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FEDERAL GOVERNMENT CONTRACTS AND COMMERCIAL CONTRACTS: A BRIEF COMPARISON

I. RELATIONSHIP OF COMMERCIAL AND GOVERNMENT CONTRACT LAW

Since the Second World War the federal government (government) has consistently purchased or funded, directly or indirectly, a larger volume of construction services or work than any other single entity. While some agencies of the federal government, especially within the Department of Defense (DOD), have some internal capability to perform construction services, that capability is extremely small and is often used to support the military forces in their field operations. Consequently, the government procures nearly all of the needed construction work and services under contracts with private entities.

The basic principles governing government construction contracts reflect the American common law of contracts, which evolved from the English common law. A contract is traditionally defined as "a promise or set of promises, for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."[1] Thus, a contract is basically a set of promises made by one party to another party, and vice versa. In the United States, contract law reflects both the common law of contracts, as set forth in court decisions, and statutory law governing the terms of certain transactions.

[1]Samuel Williston and Richard Lord, Williston on Contracts § 1:1 (4th Ed. 1990).

Parties with capacity to contract may generally agree to whatever they wish, as long as their agreements do not run afoul of some legal authority or public policy. Thus, in private commercial contracts, an owner and a contractor may agree to some risky undertaking in a construction project, but they may not agree to gamble on the project's outcome. The former agreement reflects a policy of freedom-of-contract; the latter could violate a prohibition on gambling transactions.

Similar to private contracts, government construction contracts contain or reflect both express and implied obligations or promises. Express contract obligations are those that are spelled out in the agreement or contract. Less obvious than the express duties under a contract, but just as important, are those obligations that are implied in every contract. Examples of these duties include the obligations of good faith and cooperation.

In the context of a construction project, one of the most important of these implied duties is the obligation that each of the contracting parties cooperates with the other party's performance.[2] The fact that this obligation is implied rather than express is not reflective either of its importance or of the frequency with which it forms the basis for claims for compensation. Rather, the obligation to cooperate forms the very basis of the agreement between the parties.

The obligations to coordinate and cooperate are reciprocal and apply equally to all contracting parties. By way of illustration, an owner (public or private) owes a contractor an obligation to allow the contractor access to the site in order to perform its work; a prime contractor has a similar duty not to hinder or delay the work of its own subcontractors; and one prime contractor is obligated not to delay or disrupt the activities of other parallel prime contractors to the detriment of the government. Each example demonstrates that a contracting party owes an obligation of cooperation to the other party.

In addition to the obligation of cooperation, the government, as the owner, and the contractor have other implied obligations, such as warranty responsibilities. The government's implied warranty of the adequacy of plans and specifications is of great importance to the contractor, and the breach of this warranty forms the basis for a large portion of contractor claims. The existence of an implied warranty in connection with government-furnished plans and specifications was recognized in *United States v. Spearin*.[3] The so-called Spearin doctrine has become well established in virtually every American jurisdiction that has considered the question of who must bear responsibility for the results of defective, inaccurate, or incomplete plans and specifications. In layman's language, the doctrine states that when an owner supplies the plans and specifications for the construction project, the contractor cannot be held liable for an unsatisfactory final result attributable solely to defects or inadequacies in those plans and specifications. The key in this situation is the allocation of the risk of the inadequacies of the design to the contracting party, which furnished the design or controlled the development of the design. Thus, in a design-build project,

[2]*See 13 id.*§ 39:6 (4th Ed. 2000).
[3]248 U.S. 132 (1918).

the design-build contractor, not the government, typically would bear the risk for a design error or deficiency.[4]

Similar to private contracts governed by the common law, the basic concept of breach of contract applies to government contracts. In private contractual relationships, *breach of contract* results when one party fails in some respect to do what that party has agreed to do, without excuse or justification.[5] For example, a contractor's failure to use the specified trim paint color, or its failure to complete the work on time, constitutes a breach of contract. Public or private owners may likewise breach their contract obligations. Many contracts expressly provide, for example, that the owner will make periodic payments to the contractor as portions of the work are completed. If the owner unjustifiably fails to make these payments, this failure constitutes a breach. Similarly, an owner may be held in breach for failing to meet other nonfinancial contractual obligations, such as timely review and return of shop drawings and submittals. In short, any failure to live up to the promises that comprise the contract is a breach.

Whenever there is a breach of contract, the injured party has a legal right to seek and recover damages. In addition, if there has been a serious and *material* breach—that is, a breach that, in essence, destroys the basis of the parties' agreement—the injured party is justified in treating the contract as ended.[6]

Breach of contract actions are relatively rare in government contracting due to the fact that these contracts include *remedy*-granting clauses, such as the Changes clause,[7] the Default clause,[8] and the Suspension of Work clause.[9] These remedy-granting clauses, when combined with a very comprehensive disputes procedure that generally requires a contractor's continued performance pending claim resolution **(see Chapter 15),** effectively limit the application of traditional breach of contact theories and damages claims in government contracts. However, even the concept of contractual terms limiting the scope of breach of contact liabilities and damages is not unique to government contracts, as illustrated by the provisions of the Uniform Commercial Code[10] that provide for limitations on liabilities[11] and remedies.[12] All of these basic principles and concepts of contracting are reflected in both government contracting and private commercial contracts.

[4]This risk allocation may be altered by the actions of the government. For example, in *M.A. Mortenson Co.,* ASBCA No. 39978, 9v3-3 BCA ¶ 26,189, the government furnished a conceptual structural design to the design builder for estimating (bidding purposes). When it was determined that the conceptual structural design was inadequate, the government bore the risk of the cost of the additional steel and concrete to remedy the design problems, even though the contract was labeled as a "design-build" contract.

[5]*See* Restatement (Second) of Contracts §§ 235, 236.

[6]*See generally* 17A Am. Jur. 2d Contracts § 528 (2007).

[7]FAR § 52.243-4.

[8]FAR § 52.249-10.

[9]FAR § 52.242-14.

[10]The UCC, which applies to the sale of goods and other commercial transactions has been adopted in 49 states (Louisiana is the exception), the District of Columbia, and the Virgin Islands.

[11]UCC § 2-316.

[12]UCC §§ 2-718, 2-719.

II. SOURCES OF FEDERAL LAWS AFFECTING CONTRACTS

A. Contracts Awarded by Federal Agencies

The procurement and administration of government construction contracts, as well as the resolution of disputes on these projects, are governed by multiple statutes and extensive regulations. An array of administrative boards of contract appeals (boards), and special courts have operated for decades for the sole purpose of resolving disputes on federal contracts.[13] Each year the boards and courts generate hundreds of decisions that collectively provide the single largest body of law in the area of construction disputes. Numerous fundamental principles of construction law have their genesis in the law of government construction contracts. It is impractical to speak of modern American construction law without the consideration of federal procurement law.

Government construction contracts reflect policies contained in statutes and in Federal Acquisition Regulation (the FAR).[14] Besides containing standard contract clauses, the FAR also sets forth extensive guidance to the federal agencies and their personnel regarding the award and administration of government construction contracts. In addition to the basic FAR, many of the federal agencies have supplements to the FAR. For example, the DFARS is the Department of Defense FAR supplement. These supplements can substantially alter a contractor's rights, obligations, and remedies on a government contract. While possibly not as complex as the federal income tax regulations, the collective volume of these procurement regulations is extensive.[15]

Disputes arising out of or related to the performance of a government construction contract are governed by the Contract Disputes Act (CDA or Act).[16] The CDA and its implementing regulations set forth a comprehensive approach to the resolution of contract claims by contractors and the government. **(See Chapter 15.)** The citations in this book are to the appropriate provisions of the CDA, other relevant statutes, and the applicable regulations, particularly the FAR, as well as to the various board and court decisions. The CDA and the other cited statutes are found in West Publishing Company's United States Code Annotated. FAR citations are from Title 48 of the Code of Federal Regulations (CFR).

[13]*See* **Chapter 15.**

[14]The United States Postal Service contracts under authority of the Postal Services Reorganization Act, 39 U.S.C. § 410(a), which exempts the Postal Service from the federal procurement laws and regulations governing traditional federal agencies. The Postal Service has its own regulations and policies contained in its Purchasing Manual. The Federal Aviation Administration is exempt from several procurement statutes pursuant to Public Law No. 104-50.

[15]As published by the Government Printing Office, the FAR and its supplements are found in 48 C.F.R. (Web site: *www.gpoaccess/cfr/index.html*). Collectively, the FAR and its supplements total in excess of 4,100 pages of material. While the FAR contains separate parts or sections for particular types of contracts, those designations may be misleading. For example, FAR Part 36 is entitled "Construction and Architect-Engineer Contracts," but that part does not contain all of the provisions and regulatory guidance applicable to construction contracts. In addition, 41 C.F.R. Chapters 50, 51, 60 and 61 contain an additional 240 pages of regulations addressing wage and hour laws, affirmative action requirements, and other labor laws governing the performance of government contracts.

[16]41 U.S.C. §§ 601 *et seq.*

Government contract case law is found in a variety of sources. Since 1921 selected bid protest decisions issued by the United States Government Accountability Office (GAO) have been published in the *Decisions of the Comptroller General of the United States*.[17] Beginning in 1974, Federal Publications, Inc., now part of the West Group, has published the *Comptroller General's Procurement Decisions* (*CPD*) service containing the full text of all of the GAO's bid protest decisions. Court decisions regarding bid protests have been issued by the federal district courts,[18] the various federal circuit courts of appeals, the United States Court of Federal Claims (and its predecessor courts), and the United States Court of Appeals for the Federal Circuit. The case law involving claims and disputes arising out of or related to the performance of a contract basically consists of the decisions of the various boards, United States Court of Claims, United States Claims Court, United States Court of Federal Claims (Court of Federal Claims), and the United States Court of Appeals for the Federal Circuit (Federal Circuit). On relatively rare occasions, the United States Supreme Court will consider and issue decisions directly addressing federal government contracts.[19]

The Court of Claims, which was abolished in 1982, had jurisdiction to entertain suits involving government contract claims, including claims under the CDA. When Congress abolished the Court of Claims, it created the Claims Court, now the Court of Federal Claims,[20] and granted to it all of the original jurisdiction of the Court of Claims.[21] At the same time, Congress also created a new United States Court of Appeals for the Federal Circuit.[22] The Federal Circuit reviews appeals of decisions from the boards and the Court of Federal Claims.[23] The Court of Federal Claims and the Federal Circuit view decisions of the old Court of Claims as binding precedent.[24]

B. Contracts Funded by Federal Grants

Although not considered to be government construction contracts, many federal agencies provide grants to state, county, and municipal agencies to partially fund construction projects. These grant agreements may provide for the inclusion of clauses or application of federally mandated policies in the actual construction contracts. These grant agreements are addressed in **Chapter 16** of this book.

[17]Formerly the General Accounting Office. Typically, about 10 percent of the GAO's decisions in a given year are published in that publication.

[18]The U.S. Federal District Courts' jurisdiction over bid protests ended as of January 2001.

[19]*See, e.g., S&E Contractors, Inc. v. United States,* 406 U.S.1 (1972).

[20]28 U.S.C. § 171.

[21]28 U.S.C. § 1491(a)(2). The United States Court of Federal Claims has the same basic jurisdiction, but broadened to include nonmonetary claims.

[22]28 U.S.C. § 41.

[23]41 U.S.C. § 607(g)(1)(A); 28 U.S.C. § 1295(a)(10), (a)(3).

[24]*South Corp. v. United States,* 690 F.2d 1368, 1369 (Fed. Cir. 1982) (en banc); United States Court of Federal Claims Gen. Order No. 33, 27 Fed. Cl. xyv (1992).

C. Effect of Statutes and Regulations on Contractors

1. Possible Conflicting Themes

When contracting with the federal government, contractors need to appreciate that there are two fundamental and potentially conflicting policies that have the potential of affecting the parties' rights and obligations. One policy addresses the status of the United States when it enters into a contract in the commercial marketplace. This was summarized in *McQuagge v. United States*[25]:

> In ordinary contractual relations with its citizens, the government enjoys the same privileges and assumes the same liabilities as does its citizens. This is distinguished from the situation where the sovereign is seeking to enforce a public right or protect a public interest, for example, eminent domain or an exercise of the taxing power. In the latter case the government is not bound by ordinary rules of private contract law or by doctrines of estoppel or waiver. When the government enters the market place, however, and puts itself in the position of one of its citizens seeking to enforce a contractual right (i.e., one which arises from express consent rather than sovereignty), it submits to the same rules which govern legal relations among its subjects.[26]

Many of the decisions that provide that the United States is bound by its contracts just as a private party involve questions of contract interpretation.[27] However, there is another theme in government contract cases reflecting a statement by Justice Oliver Wendell Holmes, Jr., that "Men must turn square corners when they deal with the Government."[28] This statement would seem to imply that the government may have, in certain respects, a special status in its contractual relationships and that all of the rules governing contractual relationships may not apply in government contracts.

2. Authority and Public Policy Considerations

While the two themes just noted appear to conflict, the *McQuagge* decision referenced two conditions that are critical. First, the government must be acting in a contractual capacity. Second, it must not be seeking to protect or enforce a public policy.

There is no question that the government has the capacity to enter into a contract.[29] However, a contract that is prohibited by statute or varies from mandatory procedures is not enforceable or binding on the government.[30] Similarly, the person or entity entering into a contract on behalf of the government must have the requisite

[25]197 F. Supp. 460 (W.D. La. 1961).
[26]197 F. Supp. at 469; *see also Mann v. United States,* 3 Ct. Cl. 404, 411 (1867); *Hollerbach v. United States,* 233 U.S. 165 (1914).
[27]*See, e.g., Hollerbach v. United States,* 233 U.S. 165 (1914).
[28]*Rock Island, Ark. & La. R.R. v. United States,* 254 U.S. 141, 143 (1920).
[29]*United States v. Tingey,* 30 U.S. 115 (1831).
[30]*The Floyd Acceptances*, 74 U.S. 666 (1868).

authority to do so. If that person has the requisite authority to bind the government, the exercise of that authority usually involves a degree of discretion.[31] Consequently, if the contractual action by the government's representative reflects an error in judgment, the government is usually bound so long as the person was acting within the limits of that person's authority.[32]

The key is ascertaining the limits of authority. This is one of those *square corners* for government contractors. The limits of authority question was addressed by the United States Supreme Court in *Federal Crop Insurance Corp. v. Merrill,*[33] which involved an issue of the ability of an unauthorized agent of a government agency to bind the United States. The Court rejected the application of the concept of apparent authority and ruled that the party dealing with the United States had the burden of ascertaining the actual authority of the government's representative. The Court, after reviewing the prior proceeding in the case, stated:

> That court [Supreme Court of Idaho] in effect adopted the theory of the trial judge, that since the knowledge of the agent of a private insurance company, under the circumstances of this case, would be attributed to, and thereby bind, a private insurance company, the Corporation [United States] is equally bound.
>
> The case no doubt presents phases of hardship. We take for granted that, on the basis of what they were told by the Corporation's local agent, the respondents reasonably believed that their entire crop was covered by petitioner's insurance. And so we assume that recovery could be had against a private insurance company. But the Corporation is not a private insurance company. It is too late in the day to urge that the Government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business theretofore conducted by private enterprise or engages in competition with private ventures. Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it. The Government may carry on its operations through conventional executive agencies or through corporate forms especially created for defined ends. See Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 390. Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority.[34]

[31] *Arizona v. California,* 373 U.S. 546 (1963); *United States v. MacDaniel,* 32 U.S. 1 (1833).
[32] *United States v. Winstar Corp.,* 518 U.S. 839 (1996); *Cooke v. United States,* 91 U.S. 389 (1875); *Liberty Coat Co.,* ASBCA No. 4119, 57-2 BCA ¶ 1576.
[33] 332 U.S. 380 (1947).
[34] 332 U.S. at 383–384.

The *Federal Crop Insurance* decision reflects one of the two conditions expressed in *McQuagge*. The government must have entered into a valid contractual relationship. The latter can occur only if the government's representative is authorized to bind the United States. Since the burden is on the contractor to ascertain the authority of the person with whom it is dealing, these issues related to authority are addressed in several chapters of this book. **(See Chapters 2, 8, and 10.)**

The second *McQuagge* exception to the general principle that the United States is bound to its contracts in the same manner as a private party referred to the enforcement of a *public right* or *public interest*. This exception is best illustrated by the decision of the United States Court of Claims in *G. L. Christian & Associates v. United States*.[35] The *Christian* decision involved a contractor's claim for its lost anticipated profits following the government's decision to terminate for convenience a large housing project. The contract did not contain a termination for convenience clause;[36] hence, there was no contractual preclusion on the recovery of lost anticipated profits. While acknowledging the basic principle that the government has the rights and ordinarily the liabilities of a private party when it enters into a contract, the Court of Claims held that the termination for convenience clause was incorporated into the contract by operation of law as it was a mandatory clause under the applicable procurement regulations.[37]

While the Christian doctrine appears to apply only to mandatory clauses that implement fundamental policy, a contractor is generally deemed to be on notice of these clauses. Contractual notice of the provisions to the contractor occurs following publication of the procurement regulation in the *Federal Register*.[38] If a regulation is not published in the *Federal Register*, the contractor may still be bound if it has actual notice or knowledge of it.[39] Given this doctrine, any government construction contractor needs to have a basic understanding of the key principles affecting the interpretation and enforcement of the standard mandatory clauses and the ability to obtain advice on these provisions. In addition, as the FAR provides guidance to the government's representatives on the award and administration of government contractors, a contractor should obtain or have access to the edition of the FAR and any agency supplements applicable to its contract.[40]

A final, potential square corner for government contractors follows from the principle that actions taken by a government official within the limits of its authority are presumed to be properly made unless contrary to law or regulation.[41] While this doctrine may operate to protect a contractor when the government's authorized

[35]312 F.2d 418 *rehearing denied* 320 F.2d 345 (Ct. Cl. 1965).
[36]*See* **Chapter 11** for a discussion of convenience terminations.
[37]312 F.2d at 427.
[38]41 U.S.C. § 4186.
[39]*Timber Access Indus. Co. v. United States,* 553 F.2d 1250 (Ct. Cl. 1977).
[40]Electronic versions of the FAR and its supplements can be accessed at the Government Printing Office's Web site, *www.gpoaccess.gov/cfr/index.html. See also http://acquisition.gov/comp/far/index.html; www.arnet.gov/far/* for the FAR and proposed changes to the FAR.
[41]*General Electric Co. v. United States,* 412 F.2d 1215 (Ct. Cl. 1969).

representative makes what is later challenged as a bad business decision,[42] the same presumption that the contracting officer acted in good faith makes it very difficult to overturn actions such as termination for convenience on the basis that the action was an abuse of discretion, taken in bad faith, or motivated with malice toward the contractor.[43]

III. OVERVIEW OF THE GOVERNMENT CONTRACTING PROCESS

A. Contracting Process

The organization of this book reflects many of the major facets of the government contracting process. Government contracts, whether for supply, service, or construction, reflect a need to use the procurement process to fill a perceived need. The initial elements are the authorization of funds, financing, and the delegation of authority to procure the work. **(See Chapter 2.)**

Once that is done, the procuring agency selects the project delivery method/contract type and undertakes to award the work. This involves basic principles of contract law (offer, acceptance, authority to bind the government) and the selection of the actual procurement method (sealed bids or negotiated proposals), as well as the appropriate contract type. **(See Chapters 3 and 4.)**

For the past several decades, government contracts have been used to achieve social policies. These policies can affect contractor selection (small business firms, disadvantaged contractors, etc.) as well as performance of the work (labor laws, environmental laws, safety, etc.) and a preference for domestic (U.S.) products. These topics are addressed in **Chapter 5.**

Performance of the work issues may involve issues of contract interpretation, differing site conditions, delays, changes, inspection and acceptance, payment, bonding, and terminations. As these contract administration issues reflect the large majority of potential problems, they are covered in **Chapters 6 to 13.**

Project documentation is important throughout contract performance and can affect the parties' rights and obligations under the various clauses. Consequently, notice is addressed in **Chapter 14**. In that regard, government contractors need to consider that subcontracts and purchase orders are actually commercial (private) contracts being performed to satisfy the requirements of the contract with the government, notwithstanding the requirement to flow down many of the federal government's terms and conditions. The topics, which relate to the management of subcontracts, are beyond the scope of this book.[44]

[42]*McQuagge v. United States,* 197 F. Supp. 460 (W.D. La. 1961); *Conrad Weihnacht Construction, Inc*., ASBCA No. 20767, 76-2 BCA ¶ 11,963.

[43]*See Librach v. United States,* 147 Ct. Cl. 605, 612 (1959); *Kalvar Corp. v. United States,* 543 F.2d 1298 (Ct. Cl. 1976); *see also* **Chapters 2 and 11.**

[44]*See generally Common Sense Construction Law—Third Edition* (Thomas J. Kelleher, Jr. ed., John Wiley & Sons, 2005) for a review of these issues and others (subcontract bidding, insurance, bankruptcy, purchase of goods under the UCC, etc.).

Given the complexity of government projects and contracts, it is highly unlikely that all claims and disputes can be avoided. Even if a contractor is claim adverse, it needs to have an appreciation of the disputes process in the event a claim develops or appears likely. This topic is addressed in **Chapter 15.**

Finally, while not technically government contracting, projects funded by federal grants may have attributes similar to federal government contracts. Consequently, the role of the federal government and the effect of federal procurement principles on federally funded grant contracts are addressed in **Chapter 16.**

B. Internet-Based Resources

This book is intended to provide a construction professional with a reasonably comprehensive, basic resource and overview of the topics and issues that a government construction contractor may be required to address and needs to appreciate. In the Internet Age, there are numerous specific resources or sources of information that can be accessed electronically. To reduce costs associated with the management of the procurement process and to provide a single points of reference for procurement related information (potential contracting opportunities, contractor registration), the government has created a number of Web sites that pertain to the construction contracting process.

Attached to this chapter as **Appendix 1A** is a summary of the primary government contract–Web sites along with a brief description of the purpose of each and the information that is available on the site. In addition, information on Web sites maintained by federal agencies pertaining to planned construction projects is also contained within **Appendix 1A.**

IV. PROCUREMENT INTEGRITY AND STANDARDS OF CONDUCT

Government contractors are expected to conduct business with a high degree of integrity and ethics. Consequently, these requirements, as well as the related laws and regulations, must be understood and appreciated by contractors and subcontractors performing work for the government. This section provides an overview of a very important aspect of government contracting.

A. Importance of Certifications

A central theme in government contracting is the requirement that contractors and subcontractors must be honest in their dealings with the government. This theme is reflected in the general standards of responsibility for a prospective contractor[45] and in the requirements for certification of cost or pricing data[46] and claims.[47]

[45]FAR § 9.104-1(d).
[46]FAR § 15.403.
[47]FAR § 33.207. *See also* **Chapter 15.**

Complete treatment of the details of the various laws and regulations and their interpretation is beyond the scope of this book and would justify, if not require, an entire separate book. However, contractors need to appreciate that government contractors are held to a high standard of ethics and conduct. Consistent with the expectation of a high standard of ethics and conduct, contractors are routinely required to provide certifications during all phases of the process, from the initial solicitation to the resolution of claims. Often these certifications provide the initial foundation of the government's assertion of wrongdoing by a contractor. Consequently, no certification or affirmation of fact should be dismissed as just *another government form*.

While the subject matter and wording of contractor-provided certifications are subject to change, **Table 1.1** (see p.12) lists many of the certifications, affirmations, or representations currently required of a government construction contractor.[48]

While a few of these provisions reference potential liabilities associated with the various certifications, many are silent. In that regard, the FAR requires the inclusion of this clause in sealed bid procurements issued under FAR Part 14:

FAR § 52.214-4

False Statements in Bids (APR 1984)

Bidders must provide full, accurate, and complete information as required by this solicitation and its attachments. The penalty for making false statements in bids is prescribed in 18 U.S.C. 1001.

That provision is not mandated for use in negotiated contracts awarded under FAR Part 15. However, 18 U.S.C. § 1001, the False Statements Act that is referenced in False Statements in Bids clause, is not limited in application to sealed bid procurements.[49]

B. Overview of Federal Laws Related to Procurement Integrity/Standards of Conduct

Whether competing for or performing a government contract, every contractor needs to appreciate the broad scope of legislation intended to protect the government (the public) from a variety of prohibited activities. These laws prescribe a range of improper actions and the applicable civil and criminal sanctions. However, the government agencies perceive that the task of inspecting work and determining compliance with the contract requirements for billions of dollars in contracts every year is extremely difficult.

[48]Each contract, including those provisions incorporated by reference, should be screened to identify requirements for contractor certifications as the extent and scope of the requirements for certifications are subject to change.

[49]*See also* 15 U.S.C. § 645(d) (provides for criminal penalties for knowingly misrepresenting a party's small business size status).

Table 1.1 Contractor Certifications and Representations

Title of Provision	FAR Reference	Basic Subject Matter
Taxpayer Identification	FAR § 52.204-3	Ownership and tax status of bidder/offeror
Covenant Against Contingent Fees	FAR § 52.203-5	Agents engaged to solicit award
Small Business Program Representations	FAR § 52.219-1	Status of bidder/offeror under various SBA-related preference programs
Disclosure Statement—Cost Accounting Practices And Certification	FAR § 52.230-1	Applicability of cost accounting standards to offeror
Certification of Independent Price Determination	FAR § 52.203-2	Price competition and actions to influence others in submitting offers in connection with a solicitation
Certificate of Current Cost or Pricing Data	FAR § 15.406-2	Applicable when contractor submits cost or pricing data for proposals or modifications (equitable adjustments)
Subcontractor Cost or Pricing Data—Modifications	FAR § 52.215-13	Applicable when subcontractor submits cost or pricing data for pricing of contract modifications (equitable adjustments)
Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters	FAR § 52.209-5	Debarment (actual or proposed), suspension, defaults, civil or criminal charges of fraud or criminal offense in connection any public contract or subcontract
Payrolls and Basic Records	FAR § 52.222-8	Certification that Davis Bacon wages fully paid and data on payroll records form (e.g., social security numbers) are accurate and complete
Affirmative Action Compliance	FAR § 52.222-25	Affirmative Action Program Status
Exemption from Application of Service Contract Act Provisions	FAR § 52.222-48	Contractor certification that services qualify as “commercial items” and priced based on catalog or market prices
Recovered Material Certification	FAR § 52.223-4	Applies if specifications required use of Environmental Protection Agency–designated products
NC State and Local Sales and Use Tax	FAR § 52.229-2	Certification and payment of NC taxes
Payments Under Fixed-Price Construction Contracts	FAR § 52.232-5	Amounts requested are only for performance in accordance with specifications, terms, and conditions of contract; payments to subcontractors have been made from previous payments; timely payments to subcontractors will be made; and payment request includes no amount that prime contractor intends to withhold (retain) from a subcontractor or supplier
Disputes	FAR § 52.233-1	Claims in excess of $100,000.00

Certification of Final Indirect Costs	FAR § 52.242-4	No unallowable costs are included in the costs used to establish indirect cost rates. (Applies to cost reimbursement construction contracts.)
Termination for Convenience Settlement Proposals (Total Cost Basis)	FAR § 53.301- SF 1436	Proposal reflects recognized commercial accounting practices and includes only those charges allocable to terminated contract and that are fair and reasonable
Termination for Convenience Schedule of Accounting Information	FAR § 53.301- SF 1439	Disclosure of contractor's accounting practices

Three different approaches have been adopted to address this difficulty. One approach involves the broad use of contractor furnished certifications and representations. Many of these are identified in **Table 1.1**. These certifications and representations can serve at least three possible purposes.

(1) Alert the contractor signing the certification or representation to the significance of its signature.
(2) Simplify the government's proof in establishing a violation of an underlying statute.
(3) Create the basis for an action based solely on the false nature of the certification.

The final two purposes involve multiple civil and criminal statutes addressing prohibited conduct and the provision of economic incentives to those who report wrongdoing. In that regard, federal law provides substantial economic incentives or bounties for individuals to disclose fraudulent conduct by government contractors. In 1986 Congress amended the Civil False Claims Act, 31 U.S.C. §§ 3729–3733 to encourage third parties to identify and institute civil *qui tam* actions[50] involving allegations of fraudulent conduct and to share in the recovery of those actions. Coupled with this statute are requirements for self-reporting and/or "hotlines" as discussed in **Section IV.F** of this chapter.

The federal false claims and anti-fraud statutes are varied in terms of the subject matter of the prohibited conduct or activities. Some of the statutes provide for civil penalties or sanctions for prohibited activities while others provide for criminal sanctions. **Table 1.2** (see p.14) lists many of the statutes in the government's arsenal of remedies for contractor fraud and false claims.

C. Contract Cancellation Remedy

In addition to the specific remedies set forth in the various statutes, a government contractor faces the total cancellation of the underlying contract if it is tainted by

[50]Essentially means private attorney general actions.

Table 1.2 Federal Anti-Fraud/False Claims Laws

Title	Statutory Reference	Subject Matter/Notes
	Criminal Statutes	
Anti-Kickback Act	41 U.S.C. §§ 51–58	Prohibits payments by subcontractors at any tier to prime contractors or subcontractors to obtain a Government contract
Conspiracy to Defraud	18 U.S.C. § 286; 18 U.S.C. § 371	Addresses claims and general conspiracy to defraud the government
False Claims Act, Criminal Liabilities	18 U.S.C. § 287	False claim need not have been paid by government to provide basis of liability
Theft from Federal Programs	18 U.S.C. § 666	Applies to theft from state and local public agencies receiving federal funds by "agents" of those agencies
False Statements Act	18 U.S.C. § 1001	Includes statements, false entries, oral and unsworn statements
Mail and Wire Fraud	18 U.S.C. §§ 1341–1350	Applies to use of mails and telecommunications to execute a scheme to defraud the United States
Major Fraud Act	18 U.S.C. § 1031	Applies to procurement fraud on a government contract or subcontracts thereunder valued at $1 million or more
Obstruction of Federal Audit	18 U.S.C. § 1516	Applies to any person employed on full-, part-time, or contractual basis to conduct an audit or a *quality assurance inspection* for or on behalf of the United States
Sarbanes-Oxley Act of 2002	18 U.S.C. § 1519	Applies to anyone who knowingly alters a document with intent to influence proper administration of any matter within jurisdiction of department or agency of the United States; violators subject to fines or imprisonment up to 20 years, or both
	Civil Statutes	
Anti-Kickback Act	41 U.S.C. § 51–58	Prohibits kickback by subcontractors and suppliers
Contract Disputes Act of 1978	41 U.S.C. § 604	False or unsupported claims submitted to contracting officer; necessity for certification
False Claims Act	31 U.S.C. §§ 3729–3733	Applies to any request related to the payment of money by the United States, directly or indirectly
Forfeiture of Claims Act	28 U.S.C. § 2515	Allows a special plea in United States Court of Federal Claims providing for forfeiture of entire claim if any part of it is tainted by fraud
Program Fraud Act	31 U.S.C. §§ 3801–3812	Administrative alternative to litigation in civil false statements and smaller false claims cases
Truth in Negotiations	10 U.S.C. § 2306a; 41 U.S.C. § 254	Cost or pricing data on negotiated contracts or subcontracts; modifications of contracts in excess of $650,000; necessity for certification

conduct that is considered to be a corrupt practice. In *United States v. Acme Process Equipment Co.,*[51] the contractor sued to recover breach of contract damages after the government cancelled its contract. The cancellation was based on the fact that three of the contractor's employees accepted compensation for awarding subcontracts in violation of the Anti-Kickback Act. The contractor argued at the Court of Claims that contract cancellation was not an authorized remedy for a violation of the Anti-Kickback Act because both civil and criminal remedies were set forth in that statute. The Court of Claims accepted that argument on the grounds that Congress had intended to set forth the *entire* set of remedies available to the United States for a violation of that statute. The Supreme Court reversed that decision holding that public policy requires that the United States be able to rid itself of a prime contract tainted by kickbacks. In such cases, the contractor would not be entitled to payment on a theory of quantum merit or otherwise, regardless of the incurrence of otherwise allowable performance costs.[52]

Applying this public policy, contract cancellation has been permitted when the contract was tainted by the making of false statements and false claims.[53] Similarly, in *Beech Gap, Inc.,*[54] the board upheld a termination for default following the conviction of the contractor's employees for submission of falsified test reports and pay estimates. The board refused to consider the contractor's argument that the government had superior knowledge of the alleged false test reports and pay estimates as an effort to relitigate an issue unsuccessfully litigated in the prior criminal action and dismissed the contractor's appeal.

Even if government insists on contract performance after becoming aware of the prohibited conduct, that action by the government does not operate to ratify the underlying contract. For example, in *Schuepferling Gmbh & Co., KG,*[55] the contract was tainted by bribery. Even though the government insisted on and accepted further performance by the contractor, those actions did not negate the government's right to void the contract *ab initio* (from the outset).

D. Civil False Claims Act Actions

While there are multiple statutes available to the government to combat improper conduct, fraud, and false claims, the civil False Claims Act (FCA)[56] is often invoked by the government as the preferred statutory basis for an action rather than the parallel criminal FCA statute. There are several reasons for this, including the proof of knowledge standard and damages.

[51]385 U.S. 138 (1966).
[52]*United States v. Mississippi Valley Generating Co.,* 364 U.S. 520 (1961).
[53]*See Brown v. United States,* 524 F.2d 693 (Ct. Cl. 1973).
[54]ENG BCA Nos. 5585 et al, 95-2 BCA ¶ 27,879.
[55]ASBCA No. 46564, 98-1 BCA ¶ 29,659.
[56]31 U.S.C. §§ 3729–3733.

1. Proof of Knowledge Standard

The criminal False Claims Act (FCA) requires proof that the false statement was made with intent to deceive, was designed to induce a belief in the false statement, or mislead.[57] A "knowing" act means "[a]n act is done knowingly if the defendant realized what he or she is doing, and did not act through ignorance, mistake or accident."[58] Intentional ignorance has been held to constitute constructive knowledge sufficient to satisfy this element of the offense.[59] In addition, the false statement need not be delivered to the government if it was relied on in the disbursement of funds provided by the government.[60]

In contrast, the civil FCA has a lower knowledge (scienter) requirement. Unless an allegation of conspiracy is made, the level of "knowledge" for a civil FCA action was described in *United States ex rel Bettis v. Odebrecht Contractors of CA, Inc.*:[61]

> The Act's *mens rea* element does not require proof of a specific intent to defraud or deceive. . . . Instead a person acts knowingly when he or she:
>
> (1) has actual knowledge of the information;
> (2) acts in deliberate ignorance of the truth or falsity of the information; or
> (3) acts in reckless disregard of the truth or falsity of the information." In other words, the requisite intent is the "knowing presentation of what is known to be false.". . . "While a faulty estimate or opinion can qualify as a false statement where the speaker knows facts which would preclude such an opinion, the 'facts'. . . are those that the speaking party could reasonably classify as true or false.". . . However, innocent mistakes, negligence, and the common failings of scientists or engineers are insufficient.[62]

2. Damages

Under the civil FCA, the government is entitled to recover treble damages in addition to a $10,000 fine for each false claim. For example, multiple false progress reports may constitute multiple violations even though the government makes a single payment based on those reports. Proof of actual damages is not required.[63]

E. Other Remedies for Prohibited Conduct

The government's effort to prevent fraud and false claims may become more focused on the construction industry due to several factors:

[57] *United States v. Lichenstein,* 610 F.2d 1272 (5th Cir. 1980), *cert. denied* 447 U.S. 907 (1980).
[58] *United States v. Ibarra-Alcarez,* 830 F.2d 968 (9th Cir. 1987).
[59] *United States v. Petullo,* 709 F.2d 1178 (7th Cir. 1983).
[60] *United States v. Petullo* at 1180.
[61] 297 F. Supp. 2d 272 (D.D.C. 2004).
[62] 297 F. Supp. 3d at 277–8 (citations omitted).
[63] *Fleming v. United States,* 336 F.2d 475 (10th Cir. 1964) *cert. denied*, 380 U.S. 907 (1965).

- Past efforts were primarily focused on the healthcare industry. Many of those cases concluded with substantial payments to the government.
- The allegations about "abuses" in Iraq and elsewhere have placed government construction and service contracts in the spotlight.
- Over a four-year period (2000 to 2003), an average of 331 federal *qui tam* actions (whistleblower actions) were filed annually. In those cases in which the United States elected to intervene, the average annual recovery was $1,204,998.00. On average, whistleblowers received in excess of 15 percent of that recovery.
- Decisions in 2006 and 2007 involving a commercial bank (*The Long Island Savings Bank, FSB, et al., v. United States*)[64] and major construction contractors, *Morse Diesel International, Inc., d/b/a AMEC Construction Management, Inc. v. United States,*[65] and *Daewoo Engineering and Construction Co., Ltd., v. United States*[66] and are likely to stimulate *qui tam* actions and agency interest in fraud and false claim actions related to construction projects.

While involving a commercial bank, *The Long Island Savings Bank* decision is important because the Federal Circuit reversed the Court of Federal Claims and held that all claims under a contract that has been tainted by fraud were forfeited pursuant to 28 U.S.C. § 2514. No division of tainted claims from untainted claims was permitted.

In *Morse Diesel & Daewoo,* several contractor practices became the basis for government efforts to have the contractors' claims forfeited or to recover damages from the contractor. In the *Morse Diesel* decision, the conduct that was the basis for the government's actions was described as including:

- Rebates by bonding companies and insurers. Illegal kickbacks under the Anti-Kickback Act of 1986, 41 U.S.C. §§ 51-58.
- Billing for the full amount of the bond premiums when there was a discount or rebate agreement with the bonding company. False Claims Act, 31 U.S.C. § 3729(a)(1), (a)(2) exposure.
- Providing invoices from the bonding company marked "Paid" when payments had not been made. False Claims Act, 31 U.S.C. § 3729(a)(1), (a)(2) exposure.
- Advance billings by reallocating $5.4 million in subcontractor line (pay) items, which were allegedly billed but not paid to the trades. Violation of certification provided pursuant to Payments under Fixed-Price Construction Contracts. False Claims Act, 31 U.S.C. § 3729(a)(1), (a)(2).

[64]476 F.3d 917 (Fed. Cir. 2007).
[65]74 Fed. Cl. 601 (2007).
[66]73 Fed. Cl. 547 (2006).

In addition to negotiated pleas and criminal fines, all of Morse Diesel's claims on the affected projects, which totaled in excess of $50 million, were forfeited under the operation of the Forfeiture of Fraudulent Claims Act, 28 U.S.C. § 2514 and the Anti-Kickback Act of 1986. There were no findings that any of the underlying claims were tainted by fraud. The argument that there was no harm because all of the contracts were firm-fixed-price was expressly rejected.

In *Daewoo Engineering and Construction*, the court identified these actions as providing grounds for finding that the contractor had committed fraud or submitted false and inflated claims:

- Inflating certified cost projections to obtain negotiating leverage. False Claims Act, 31 U.S.C. § 3729, Contract Disputes Act Fraud Statute exposure, 41 U.S.C. § 604.
- Misrepresenting (overstating) the contractor's estimated or planned production rate in the context of a certified claim. Contract Disputes Act Fraud Statute exposure, 41 U.S.C. § 604.
- Alleged "bait and switch" tactics in the original proposal on a neglected contract. Listing a proposed project manager, who was known and highly regarded by the owner, with no intent of placing that person on the project. Similar conduct with regard to proposed subcontractors with no disclosure of actual anticipated subcontractors. Fraud in the inducement.

All of the claims submitted by the contractor were denied under the Forfeiture of Fraudulent Claims Act. The Federal Claims Court also allowed a counterclaim by the government under the Contract Disputes Act Fraud Statute and rendered judgment for the United States for more than $50 million plus interest.

F. Self-Reporting/Hotline Requirements

A growing trend in government contracting involves requirements that contractors adopt self-policing and reporting programs to prevent fraud or other prohibited conduct. This trend is illustrated by the provisions contained in the clause at FAR § 52.203-7 Anti-Kickback Procedures. This clause requires contractor to have in place and follow reasonable procedures designed to prevent and detect possible violations. In addition, when the contractor has reasonable grounds to believe that there has been a violation of the Anti-Kickback Act, it is required to report the "possible violators" to the agency inspector general (IG) or the Department of Justice if there is no agency IG.[67] This standard FAR clause applies to all government contracts.

Several agencies have adopted supplements to the FAR addressing contractor ethics and the reporting of suspected violations of the various standards of conduct

[67]FAR § 52.203-7(c)(1).

laws and regulations. Set forth next is a summary of many of the programs and procedures in place at various federal agencies.

Department of Defense. The Department of Defense FAR Supplement (DFARS) generally applies to contracts awarded by DOD agencies. DFARS § 203.7000(1), which is found in 48 CFR Subpart 203.7, *Voiding and Rescinding Contracts,* applies to DOD agency construction contracts of $5 million or more. Under that regulation, the contractor is obligated to have a written code of ethics, conduct an ethics training program, establish an internal hotline to receive employee reports of suspected instances of improper conduct, and provide instructions that encourage employees to make such reports. Absent such a program, the contractor must post DOD Hotline posters prepared by the Department of Defense's IG.

Department of Veterans Affairs. The Department of Veterans Affairs (VA) FAR Supplement found at 48 CRF § 803.70 applies to VA construction contracts of $3 million or more. The contractor is required to have a written code of ethics and conduct an ethics training program. Absent such a program, the contractor must post VA Hotline posters prepared by the VA's IG.

National Aeronautics and Space Administration. The National Aeronautics and Space Administration (NASA) FAR Supplement found at 48 CFR § 1803.7001 requires the posting of NASA's Hotline posters at contract facilities when the contract amount exceeds $5 million.

Environmental Protection Agency. The Environmental Protection Agency (EPA) FAR Supplement found at 48 CFR § 1503.500-72 requires the posting of EPA's Office of Inspector General Hotline posters at contractor facilities where work on a contract of $1 million or more is performed.

These or similar requirements may well be adopted by more federal agencies or result in the adoption of a uniform FAR requirement for ethics training, violation reporting, hotlines, and so on, that would be applicable to all government contracts at or above some dollar threshold. Contractor compliance, ethics training, and the like will be a continuing requirement and cost for government construction contractors. Developing and implementing a meaningful program will be essential to managing the challenges of government contracts.

➢ KEY POINTS—ISSUES TO CONSIDER

- Like private commercial contracts, government contracts are based on the concepts of an *exchange of promises* by the contracting parties and express and *implied obligations* binding on the parties.
- While it is often stated that the United States submits to the same rules as private parties when it enters into a contract, there are important *exceptions* to that concept involving *authority* and fundamental *public policy* considerations.
- Federal government construction contract forms, policies, and procedures are devised from *multiple statutes* and a *comprehensive regulatory* system.
- To deter *fraud and false claims,* the federal government has available a broad spectrum of criminal and civil statutes that carry severe penalties for contractor wrongdoing.
- *Contractor certifications* are a key element of the government's effort to deter fraud and false claims. Such certifications should not be considered as mere formalities.
- A growing trend in government contracting is a requirement that such contractors employ programs encouraging employees to *report suspected fraud and wrongdoing.*
- Many key *resources* for government contractors are available on the Internet. Consistent with an effort to reduce reliance on paper, the federal government requires its contractors to report and post key information electronically.

APPENDIX 1A: INTERNET-BASED RESOURCES APPLICABLE TO GOVERNMENT CONTRACTING

FED BIZ OPPS

For firms and individuals desiring to do business with the various agencies of the government, most agencies maintain Web sites that will provide information regarding solicitations, both pending and contemplated (i.e. pre-solicitation notice). The primary source, however, for all contracting is Fed Biz Opps—Federal Business Opportunities: *http://fedbizopps.gov/*.

To access the Fed Biz Opps main page, enter *http://fedbizopps.gov* in the address bar. At the bottom of the page there are two boxes, "Buyers" and "Vendors." Select "Vendor" and "enter." If the acronym for an agency is known (e.g., AID for "Agency for International Development," EPA for "Environmental Protection Agency," FEMA for "Federal Emergency Management Agency,", etc.), the specific agency may be selected from the drop-down box under the word "acronym" in the middle of the page.

If, however, a more generalized search is necessary, below the drop-down box there are several hotlinks to major agencies that procure goods and construction services (e.g., DOD—Department of Defense, and DHS—Department of Homeland Security). If the search is for business opportunities for all agencies, select "all" (or go to the alphabetical listing of agencies).

CENTRAL CONTRACTOR REGISTRATION

Currently, in order to participate in most federal agency contracting programs, a contractor must be listed in the Central Contractor Registration (CCR). To access, enter *www.ccr.gov*. This Web site provides information on the procedures for becoming registered in the government's CCR. There is also information on how to become registered on the Fed Biz Opps Web site, as well as on individual agency Web sites. Obtaining a Central Contracting Registration number is not a complex procedure, but if a contractor wants to view an agency's solicitations or submit a bid proposal, the contactor must provide its registered CCR number.

Electronic funds transfer (ETF) is the default payment procedure used by the government on its contracts.[68] All contractors, except for foreign firms working outside of the United States, must provide the data regarding ETF transfers to the contractor's financial institution or bank to enable the government to make payment via an ETF. These sections are mandatory fields in the Central Contractor Registration process.

[68] *See* FAR Subpart 32.11.

OTHER WEB-BASED RESOURCES—CONTRACTING OPPORTUNITIES

Virtually all agencies have Web sites, both home page sites for the headquarters' organization and sites for individual subordinate offices located throughout the United States. Many agencies, such as the United States Department of Defense and its various service branches (e.g., the United States Air Force, the Department of the Army, the United States Corps of Engineers, the United States Navy, etc.), annually issue thousands of solicitations for various types of goods or services.

If a contractor is only interested in federal business opportunities in a specific geographical area, the contractor may search, for example, the United States Army Corps of Engineers. In a search engine (e.g., Google or Yahoo!), put in the name "United States Army Corps of Engineers" (in quotes) and add the word "web." One site that will come up is the Corps of Engineers Headquarters Web site. On the first page at the top there is a hotlink entitled "contract with the Corps." The hotlink will take a contractor to a Web site that provides information on how to become a registered contractor (a contractor with a CCR number). This page also has a hotlink to all Corps of Engineers field offices ("list of Corps offices") in, and outside, the United States

Each Corps field office has its own Web site. By searching for the term "contracting opportunities," information may be obtained for that office's upcoming projects, telephone numbers, e-mail addresses, and procedures for submitting bids.

Other agency Web sites provide contracting opportunities. For example, the Web site *www.defenselink.mil/sites/* lists all DOD agencies and offices. The same information may be obtained, for example, for the United States Department of the Interior (*www.doi.gov/*), the General Services Administration (*www.gsa.gov/*), or the Department of Housing and Urban Development (*www.hud.gov/*). On the first page of each of those agency's Web sites is a search box. A search using "contracting opportunities" will provide substantial information on each agency's programs, procurement procedures, and current and planned projects.

INFORMATION ON REGULATIONS AND PROCEDURES

A partial listing of various Web sites that provide information on several aspects of federal contracting, including laws and regulations, follows. You may find these Web sites beneficial, and there are generally links to other locations where pertinent procurement information may be obtained. To access any of these sites, highlight the site, open up your browser, paste the site into the address bar, and press "enter" on your PC.

A. Regulations

- For research of the basic Federal Acquisition Regulation (FAR), see: *www.arnet.gov/far.*
- For research of the agency supplements to the FAR, see: *www.gpoaccess.gov/cfr/index.html.* Click on the Browse and/or Search link on the left-hand side of

the Code of Federal Regulations Main Page. This will open a page listing all of the available CFR titles. Select Title 48, Federal Acquisition Regulation. This will open a table of contents to various agency supplements to the FAR, as well as the basic Federal Acquisition Regulation.

- The United States Air Force maintains a Web site that provides search capability of the Federal Acquisition Regulations as well as the FAR supplementary procurement regulations promulgated by various federal agencies. See: *http://farsite.hill.af.mil.*

B. Other Federal Agency Programs and Procedures

- The United States Army Corps of Engineers site provides information on its various offices, programs, and activities. This site also provides information and access to ongoing and planned procurement opportunities. See: *www.hq.usace.army.mil/hqhome/*
- For research of the Federal Emergency Management Agency, see: *www.fema.gov/*
- For research of the General Services Administration (GSA), its programs, offices, and activities, see: *http://gsa.gov/*
- For research of the Government Accountability Office (GAO), its rules, regulations, and decisions, see: *www.gao.gov/*
- For research of the Department of Health and Human Services, see: *www.hhs.gov/*
- For research of the United States Department of the Interior (DOI), and its programs and activities, see: *www.doi.gov/*
- For research of the Department of Labor (DOL) programs, activities and forms, see: *www.dol.gov/index.htm*
- For research of the United States Postal Services, its contracting programs, and policies, see: *www.usps.com/cpim/manuals/pm/pm.htm*
- For research of the Small Business Administration, its programs and activities, as well as size standards, see: *www.sba.gov/services/contractingopportunities/sizestandardstopics/index.html*
- For research of the United States Department of Transportation (DOT), its programs and activities, see: *www.dot.gov/*
- For information published by the Department of Treasury on interest rates applicable to monies owed by or to the federal government, see: *www.treasurydirect.gov/govt/rates/rates.htm*
- For research of the Department of Treasury regulations and procedures affecting prompt payment, see: *www.fms.treas.gov/prompt*
- For research of the Department of Veterans Affairs, its programs and activities, see: *www.va.gov/partners/buspart/index.htm*
- For Davis-Bacon Act Wage rate determinations, see: *www.access.gpo.gov/davisbacon*

C. Past Performance Evaluations

- For information on the Office of Federal Procurement Policy's (OFPP) guidance on contractor's past performance evaluations, see: *www.whitehouse.gov/omb/procurement/contract_perf/best_practice_re_past_perf.html*
- For information on the Department of Defense's (DOD) policy and guidance on contractor's past performance evaluations, see: *www.acq.osd.mil/dpap_archive/guidebooks/index.htm*