

# GOVERNMENT CONTRACTING BASICS

## IT'S A WHOLE NEW BALLGAME

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## Introduction

- Government procurement spending exceeds \$400 billion annually
- There are tremendous advantages to doing business with the government (*e.g.*, timely payment, standardized procedures)
- However, contracting with the government may also subject the contractor to a number of complicated and costly equal employment opportunity and affirmative action obligations

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## Outline by Topic

- Doing Business with the Government
- Right to Protest and Seek Reimbursement
- Equal Employment Opportunity and Affirmative Action Obligations

## Doing Business with the Government

## Eligibility

- Before contracting with the government, all prospective contractors must register in the System for Award Management (“SAM”)
- Contracts may only be awarded to “responsive” and “responsible” contractors as determined by a government Contracting Officer:
  - Ability to perform contract requirements (*e.g.*, financial capabilities, experience, managerial and technical abilities)
  - Capacity to satisfy contract’s performance requirements in light of experience and other commitments
  - Standing as a good corporate citizen
  - Past performance record

## Government Set-Asides

- The Small Business Act requires federal agencies to help level the playing field for small businesses through “small business set-asides”
  - Section 8(a) business development
  - Historically underutilized business zone (“HUBZone”)
  - Women-owned small business
  - Service-disabled veteran-owner
- A qualifying small business can form a joint venture with another small business (or a large business through the All Small Mentor-Protégé Program) to compete for HUBZone, women-owned and veteran-owned business set-asides

## Formation and Administration of Government Contracts

- Governed by the Federal Acquisition Regulations (“FAR”) and over 20 agency FAR supplements (*e.g.*, Department of Defense FAR Supplement (“DFARS”))
- Types of procurement
  - Commercial item acquisitions (FAR Part 12)
  - Simplified acquisition procedures (FAR Part 13)
  - Sealed bids (FAR Part 14)
  - Negotiated procurements (FAR Part 15)
  - Federal supply schedules (FAR Subpart 8.4)

## Formation and Administration of Government Contracts (cont.)

- Types of contracts
  - Fixed price contract
    - Commercial item acquisitions
    - Simplified acquisitions
    - Sealed bidding; and
    - Federal supply schedules
  - Cost reimbursement contract
    - Negotiated procurement

## Formation and Administration of Government Contracts (cont.)

- Government subcontracts (FAR Part 44)
  - Hybrid of government and commercial contracts
    - Some clauses in the prime contract *must* “flow down” to the subcontract to avoid breaching the prime contract
    - However, other portions of subcontracts are negotiable (subcontractors lack privity of contract with government)
  - Terms of the subcontract will often dictate
    - Subcontractors should *always* negotiate terms that reduce potential liability to the prime contractor (*e.g.*, changes, termination, indemnification, and warranty clauses)

## Right to Protest and Seek Reimbursement

## Right to Protest

- Interested parties may challenge the award or proposed award of a contract or challenge the terms of a solicitation
- Government Accountability Office (“GAO”)
  - Protest must be filed within 10 calendar days of when the protester knows or should have known of the basis for the protest
  - Automatic stay of contract award/performance during protest
  - GAO *must* issue a decision within 100 calendar days
  - If GAO sustains the protest, it will recommend that the procuring agency address the violation through appropriate corrective action
- Protester may also file a “second bite at the apple” protest with the Court of Federal Claims—review of agency decision, *not* GAO decision

## Right to Protest

- What can be protested?
  - A faulty or ambiguous solicitation provision
  - A decision to set aside, or not to set aside, a contract
  - An agency’s failure to follow stated evaluation criteria
  - An agency’s flawed technical evaluation
  - An agency’s disparate treatment of offerors

## Right to Seek Reimbursement

- Government Shutdown
  - Most-recent government shutdown lasted from December 22, 2018 to January 25, 2019 (35 days)
  - Government is currently funded until February 15, 2019
  - The shutdown's impact on contractors and their employees can vary depending on the length of the funding lapse, contract terms, and agency contract administration decisions

## The Right to Seek Reimbursement (Cont.)

- The shutdown's potential effects on existing contracts
  - May restrict an agency's ability to obligate new funds under existing contracts
  - May result in contract termination after a funding limit is reached under a cost-reimbursement contract
  - May affect fully-funded contracts to the extent furloughed federal procurement officers cannot approve payment or conduct mandatory inspections or formal acceptance of deliveries

## The Right to Seek Reimbursement (Cont.)

- The government can and will adapt to unexpected circumstances
  - Government may order a contractor to stop all, or any part, of the work under the contract for 90 days (or another agreed-to amount of time) pursuant to a stop-work order clause
  - Government may issue a unilateral change order to address necessary revisions to performance requirements
  - Government may terminate the contract for convenience to limit exposure to work performed prior to termination

## The Right to Seek Reimbursement (Cont.)

- Contractors should document all costs incurred as a result of the shutdown and seek reimbursement for those costs
  - Create unique charge codes for shutdown-related costs
  - Document justifications for shutdown-related costs and steps taken to mitigate the impact of such costs
  - Document communications with government officials regarding shutdown-related delays and work-stoppages
- Note—certain contract clauses require reimbursement requests to be made no later than 30 days after the end of the shutdown ... time is running out!



# Equal Employment Opportunity and Affirmative Action Obligations

## Legal Requirements and Administrative Structure

- Government requires certain contractors to comply with various equal employment opportunity and affirmative action requirements
- These requirements are enforced by the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") (*i.e.*, not the Equal Employment Opportunity Commission ("EEOC"))
  - Executive Order 11246, as amended—minorities and women
  - Section 503 of the Rehabilitation Act of 1973—individuals with disabilities ("IWD")
  - Vietnam Era Veterans' Readjustment Assistance Act ("VEVRAA")—protected veterans

## OFCCP Coverage

- Which contractors must comply with these obligations?
  - Prime contractors with an executive agency
  - Covered subcontractors
    - Provide goods or services that are "necessary" to fulfill a covered prime contract or subcontract
    - Undertakes/assumes any portion of a prime contractor's obligation
  - **Caution: Grant recipients are *not* subject to the same EEO obligations**
    - Healthcare providers are not covered contractors if their only relationship with the government is as a participating provider under Medicare Parts A and B and Medicaid

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## OFCCP Coverage

EXECUTIVE ORDER 11246				SECTION 503			
SUPPLY & SERVICE Basic Coverage		CONSTRUCTION Basic Coverage		SUPPLY & SERVICE Basic Coverage		CONSTRUCTION Basic Coverage	
Any number of employees	+ Contracts more than \$10,000	Any number of employees	+ Contracts more than \$10,000	Any number of employees	+ A contract of more than \$15,000	Any number of employees	+ A contract of more than \$15,000
AAP Coverage		16 SPECIFICATIONS		AAP Coverage		AAP Coverage	
50 or more employees	+ A contract of \$50,000 or more	Any number of employees	+ Contracts more than \$10,000	50 or more employees	+ A contract of \$50,000 or more	50 or more employees	+ A contract of \$50,000 or more
VEVRAA				VEVRAA			
SUPPLY & SERVICE Basic Coverage		CONSTRUCTION Basic Coverage		SUPPLY & SERVICE Basic Coverage		CONSTRUCTION Basic Coverage	
Any number of employees	+ A contract of \$150,000 or more	Any number of employees	+ A contract of \$150,000 or more	Any number of employees	+ A contract of \$150,000 or more	Any number of employees	+ A contract of \$150,000 or more
AAP Coverage		AAP Coverage		AAP Coverage		AAP Coverage	
50 or more employees	+ A contract of \$150,000 or more	50 or more employees	+ A contract of \$150,000 or more	50 or more employees	+ A contract of \$150,000 or more	50 or more employees	+ A contract of \$150,000 or more

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## Basic Threshold Requirements

- Don't discriminate! (E.O. 11246 protects *more* classes than Title VII)
- Ensure proper posting of EEO notices in the workplace
- Include EEO tagline in employment advertising
- Include EEO clause in all subcontracts
- Two-year recordkeeping retention requirement (unless fewer than 150 employees)
- Annual reporting requirements:
  - Form EEO-1 (*a* contract of \$10,000 or more *and* 50 employees)
  - Form VETS-4212 (*a* contract of \$150,000 or more)

## Basic Threshold Requirements (cont.)

- Pre-offer invitation to self-identify
- Reasonable accommodation for electronic/online applicants
- Outreach and recruitment for IWDs and protected veterans
- "List" all available jobs with local Employment Service Delivery System (*e.g.*, Job Center of Wisconsin)
- Permit OFCCP to access books and records during compliance investigation

## AAP Threshold Requirements

- What is an AAP?
  - A proactive tool used to identify and address areas of inequity or unfairness in a covered contractor's employment practices, as compared to the general representation of individuals with similar skills in the relevant labor market
  - First line of defense against an OFCCP audit
- Affirmative action is *not* equal employment opportunity
  - EEO refers to fairness and equality of treatment for specific, designated protected classes as defined by law
  - Affirmative action requires contractors to proactively recruit, hire, train and promote women, minorities, IWDs and protected veterans to ensure that all individuals have equal opportunities in employment

## AAP Threshold Requirements (cont.)

- What are the components of an EO 11246 AAP?
  - Organizational profile
  - Workforce analysis
  - Job group analysis
  - Availability analysis (internal and external)
  - Comparison of incumbency versus availability
  - Placement goals
  - Analyses of recruitment, personnel activity and compensation practices
  - Action-oriented programs

## AAP Threshold Requirements (cont.)

- What are the components of a Section 503/VEVRAA AAP?
  - Data collection analyses regarding the number of applicants who self-identify or who are otherwise known to be a protected veteran or IWD and the number of protected veterans and IWD hired
  - Adoption of established utilization goals for each job group
  - Establishment of specific action-oriented programs to achieve utilization goal

## Responding to an OFCCP Audit

- OFCCP conducts random audits announced by corporate scheduling announcement letter followed by a scheduling letter
- Before turning over an AAP to the OFCCP, contractors should:
  - Immediately notify their corporate attorney
  - Closely scrutinize every detail of your AAP
  - Conduct disparity and pay-equity analyses under attorney-client privilege
  - Require all management officials to attend a refresher training

## Responding to an OFCCP Audit (cont.)

- If OFCCP finds potential discrimination, it *must* issue a Predetermination Notice (“PDN”)
  - Contractors have 15 days to rebut OFCCP’s initial finding
  - All submissions will be reviewed by the Solicitor of Labor and then submitted to OFCCP’s national office for final decision
  - Opportunity for Contractor to put its “best foot forward” to resolve an audit without any additional exposure
- If OFCCP determines the contractor has engaged in unlawful discrimination, it may issue a Notice of Violation and seek monetary damages for the victims of discrimination (*e.g.*, back pay)

## Enforcement by the OFCCP

- Contractor’s failure to comply with relevant EEO and AAP obligations may also result in severe penalties, including:
  - Suspension or cancellation of the covered contract
  - Debarment of contractor from future procurement opportunities
  - For material violations, OFCCP may refer case to the U.S. Department of Justice, which may bring suit to enforce the OFCCP regulations

# Questions?



## Thank You!

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