder protest**
 - **Broad General Language**
 - **Note FOIA but did not receive anything**
 - **Provide any facts that you know or should know**
- **Supplement place holder protest when documents arrive**
- **If the protest is not meritorious can withdraw it**

State and Local Bid Protest

- **Winning the Award and Competitor Protest**
 - **Intervene**
 - **Show the Government You Care**
 - **Team with the Government in Defense**
 - **Protect Your Valuable Asset**
 - **Obtain Documents Provided**
 - **Informally if possible or**
 - **FOIA**

State and Local Bid Protest

Process

- **Exhaust Administrative Remedies**
 - Agency – Hard to Win
 - Appeal to Director
- **Head to Court – Appeal or First Impression**
- **If necessary obtain an injunction to stay in as incumbent**

State and Local Bid Protest

Remedy

- **Rebid (common)**
 - If incumbent, buying more contract time
 - Often can make competitor look bad
- **Win the contract (rare)**
 - Disqualify the Opponent and your company took second place
 - Fraud – Ask Court to Award the Contract

Bid Protests – Federal Contracts

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The Decision: Electing to Protest or Intervene

PROTESTER CONSIDERATIONS

- Business Considerations
 - Contract value
 - Automatic CICA stay (GAO) or preliminary injunction (Court)
 - Incumbent considerations
 - Potential discovery of additional evaluation flaws after production of Agency Report (or Administrative Record in COFC)
 - Relationship with customer
 - Likelihood that agency might take corrective action (faster resolution)
 - Cost to pursue
 - Realistic assessment of achieving a meaningful remedy

PROTESTER CONSIDERATIONS (CONT.)

- Other Methods of Resolution
 - Debriefing
 - Agency level protest
 - Alternative Dispute Resolution
 - Occasionally agency counsel agrees to a pre-protest call or meeting; convincing agency to take immediate corrective action

In-house Counsel Tip: Help arm outside counsel with reasons why Agency should take immediate corrective action; allow counsel to pursue with agency counsel.

In-house Counsel Tip: Manage client expectations; try to educate clients on ultimate objectives (which may go beyond winning this particular procurement).

INTERVENOR CONSIDERATIONS

- Many of the same considerations discussed above.
- Is protester attacking the quality or substance of your proposal?
 - Intervenor is in the best position to respond to these arguments, particularly those involving technical approach, key personnel, or conflicts of interest.
- Is Agency likely to vigorously defend its decision?
 - The contracting agency's interests may not be the same as your company's interests.
 - Depending on the agency, intervenor may be able to provide needed man hours or bid protest experience.

INTERVENOR CONSIDERATIONS (CONT.)

- Even if you see flaws in the procurement, could it benefit your standing to have counsel involved in framing corrective action?
 - Unlikely to have advance notice of the proposed corrective action or have an opportunity weigh in if you haven't intervened in the protest.
- Other potential benefits:
 - Better positioned to protect your proprietary/confidential information
 - Intervention does not require filing comments or otherwise participating in the process. Can intervene solely for purpose of “following along”, and being in a position to influence corrective action, if taken.

In-house Counsel Tip: Intervene as soon as possible; arm outside counsel with technical knowledge, nomenclature, facts of procurement; release outside counsel to try to convince agency to defend (or occasionally, not to defend, but to correct record first).

In-house Counsel Tip: Protester is required to provide CO with redacted copy of protest within one day of filing. Contents will help intervention assessment. If you don't receive one from the CO, request it.

The Protest Process

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Strategies for Compliance

Take Inventory of Contracts & the Law

- Take stock of current government contracts, upcoming opportunities and long-term targets.
 - *Are you in compliance with the terms of your contracts?*
 - *Are you ready to respond to new opportunities in a timely fashion?*
 - *Are you focused on what you need to succeed with respect to long-term targets?*
- Make sure you understand your contract requirements as well as the rules of the road at the federal, bi-state, state and local level for upcoming opportunities.
 - *Are you complying with your current contracts in terms of invoicing, projects updates and staffing?*
 - *Are your registrations current?*
 - *Are you complying with set-aside requirements if applicable?*

Procedures & Protocols

- Establish Procedures and Protocols
- Put the right team in place
- Train (and re-train) the relevant people within the company
- Common themes exist with respect to government contracting, but the law often varies from jurisdiction to jurisdiction:
 - *Rules on communications before, after & during the procurement process?*
 - *Pay-to-Play Restrictions?*
 - *Gift Rules?*
 - *Lobbying?*
 - *Vendor Ethics?*

Common Forms

- Common Procurement Forms:
 - *Ownership Disclosure*
 - *Equal Employment Opportunity/Affirmative Action Compliance*
 - *Non-Collusion Affidavits*
 - *Restrictions on Contracting with Certain Foreign Government Entities*
 - *Subcontracting and Set-Asides*
- Vendor Responsibility Questionnaires:
 - *Who is completing the questionnaire on behalf of the company?*
 - *Does the person, people or department have accurate and up-to-date information?*
 - *Are you being consistent?*
 - *Remember – an issue in one jurisdiction may be reportable in another jurisdiction...*

Putting Your Best Foot Forward

- Government contracting can be an excellent opportunity in terms of experience, revenue and the satisfaction of performing work for the government.
- All government contracts must be awarded in the best interests of the taxpayers (*experience matters but so does pricing & vendor responsibility*).
- All proposals must be truthful, complete and accurate.
- The goal is to win the contract and not end up in a bid protest, but protests happen so the more you can do to make sure your company is putting its best foot forward, the better your likelihood of success!

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Questions?

Biographies



Sheila A. Armstrong

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Sheila Armstrong is a partner in the firm's Dallas office. She is a member of the Government Contracts and Procurement Policy practice group. Sheila represents a broad range of companies on all aspects government contracting from proposal preparation through contract closeout and everything in between. She routinely counsels both prime and subcontractors on a variety of government contracts matters including contract negotiation, foreign sourcing, intellectual property rights in government contracts, audits and government investigations, corporate compliance, internal investigations, mandatory disclosures and False Claims Act (FCA) defense.

Read Sheila A. Armstrong's full biography to learn more.



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Tara Hopkins is an associate in the firm's Washington, D.C. office. She is a member of the Government Contracts and Procurement Policy practice group. Tara provides "cradle to grave" counsel to government contractors of all sizes in the defense, information technology, construction and professional services industries.

Read Tara D. Hopkins' full biography to learn more.

Biographies, *Continued*



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Jason Richey's legal practice is concentrated in the areas of dispute resolution with an emphasis on construction and engineering industry, complex commercial disputes, energy disputes, and state and local bid protests. For almost a quarter century, Jason has focused his energy on winning litigations, arbitrations, and mediations for his clients. During this time, he has worked on local engagements as well as matters in over 35 different states, Asia, Africa, Europe, Australia, and South America representing companies both large and small. The firm has recently engaged Jason to lead our Construction practice group in the Americas.

Above all else, Jason, a former NCAA wrestler, prides himself on his (i) hard work ethic, (ii) ability to provide cost effective legal services to clients no matter how small or large the legal matter, and (iii) overall determination to bring his clients' legal matters to a successful conclusion.

Read Jason L. Richey full biography to learn more.



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Rebecca Moll Freed is a partner in the firm's Newark office and a member of the Government Contracts and Procurement Policy practice. Rebecca's practice is truly at the intersection of law, government and business. In the world of government contracting, Rebecca works hand in hand with clients to help them comply with applicable law by developing workable strategies and best practices for compliance with varying procurement, pay-to-play, lobbying, gift and ethics rules.

Read Rebecca Moll Freed full biography to learn more.