

I N S I D E T H E M I N D S

Navigating the Government Contracts Process

*Leading Lawyers on Examining Recent Trends in
Government Contracting and
Understanding Their Affect on Clients*

2010 EDITION



ASPATORE

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Practicing in the
Ever-Changing World
of Government Contracts

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Introduction

My practice offers a full range of legal services to clients across a broad range of industries. Our areas of expertise span a diverse array of legal issues, with a primary focus on government contracting and U.S. Small Business Administration (SBA) procurement programs, corporate transactions, labor and employment law, and litigation. Personally, my practice focuses on government contracting and SBA procurement programs.

In the government contracts arena, my firm has a strong track record of helping contractors navigate the procurement protest processes available before the U.S. Government Accountability Office (GAO), the U.S. Court of Federal Claims, the SBA, and other federal agencies. We have been successful in many high-profile protest cases, some of which are discussed in this chapter. Protests are a central aspect of my practice.

My government contracts practice also helps firms navigate the transactional aspects of the procurement process. Typical government contracts transactions include forming teaming agreements, subcontracts, joint ventures, and mentor/protégé relationships. There are regulatory compliance aspects to my practice as well, which include performing compliance audits and developing codes of ethics and organizational conflicts of interest plans.

Woven throughout my government contracts practice are issues related to SBA procurement programs. The SBA has several programs that provide contracting preferences for contractors that are considered to be small businesses for their industry, or based on the status of the owner or the location of the business. For example, the SBA's Section 8(a) Business Development Program is available for small businesses that are owned by socially and economically disadvantaged individuals. There are also programs for small businesses owned by service-disabled veterans (referred to as SDVO firms) and for small businesses located in historically underutilized business zones (referred to as HUBZone firms). We help firms navigate the application, regulatory compliance, contracting, and protest processes for these and other SBA procurement programs.

My firm's approach to government contracts is unique in several respects. Most importantly, we are one of the only firms in the country to focus so extensively on SBA procurement programs. Our knowledge of the programs, regulations, agency officials, and standard operating procedures sets us apart in this aspect of government contracting. Additionally, sophisticated boutique practices like ours are able to offer a robust array of legal services to clients in an efficient and cost-effective package with a personal touch. In my experience, success comes from the distinctive approach of building personal relationships with clients and never losing sight of the bottom line. This is unique in the government contracting field, and it leads to a successful government contracts practice.

Navigating the Recent Changes in Government Contracting

Understanding the rules for doing business with the federal government is the key to successfully navigating what can be a cumbersome and daunting process. Adding to the difficulty for contractors is the organic and ever-evolving nature of the government's procurement policies and procedures. To help contractors and their counsel stay at the cutting edge of government acquisition, this chapter examines several recent changes to the government contracts process, what is driving the changes, and what the changes are likely to mean for contractors in the future.

The Driving Factors: The Obama Administration, Iraq Contractors, and AIG

The Obama administration, Iraq contractors, and AIG may seem like an odd trio, but they share a common trait: each has played an important role in shaping recent changes to the government contracting process. During the last presidential campaign, candidate Obama often promised to bring about change. Since the election, President Obama's administration has followed through on his promise by introducing and implementing several initiatives that have altered how contractors do business with the federal government. The trends the Obama administration is establishing are an important component of the new government contracting landscape.

Many of the recent changes have been driven by the government's desire to foster greater oversight and accountability for the contracting process. This goal is a byproduct of the numerous and well-publicized cases of fraud by

contractors operating in Iraq and in response to Hurricane Katrina. See, e.g., Office of the Special Inspector General for Iraq Reconstruction, *Applying Iraq's Hard Lessons to the Reform of Stabilization and Reconstruction Operations* (2010); Office of the Special Inspector General for Iraq Reconstruction, *Hard Lessons: The Iraq Reconstruction Experience* (2009); and U.S. Government Accountability Office, *Hurricanes Katrina and Rita Disaster Relief: Continued Findings of Fraud, Waste, and Abuse*, GAO-07-300 (2007). As a result, many recent changes have placed even greater emphasis on compliance and, in doing so, have made the government contracting process stricter, and in some senses, more cumbersome.

One might wonder how AIG fits into all of this: simply put, it is a result of the economy. What happened with AIG is just one example of the unprecedented economic downturn over the past few years. The confluence of many economic factors have impacted government contracting in several ways, from the temporary boost in contracting spurred by the American Recovery and Reinvestment Act of 2009, to the greater focus on fiscal austerity that is shrinking agency budgets and causing the government to “insource” private sector functions and jobs. Economic conditions are also increasing competition and litigation related to government procurement.

Contractors Must Face a New Government Contracting Landscape

The above-described triumvirate of driving forces has led to many new developments in government contracting. Successful navigation of the procurement maze requires contractors and practitioners to develop a keen understanding of the recent changes and how the acquisition processes are evolving. To this end, several of the most noteworthy recent changes and their potential impacts are surveyed below.

Insourcing

Since President Obama took office, there has been an increase in the number of private sector jobs being “insourced” by the federal government. In what has been a bitterly ironic development for many contractors, the government is accelerating its initiative to eliminate outsourced functions—and jobs—at a time when the economy is still struggling to turn the corner and unemployment remains high. According to the government, the push

to insource is the result of budgetary pressures and the administration's determination that the government is too reliant on private contractors and should do more work "in-house."

Insourcing is currently one of the most important trends in government contracting, particularly for small businesses that are more apt to be impacted because their contracts are easier to convert over to the government. However, the issue has been building for several years. As is often the case between administrations, the pendulum is now swinging back from the tremendous outsourcing that occurred during the last Bush administration. In fact, the tide began to turn late in President Bush's last term when the Department of Defense was directed to establish procedures to ensure that the department's civilian employees were considered for performance of new functions. See 10 U.S.C. § 2463 (Supp. II 2008).

Momentum for the insourcing initiative has increased substantially since March 2009 when President Obama issued a Memorandum on Government Contracting. Memorandum of March 4, 2009, Government Contracting, *Memorandum for the Heads of Executive Departments and Agencies*, 74 Fed. Reg. 9,755 (March 6, 2009). This memo expressed concern about the federal government's potential over-reliance on contractors at the expense of "inherently governmental functions." To address this concern, the President directed the Office of Management and Budget to clarify when outsourcing is appropriate.

In response to the President's memo and the National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, the Office of Federal Procurement Policy (OFPP) issued a proposed policy letter in March 2010 "to provide guidance addressing when work must be reserved for performance by federal employees." *Work Reserved for Performance by Federal Government Employees*, 75 Fed. Reg. 16,188, 16,189 (March 31, 2010). The OFPP's proposed insourcing policies were subject to public comment, which closed on June 1. The Office of Management and Budget is hopeful that final policies will be released sometime in late 2010.

The OFPP's proposed policy letter seeks to establish a single, consistent definition of what is considered an "inherently governmental function." The government's view is that only government personnel should perform

inherently governmental functions. According to the Federal Activities Inventory Reform Act, an inherently governmental function is “a function that is so intimately related to the public interest as to require performance by Federal Government employees.” See Pub. L. No. 105-270, § 5(2)(A), 122 Stat. 2382, 2384 (1998). The OFPP’s plan is to adopt the Federal Activities Inventory Reform Act definition of inherently governmental functions. See 75 Fed. Reg. at 16,193. Under this definition, there is not much surprise about that which is considered inherently governmental; such functions range from direct conduct of criminal investigations to the command of military forces.

The OFPP’s policy letter also develops criteria for identifying “critical” functions given agencies’ unique missions and structures, and identifies positions that should be filled by civilian or military government employees in order for the agency to maintain control of its mission/operations and to promote “sufficient organic expertise and technical capability.” *Id.* at 16,189. As with inherently governmental functions, the OFPP’s position with respect to critical functions is that they should be done by the government, not private contractors.

Under the new policies, agency heads are supposed to document an insourcing determination before a solicitation is issued. *Id.* at 16,194-95. Additionally, agencies are supposed to perform a cost analysis before insourcing work that is not inherently governmental or critical. *Id.* at 16,196. The government is not supposed to simply take work from private contractors to perform it in-house unless the work is of a type that must be done by the government or there is a good financial reason for doing so. The Department of Defense has reinforced that insourcing should occur only after it is determined to be the most cost-effective approach, stating that a cost comparison must be performed and it must include “the full costs of military and DOD civilian manpower and contract support,” and that the “full costs of manpower include current and deferred compensations costs paid in cash and in-kind as well as non-compensation costs.” See Office of the Secretary of Defense, Directive-Type Memorandum (DTM) 09-007, *Estimating and Comparing the Full Costs of Civilian and Military Manpower and Contract Support*, at 1 (January 29, 2010).

While the government and industry continue to iron out the future of insourcing policies, the impact is already being felt by many contractors who are being hurt by aggressive government hiring practices. The government's insourcing initiative is ostensibly driven by budget pressures and quotas. In reality, however, budgetary concerns are a bit of a red herring because we are seeing that most agencies are insourcing simply for the sake of insourcing. This means insourcing is happening without a cost or manpower analysis that indicates insourcing will result in a better deal for the government.

According to the many anecdotes we have heard, small businesses have been especially vulnerable. To wit, the government told one small, disadvantaged business that it planned to hire all of the firm's former military guard service employees immediately. Then, as the government took the firm's personnel, it made it clear that the firm was expected to backfill the positions so there would be more personnel available to be hired by the government at a later date. Another small, disadvantaged business has seen the government "cherry-pick" its employees from the firm's administrative services contract. The government interviewed this contractor's employees, none of whom provided inherently governmental or even critical services, offered the employees a higher salary, and asked the employees to resign from the contractor on a Friday before starting work as a government employee the following Monday.

Such practices have serious consequences for small businesses, ranging from the loss of key personnel and institutional knowledge to contract performance issues and an unexpected end to revenue streams. This is unlikely to stop without more guidance and parameters for agencies detailing how and when work should be insourced, particularly ongoing work performed by small companies. Although the OFPP's proposed policies give agencies some guidance on what functions should be insourced, the OFPP's letter does not indicate that the damaging hiring practices discussed above are the wrong means to the end. It makes sense that the government should be required to perform inherently governmental functions, and that the government would insource work when it can be done more cost-effectively by the government. However, the OFPP's policy letter expands insourcing to "critical" functions and potentially to functions closely associated with inherently governmental

functions. Adding more fuel to the insourcing fire will enhance the need for measures to protect small businesses, to provide transparency for agencies' cost analyses, and to establish mechanisms for small businesses to challenge an insourcing decision.

There are certain industries that are most vulnerable to the insourcing initiative. These industries include pre- and post-award acquisition support, guard services (i.e., physical security), operation of prison or detention facilities, cyber security (including information technology network security), and support for intelligence services. Contractors and their attorneys who work in these fields should take steps to be prepared for the new insourcing realities. As a threshold matter, if an agency proposes to insource your contract, you should seek to obtain the agency's cost analysis to confirm that it was performed and that it accurately shows a cost savings for the government. You should also explore whether you have grounds to challenge insourcing via a protest or lawsuit under the Administrative Procedure Act. Furthermore, you should not ignore the cost implications of losing key employees and having to backfill positions on short notice. In these ways, insourcing may justify a proposal to revise indirect expense rates, a request for an equitable adjustment to your contract, or a claim for costs. Finally, depending on your industry, you may need to factor the prospect of insourcing into your cost proposal for new work, as well as into your bid/no-bid decision. The bottom line is that firms should be proactive in seeking to minimize the impact of insourcing, especially if your industry is on the chopping block.

The Government's New Tools for Accountability and Oversight

Shortly before President Obama took office, new rules went into effect that require contractors to affirmatively disclose their own misconduct or face suspension or debarment from contracting with the government. Federal Acquisition Regulation, FAR Case 2007-06, Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67064 (November 12, 2008). Soon thereafter, the President issued the March 2009 memorandum outlining his vision for changes in government contracting. In addition to insourcing, the Obama administration has implemented many initiatives designed to foster greater transparency and propriety in the contracting process. This has included a mandate to agencies to reduce the

use of so-called “high-risk” contracts and an expansion of the False Claims Act (see Fraud Enforcement Recovery Act of 2009, Pub. L. 111-21, § 5, 123 Stat. 1617, 1621-1625 (amending 31 U.S.C. § 3729-3733)), as well as the creation of a Web site to track contractor integrity and performance, affectionately referred to as the “Bad Boys List,” and the implementation of the oft-delayed “E-Verify” program.

As we survey the government’s new tools below, it quickly becomes clear that government contracting is trending toward a sharpened focus on contractor accountability and oversight. Accordingly, understanding the new ground rules and how they will be enforced is critical when navigating today’s government marketplace.

The Mandatory Disclosure Rule

On November 12, 2008, the so-called “mandatory disclosure rule” was published and incorporated in the Federal Acquisition Regulation (FAR). This rule has two parts. The first part is found in FAR § 52.203-13, Contractor Code of Business Ethics and Conduct, which must be included in all contracts and subcontracts expected to exceed \$5 million and to last more than 120 days. 48 C.F.R. § 52.203-13 (2009). The second part of the rule amended the suspension and debarment provisions of the FAR, adding to the circumstances that can lead a contractor to be suspended or debarred from contracting with the federal government. 48 C.F.R. §§ 9.406-2(b)(1)(vi) (causes for debarment), 9.407-2(a)(8) (causes for suspension) (2009).

Both the FAR clause and the new suspension and debarment FAR provisions require a contractor to “timely” disclose in writing whenever, “in connection with the award, performance or closeout” of any contract or subcontract, the contractor has “credible evidence” that a “principal, employee, agent, or subcontractor” of the contractor has committed: (1) a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in the U.S. Criminal Code; or (2) a violation of the Civil False Claims Act. 48 C.F.R. §§ 9.406-2(b)(1)(vi)(A)-(B) (causes for debarment), 9.407-2(a)(8)(i)-(ii) (causes for suspension), 52.203-13(b)(3)(i)(A)-(B) (contractor code of business ethics and conduct).

Contractors may also be suspended and/or debarred for a principal's knowing failure to disclose credible evidence of a "significant overpayment." 48 C.F.R. §§ 9.406-2(b)(1)(vi)(C) (causes for debarment), 9.407-2(a)(8)(iii) (causes for suspension). The FAR payment clauses at 48 C.F.R. §§ 52.212-4(i)(5), 52.232-25(d), 52.232.-26(c), and 52.232.27(l) (2009) require the contractor to remit an overpayment if it becomes aware that the government has overpaid on a contract financing or invoice payment. The mandatory disclosure requirements apply to all contractors, large and small.

To be sure, the new mandatory disclosure rule will benefit the taxpayer by decreasing and deterring fraud and misconduct in connection with government contracting. The new rule will also encourage contractors to impose greater self-discipline by creating new mechanisms for the deterrence and detection of fraud and other illegalities. However, creating mechanisms to comply with the new rule will be a significant added burden to small business contractors. Large contractors, due to their size, perhaps have an increased risk of running afoul of the new rule. Nevertheless, large firms have greater resources to proactively create the necessary internal controls for compliance.

Adequate compliance methods are critical because failure to timely disclose credible evidence of the subject conduct can lead to a contractor's suspension or debarment. Moreover, knowing failure to timely disclose credible evidence of a violation remains a cause for suspension or debarment until three years after final payment on a contract. This means that contractors covered by the rule must consider past conduct when assessing whether a disclosure is necessary.

Additionally, when incorporated into a government contract, FAR § 52.203-13 requires contractors to have a written code of business ethics or conduct and to implement a business ethics awareness and compliance program, complete with a system of "internal controls." A copy of the code of business ethics or conduct must be made available to each employee engaged in the performance of the contract. The contractor also must "exercise due diligence to prevent and detect criminal conduct" and "otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with law."

Small businesses are given a slight break under FAR § 52.203-13, as they are only required to have a written code of business ethics or conduct. However, from a practical standpoint, small businesses should not ignore the other elements of the rule because sound internal controls are necessary to make sure a contractor maintains compliance with the mandatory disclosure rule. At a minimum, all small business contractors should have a government contracts compliance manual or handbook that is given to employees. The manual or handbook should include a summary of the statutes and regulations addressing criminal conduct in the government contracts context, as well as the criminal, administrative, and civil penalties that could be imposed for such criminal conduct. The contractor should also include in the manual a summary of the values of the company and incorporate a statement from the company's most senior executive officer indicating his or her personal commitment to the highest ethical standards and his or her intention to discipline *all* employees who violate the company's code of business ethics and conduct. Our clients value our ability to assist them in preparing compliance manuals and handbooks that, if followed, will help make sure they comply with all necessary requirements. In addition, we provide employee training for clients to ensure that their personnel understand the applicable government contracting laws and regulations, and embody the highest ethical standards in the performance of their duties.

Finally, the mandatory disclosure FAR clause imposes on contractors the duty to prevent and detect criminal conduct. This duty requires the contractor to put into place some type of program of periodic audit, survey, and/or review to monitor its employees' compliance with the company's code of business ethics.

The Bad Boys List

The Bad Boys List, officially known as the Federal Awardee Performance and Integrity Information System (FAPIS), went into effect as a final rule on April 22, 2010. See Federal Acquisition Regulation, FAR Case 2008-027, Federal Awardee Performance and Integrity Information System, Fed. Reg. 14059 (March 23, 2010). The FAPIS is intended to be a catalog of information from various sources about contractors' integrity and performance history. The goal is to allow government contracting officers

to better determine whether a prospective contract awardee has, in the words of the iconic *Cops* theme song, been a “bad boy” on prior government contracts.

The FAPIIS is noteworthy because of the sensitive information it will contain and the sources from which it draws. The system is intended to be a “one-stop shop” for contracting officers by compiling into one source information from contractor databases like the Central Contractor Registration, the Contractor Performance Assessment Reporting System, the Excluded Parties List System, and the Past Performance Information Retrieval System. Non-responsibility determinations will be reported to the FAPIIS, as will administrative agreements that resolve suspensions and debarments. Because information will be retained in the FAPIIS for five years, contractors will find it harder to run from past performance issues (including terminations for default), suspensions, debarments, and non-responsibility determinations.

The new rule establishes a two-step test for determining whether a contractor must report information to the FAPIIS. A contractor must report information to the FAPIIS if: (1) it submits a proposal for a contract with a value of more than \$500,000 (including contracts for commercial items), or if the contract includes FAR § 52.209-8, Updates of Information Regarding Responsibility Matters; and (2) at the time its proposal is submitted, the contractor has more than \$10 million in active contracts. Additionally, if the proposal is successful, the contractor must update its FAPIIS page on a semiannual basis throughout the life of the contract.

The information that contractors must report to the FAPIIS includes criminal, civil, and administrative proceedings through which the contractor or one of its principals was found to be at fault in connection with a government contract. The FAPIIS rule defines a principal as an officer, director, owner, partner, or person having primary management or supervisory responsibilities within a business entity. The information submitted to the FAPIIS will be included with the data compiled from the Central Contractor Registration, the Contractor Performance Assessment Reporting System, the Excluded Parties List System, and the Past Performance Information Retrieval System, and other government sources.

As the repository of a wide array of information about a contractor, the FAPIIS is intended to make the contracting officer's job easier when he or she needs to make a responsibility determination about a prospective contract awardee. Contracting officers are directed to check a contractor's FAPIIS entry when considering an award of a federal contract that exceeds the simplified acquisition threshold. The current simplified acquisition threshold is normally \$100,000. For acquisitions of supplies or services that, as determined by the head of an agency, are to be used to support a contingency operation or to facilitate defense against or recovery from a nuclear, biological, chemical, or radiological attack, the simplified acquisition threshold is \$250,000 for any such contract awarded and performed or purchased inside the United States, and \$1 million for any such contract awarded and performed or purchased outside the United States. 48 C.F.R. § 2.101 (2009). In the future, contracting officers may be directed to check a contractor's FAPIIS page when considering awards at a lower dollar threshold, as well as for awards of state contracts. As such, it is critical for contractors to ensure the accuracy of the information in their FAPIIS entry. Mistaken data could be the difference between winning and losing a contract.

Just as it is much easier for a consumer to monitor a credit report for inaccuracies prior to applying for a loan or mortgage, it will generally be far easier for contractors to proactively ensure the accuracy of information in their FAPIIS entries prior to submitting bids on solicitations, rather than remedying defects at a later date. Accordingly, we proactively communicate with clients by means of, among other things, client alerts and newsletters that are designed to make sure they are aware of the new requirements and understand the significance.

The FAPIIS rule states that government personnel will receive training to ensure the information in the FAPIIS is accurate. While training is a positive step, it is unlikely to prevent all potential mistakes. Therefore, it will be important for contractors to closely monitor their FAPIIS pages and immediately report any errors. To assist contractors in this regard, the system will issue notifications to the contractor every time the government adds information to the contractor's FAPIIS page, and the system will allow contractors to post comments to explain or refute the information that has been added.

The sensitivity of the information that will be stored in the FAPIIS raises questions about how private the system will be. The new rule states that only the government and a contractor's designated company representative will have access to the contractor's FAPIIS entry. However, the rule also indicates that information in the system may be obtained by a third party through the Freedom of Information Act. As a result, contractors cannot expect that the information in the FAPIIS will always be private.

Beyond dutifully monitoring the FAPIIS and contesting overbroad Freedom of Information Act requests, the best way for contractors to mitigate the impact of the Bad Boy List is to redouble compliance and performance efforts. By eliminating the possible sources of negative information that could be added to the FAPIIS, contractors will maintain a clean performance record and may get an advantage over their less capable and less ethical competitors. As is often the case, the best defense is a good offense. The Bad Boys List should not be so bad for contractors that take extra care to ensure they have the right principals in place, develop or strengthen company policies and procedures for ethics and regulatory compliance, and perhaps most importantly, keep their customers happy.

E-Verify

Another new reality for the government contracting process is E-Verify. In September 2009, the Obama administration finalized the E-Verify program, the often-criticized electronic system for checking workers' immigration status, which is now mandatory for federal contractors. As a result, employers awarded covered federal contracts or subcontracts must participate in E-Verify to check their workers' immigration status and confirm whether the employees are authorized to work in the United States. Additionally, many states require certain businesses to participate in E-Verify, and legislation is pending to add the requirement in more states.

The E-Verify system is one tool used by the administration to advance its policy of immigration reform, and its passage into law requires new compliance measures for federal contractors. The system uses Social Security, Alien Registration, and I-94 Arrival-Departure documents to determine employee eligibility for work in the United States. The requirement to verify a contractor's workforce reinforces the

administration's policy that the federal government should do business only with companies that have a legal workforce.

The E-Verify requirements are somewhat confusing in terms of their applicability. Technically, the requirement to enroll in the E-Verify system applies to solicitations issued and contracts awarded after September 8, 2009. Under the final rule, employers are required to enroll in E-Verify if and when they are awarded a federal contract or subcontract that requires participation in E-Verify as a term of the contract.

To this end, covered federal contracts and subcontracts awarded after September 8, 2009, are expected to include the E-Verify FAR clause, a provision that requires the contractor to use E-Verify to substantiate the eligibility of new and existing employees performing work under a federal contract or subcontract. See 48 C.F.R. § 52.222-54 (Employment Eligibility Verification JAN 2009). Additionally, existing indefinite-delivery, indefinite-quantity contracts must be amended to include the E-Verify FAR clause if the remaining period of performance extends at least six months past September 8, 2009, and the amount of work or number of orders expected during the remaining performance period is deemed to be substantial. Federal contracting officers may also bilaterally amend current contracts to make them subject to E-Verify. A contractor's obligations under the new E-Verify rule do not commence unless and until the contractor is awarded a new contract that includes the E-Verify FAR clause or if the contractor has an existing contract that is amended to include the clause.

If a contractor receives a contract containing the E-Verify FAR clause, it must register in E-Verify within thirty days after the date of award. 48 C.F.R. § 52.222-54(b)(1)(i). Once enrolled, contractors are required to use E-Verify to register/check employment eligibility of all new hires regardless of whether they are working on the contract. 48 C.F.R. § 52.222-54(b)(1)(ii), (2)(i). Additionally, contractors are required to register/check the eligibility of all current employees who are directly performing work under a contract that includes the E-Verify clause, regardless of when those employees were hired. 48 C.F.R. § 52.222-54(b)(1)(iii), (2)(ii). All new hires must be verified within three business days of their start date. 48 C.F.R. § 52.222-54(b)(1)(ii), (2)(i)(A). All existing employees assigned to the contract containing the E-

Verify clause must be verified within ninety days of the date of enrollment in E-Verify or within thirty days of assignment to the project, whichever date is later. 48 C.F.R. § 52.222-54(b)(1)(iii), (2)(ii).

Thus, upon receipt of a new contract containing the applicable FAR clause, the contractor is only required to register all new employees hired after September 8, 2009, so long as none of a contractor's current contracts are modified to add the E-Verify FAR clause. However, if the contractor's current contracts are modified to contain the FAR clause, or if the contractor is a subcontractor to a prime contractor whose federal contract is modified to include the clause, the contractor will then also be required to retroactively verify all of the current employees performing on that covered contract. This will require a determination of whether each employee is directly performing work under the contract or is performing support and overhead functions. Employees who perform general support and overhead functions but do not work on a specific government contract do not need to be verified.

The E-Verify requirement subjects government contractors to increased compliance measures that, if ignored, could have serious consequences. As one example, federal contractors and subcontractors subject to the E-Verify clause are required to provide employees who received a tentative non-confirmation from the E-Verify system with the system-generated tentative non-confirmation notice. The employee must also be given an opportunity to contest the notice as well as be allowed to continue employment without penalty during the tentative non-confirmation process. Failing to allow an employee to contest a tentative non-confirmation is a violation and could be grounds for suspension or debarment. Moreover, contractors who knowingly hire unauthorized workers may face civil and criminal penalties, which can result in significant monetary penalties and possible suspension or debarment from future federal contracts.

Given the complexities of the E-Verify requirement and the potentially severe consequences imposed for non-compliance, contractors should be proactive to ensure they are in compliance with all of the requirements. Companies that take shortcuts or attempt to forge forward without fully understanding their obligations do so at their own peril.

Increase in Procurement-Related Litigation

Another shift in the government contracts process is that it has become more litigious. This is particularly noticeable with size and bid protests. For example, in recent years, the number of bid protests filed with the GAO has increased significantly. In fiscal year (FY) 2007, excluding cost claims and requests for reconsideration, the GAO received 1,276 bid protests. Using the same parameters for FY08, the GAO received 1,504 bid protests, an increase of approximately 15 percent. And an even greater jump was seen between FY08 and FY09, as the 1,834 bid protests filed with the GAO in FY09 was an 18 percent increase over FY08.

However, if cost claims and requests for reconsideration are considered along with bid protests, the increase in the GAO's total caseload in recent years is even higher. GAO statistics indicate that 1,411 total cases were brought before it in FY07, 1,652 total cases were brought before it in FY08, and 1,989 total cases were brought before it in FY09. Therefore, there has been a nearly 30 percent increase in the total cases filed with the GAO in the last three fiscal years. Our expectation is that the statistics for FY10 will show that the upward trend is continuing.

There are two major reasons for the recent increase in bid protests. First, the GAO's bid protest jurisdiction was recently expanded to include: (1) protests of task orders that exceed \$10 million (see National Defense Authorization Act of Fiscal Year 2008, § 843; Pub. L. 110-181, 122 Stat. 3, 236); (2) protests by federal employees in a competition conducted under OMB Circular A-76; and (3) Transportation Security Administration procurements (see National Defense Authorization Act of Fiscal Year 2008, §326; Pub. L. 110-181, 122 Stat. 3, 62). In FY08, the GAO attributed eighty-seven cases to its newly expanded jurisdiction. These eighty-seven cases represent approximately 36 percent of the increase in the GAO's total caseload between FY07 and FY08. Likewise, the GAO attributed 168 cases in FY09 to its expanded bid protest jurisdiction, which represents 50 percent of the increase in the GAO's total caseload from FY08 to FY09.

The second reason for the increase in bid protests and other procurement-related litigation is the increasingly harsh economic conditions facing government contractors in recent years. As has been well chronicled, the

general economy started to falter in 2008, at which point the credit markets tightened and business opportunities in the private sector became more difficult to obtain. This led many commercial contractors to seek solace in government work. Although the American Recovery and Reinvestment Act briefly increased contracting budgets for some government agencies, the general focus of the Obama administration's government contracting initiatives has been to reduce contracting budgets and contractor workforces.

In these ways, most competitively awarded government contracts have become even more prized and sought after than usual. As a consequence of the slow economy and increased competition, the stakes in losing a government contracting opportunity are higher than in past years, thereby significantly increasing the contractors' incentive to file procurement challenges with the GAO and in court.

In particular, incumbent contractors have a strong incentive to file a bid protest in the current environment. Even in the best of economic times, incumbent contractors are especially reliant on revenue from their ongoing government contracts. However, nowadays, incumbents are even more likely to feel the sting of a lost revenue stream. Therefore, when incumbents do not win the follow-on contract, they are extremely likely to protest.

In fact, there is a strategic business reason for doing so at the GAO. This is because if certain criteria are met, the Competition in Contracting Act provides for an automatic stay of the new contract pending the resolution of the protest. 31 U.S.C. § 3553(d)(3)(A)(ii) (2006). A protest to the GAO typically takes two to three months to resolve, so the protested contract is likely to be on hold for several months if the stay is triggered. Since the procuring agency will need a means to continue obtaining the desired services, the Competition in Contracting Act stay typically leads the procuring agency to issue an extension to the incumbent contract. Or, if there are no extensions left on the incumbent contract, the agency may issue a sole-source "bridge" contract to the incumbent. The extension of an incumbent contract or the award of a bridge contract permits the incumbent contractor to continue performing the work and generating revenue for the project for at least a few months longer while the protest is resolved. So, for incumbent contractors faced with the loss of a contract,

filing a protest is likely to ensure at least a few more months of revenue from the project.

Shift to GWACs

In the near future, information technology contractors may experience changes in the various contract vehicles the government utilizes, with a shift toward greater use of government-wide acquisition contracts. A government-wide acquisition contract is a task order or delivery order contract that is established by one agency for use by other government agencies. They are operated either by an executive agency designated by the Office of Management and Budget (40 U.S.C. § 11302(e) (2006)) or under a delegation of authority from the General Services Administration. There are currently several such contracts known by acronyms such as “8(a) STARS” and “Alliant.”

The government has recently become concerned that there may be too much duplication between government-wide acquisition contracts and contracts offered by individual agencies (i.e., not government-wide) for similar goods or services. This forces contractors to expend valuable resources on bid and proposal costs for multiple procurements, when the intent of the government-wide acquisition contracts was to provide “one-stop shopping” for agencies. Accordingly, the government may require agencies to make a business case to justify soliciting a single-agency contract for goods or services that are the subject of an existing government-wide acquisition contract.

Greater Audit Scrutiny

In 2009, the GAO admonished the Defense Contract Audit Agency for what the GAO perceived as the Defense Contract Audit Agency’s failures in catching waste and fraud in federal contracting. U.S. Government Accountability Office, *DCCA Audits: Widespread Problems with Audit Quality Require Significant Reform*, GAO-09-468 (September 2009). As a result, the Defense Contract Audit Agency has been increasing both the number of audits it performs and the scope of such audits. This could result in more proposed suspensions and debarments, and it will undoubtedly force

contractors to be even more careful with their billing and accounting practices.

Our clients strongly value our ability to keep them abreast of, and prepared for, all of these recent changes to the government contracting landscape. We do so through various means, such as our quarterly newsletter, regular seminars, and weekly client update e-mails. To stay on top of the new developments, we monitor several industry publications and groups, including BNA Inc.'s *Federal Contracts Reports*, Business Research Services Inc.'s *Set-Aside Alert*, and the Professional Services Council.

The New Elements of the SBA's Procurement Programs

The SBA procurement programs are not immune to the factors that have been driving changes in government contracting at large. In fact, there have recently been a flourish of changes that significantly affect how small businesses interact with large businesses on federal procurements and sell their goods and services to the federal government.

Many of the changes at the SBA are being driven by GAO reports that found fraud and abuse in several SBA programs, including those for HUBZone and SDVO firms. See, e.g., U.S. Government Accountability Office, *Service-Disabled Veteran-Owned Small Business Program: Case Studies Show Fraud and Abuse Allowed Ineligible Firms to Obtain Millions of Dollars in Contracts*, GAO-10-108 (October 2009); U.S. Government Accountability Office, *HUBZONE Program: Fraud and Abuse Identified in Four Metropolitan Areas*, GAO-09-440 (March 2009). In response to these reports, the SBA is vigorously scrutinizing its contracting preference programs. This has led to an increase in the number of Inspector General investigations, and the SBA has been more circumspect in reviewing applications for its programs. The SBA has also proposed an ambitious overhaul of its 8(a) program and small business regulations, as well as changes to the size standards that govern small business determinations and the rules for appealing SBA decisions to the Office of Hearings and Appeals. Further, there have been several important cases that impact SBA programs.

In short, much has been happening with SBA procurement programs that affects how contractors and practitioners navigate government contracts that are reserved for small and disadvantaged businesses. Some of the highlights are discussed below.

Increased SBA Oversight

In the wake of the GAO reports mentioned above, the SBA has stepped up its enforcement and oversight efforts. This is expected to continue, as the SBA has announced plans to conduct an increasing number of onsite visits for firms certified in its procurement programs, and to devote more time and resources to Inspector General and compliance activities. Proposed rule changes also seek to stiffen the penalties for non-compliance with the rules of the programs. It appears that the SBA also intends to more closely monitor compliance with the performance of work rules to make sure firms winning set-aside contracts are performing the requisite amount of the work.

There are many consequences of being caught in the SBA's widening regulatory dragnet. Contractors could face terminations for default, poor performance reviews, suspension and/or debarment, and even criminal or civil penalties in the most egregious cases. In particular, we have seen an increase in suspensions and debarment proceedings against firms that failed to abide by the SBA's regulations.

When a contractor is proposed for suspension or debarment, it creates major disruptions for the firm's operations, up to and including bankruptcy. This occurs because once a company is proposed for suspension or debarment, the FAR requires that the company be immediately placed on the Excluded Parties List System. 48 C.F.R. § 9.404 (2009). Once on the system, a company cannot perform or submit proposals for any new federal contracts. With regard to ongoing contracts, the listed company cannot perform any new task orders, purchase orders, or options. In short, before the government even makes a determination as to the guilt or innocence of a contractor, the contractor's business has already been effectively shut down. Thus, once placed on the Excluded Parties List System, there is

nothing a contractor can do to limit its damages other than to contest the proposed suspension and debarment.

While the contractor is listed on the Excluded Parties List System, the government's investigation of the propriety of the proposed debarment can take six months or more; in fact, in some cases the investigations take over a year. Due to their size, many small businesses depend on new work to stay viable, and an Excluded Parties List System listing that lasts six months to a year can cost a company dearly. The best way to avoid such a listing is to ensure the company is complying with all its regulatory and statutory obligations, especially with regard to the SBA's procurement programs. We are now recommending that companies audit their compliance with the applicable SBA requirements at least once a year to ensure they do not fall victim to a crippling suspension or debarment proceeding. While such yearly audits are not a guarantee of smooth sailing, they will help reduce the possibility of an investigation and certainly reduce the possibility of proposed suspensions or debarments.

While these new oversight measures and proposed regulatory changes can be a scary thought for federal contractors, it is important to keep in mind that with good practices and good advice, all of the potential pitfalls can be avoided. As long as small businesses ensure they clearly understand the rules and regulations applicable to their specific situations, the new oversight will not be a problem. Indeed, this new oversight could have quite the opposite effect. Small businesses that comply with all of the federal contracting requirements will find themselves in a lucrative marketplace where their less prepared competitors could suffer. In turn, this can increase opportunities for the well prepared and well informed.

Proposed Mentor/Protégé and Joint Venture Rule Changes

On October 28, 2009, the SBA proposed sweeping changes to its 8(a) and small business regulations. See SBA Size Regulations; 8(a) Business Development/Small Disadvantaged Business Determinations: Proposed Rule, 74 Fed. Reg. 55694 (October 28, 2009). Among the many proposed changes are rules that have the potential to reshape two valuable tools for government contractors: the 8(a) Mentor/Protégé Program and joint ventures. Other affected rules include those pertaining to size

determinations, 8(a) eligibility, 8(a) economic disadvantage thresholds, rules for tribes and Alaska native corporations, and the non-manufacturer rule. The potential changes to the mentor/protégé and joint venture rules stand out because these have become important and often-utilized resources for small and large contractors seeking to expand their access to government contracts.

In SBA parlance, a mentor is an experienced business that, through the SBA's 8(a) Mentor/Protégé Program, guides an 8(a) protégé on its journey through the SBA's 8(a) Program. Started in 1998, the SBA's 8(a) Mentor/Protégé Program was designed to enhance the capabilities of the protégé and improve its ability to compete successfully for federal contracts. See SBA Final Rule 63 Fed. Reg. 35726, 35764 (June 30, 1998) (codified at 13 C.F.R. § 124.520). To accomplish this purpose, the mentor may provide the protégé with various forms of assistance, including technical and management assistance, marketing and business planning, subcontracting opportunities, and financial assistance in the form of equity investments or loans. One of the keys to the arrangement is that the mentor may provide assistance to the protégé without causing the two firms to be considered "affiliated" for purposes of the SBA's small business size standards. For firms that depend on their small business status to access federal contracts set aside for small businesses and 8(a) firms, affiliation with a large business must be avoided, because such affiliation renders the small business "other than small." See 13 C.F.R. § 121.103.

Additionally, the SBA's 8(a) Mentor/Protégé Program permits joint ventures between mentors and 8(a) protégés even if the mentor is a large business so long as the protégé qualifies as a small business for the contract in question. The joint venture is attractive to protégés and mentors because it permits the firms to jointly operate a contract as a prime contractor, increasing the prime contractor's past performance, technical capabilities, and access to capital and bonding. At a more basic level, the relationship helps the 8(a) firm obtain and perform prime contracts it would otherwise have difficulty winning, and it gives the large business access to a class of contracts for which it would not otherwise be eligible to compete. The mentor/protégé relationship is crucial here because outside of the SBA's 8(a) Mentor/Protégé Program, a joint venture between a large and small

business would not be eligible for small business status or 8(a) contracts due to affiliation.

As the 8(a) Mentor/Protégé Program has evolved over the last twelve years, the SBA has become concerned that the scope of the exclusion from affiliation has been misconstrued and that mentor/protégé joint ventures may provide an unfair advantage for certain procurements. For these and other reasons, the SBA proposed a number of changes and clarifications to its mentor/protégé and joint venture regulations, including rules to:

- Limit the number of contracts a mentor can pursue with its protégé to no more than five
- Restrict mentor/protégé joint ventures to 8(a) contracts only
- Allow non-profits to serve as mentors
- Require joint ventures established as a limited liability company to have employees
- Require the 8(a) firm to perform at least 40 percent of the work done by the joint venture
- Restrict the mentor's ability to also serve as a subcontractor to the joint venture
- Ease the current requirement that the protégé must receive at least 51 percent of the joint venture's profit
- Allow mentor/protégé joint ventures to qualify as small for federal subcontracts

These rules, if finalized unchanged, will reshape how the Mentor/Protégé Program and joint ventures work for small and large businesses. In some cases, the proposed rules will make these tools easier to access. For example, the SBA may relax the “three in two” rule that currently allows a joint venture to pursue three contracts in two years. Under the proposed rule, a joint venture could pursue any number of contracts until it has been *awarded* three contracts in a two-year period. This means that as long as a joint venture has not won three contracts at the time it submits its initial offer, it may continue proposing for and winning contracts. In other respects, however, the rule could make joint ventures less attractive. For example, the SBA is proposing to cap the total number of contracts a

mentor may perform with its protégé at five. Such a rule would end the common practice of forming multiple joint ventures, each of which is subject to the “three in two” rule, and would limit the benefits that both parties can derive from the relationship.

The rule changes are also designed to alleviate administrative burdens, but in this respect, too, the SBA’s proposals are a mixed bag. On the positive side, the new rules would clarify that the joint venture agreement itself only needs to be approved for the first 8(a) contract opportunity. Thereafter, parties may simply submit an addendum to the joint venture agreement for approval. The new rules would also confirm that only mentor/protégé joint ventures pursuing 8(a) contracts need SBA approval. At the same time, the SBA plans to depart from existing precedent by requiring all joint ventures, even those going after small business contracts, to comply with the 8(a) joint venture regulations. See *Size Appeal of SES-TECH Global Solutions*, SBA No. SIZ-4951 (2008) (finding that the 8(a) joint venture rules do not apply to a small business set-aside contract). It is of greater concern that the SBA is considering a new rule that would not allow an unpopulated joint venture to be formed as a limited liability company. Such a rule would cause firms to confront the difficult choice to either forgo the legal protections of the limited liability company, or incur the costs and administrative hassles associated with hiring employees into the joint venture.

From a financial perspective, the new rules may permit mentors to make more profit in a mentor/protégé joint venture because the SBA is proposing to allow profit to be split commensurate with the work the parties perform. This is more equitable than the current requirement that 51 percent of the profits must go to the protégé, regardless of the work it performs, and should expand and strengthen the pool of mentors. The same should be true of the proposal to allow non-profits to serve as mentors and to allow mentor/protégé joint ventures to be considered small for prime contracts and for federal subcontracts. However, these gains may be mitigated by the plan to take away the mentor’s ability to act as a subcontractor to the joint venture, at least on sole-source contracts and perhaps on all contracts. Mentoring is a more attractive option under the current rules because they do not prevent the mentor from performing work as part of the joint venture and as a subcontractor to the joint venture.

The SBA's proposed rules also affect other mentoring programs offered by federal agencies, such as the Department of Defense, the Department of Homeland Security, and the Department of Energy. One of the advantages of these programs is that, unlike the SBA's program, many are open to more than just 8(a) firms. This means HUBZone, SDVOSB, woman-owned, and non-8(a) small businesses are eligible for mentoring that they cannot receive through the SBA's program. The other mentoring programs are less useful, however, without the mentor/protégé exception from the SBA's affiliation rules. Due to concerns that the SBA's mentor/protégé affiliation exception has been applied too broadly, the SBA is proposing to grant the exclusion from affiliation only for federal mentor/protégé programs specifically authorized by statute, or if the SBA makes an exception. This will change the way other agencies' mentor/protégé programs are used and will limit the type of small business that can benefit from mentoring for federal contracts.

Finally, in keeping with the government-wide focus on increased contractor accountability and oversight, the SBA plans to impose greater consequences for firms that do not adhere to the 8(a) Mentor/Protégé Program and joint venture regulations. For example, if the SBA determines that a mentor has not provided the promised business development assistance to its protégé, the SBA could recommend that the contracting agency issue a stop work order for any contracts the joint venture is performing. The SBA could also request that another 8(a) firm take over the contract. More serious violations could result in the mentor's suspension from mentoring for two years, debarment of the mentor and protégé from contracting with the federal government, and termination of the protégé from the 8(a) Program. These punitive measures would raise the stakes for compliance by mentors, protégés, and joint venture partners, and would likely increase procuring agencies' reluctance to use the SBA's Mentor/Protégé Program.

Final rules to implement the SBA's mentor/protégé and joint venture proposals are expected by the start of FY11, and many of the proposals are expected to be adopted as proposed. Consequently, small and large contractors need to plan for and better understand the direction in which these programs are headed.

Noteworthy Government Contracting Cases

As procurement-related litigation has increased, so too has the number of cases that are shaping SBA procurement programs. This has led to several important cases that have changed how small and large businesses utilize the government contracting process.

Delex Systems, Inc.

One such case, a bid protest decided by the GAO in *Delex Systems Inc.*, B-400403 (October 8, 2008), was one of the first protests under the GAO's new authority to hear protests of task orders valued in excess of \$10 million. The protest alleged that the procuring agency failed to comply with the set-aside provisions of FAR § 19.502-2(b), which is commonly called the "Rule of Two." The Rule of Two requires that an acquisition be reserved for small businesses when there is a reasonable expectation that the agency will receive offers from at least two responsible small businesses and the award will be made at a fair market price. In the agency's defense of the protest, it argued that the Rule of Two was inapplicable because a task order under a multiple-award contract is not an "acquisition," as defined in the FAR.

In sustaining the protest, the GAO found that the Rule of Two applies to competitions for task and delivery orders issued under multiple-award contracts. This was an important victory for small businesses, because it means they have greater access to task order work. In the past, a problem with multiple-award contracts has been that after the main contract is awarded, there are less stringent competitive requirements governing the issuance of task orders under the contract. And an increasingly large amount of work is being procured through task orders. Thus, if agencies are free to ignore set-aside requirements for task order competitions, small businesses stand to be excluded from a growing segment of the federal market.

The GAO's ruling in *Delex* has led to greater opportunities for small businesses. Agencies are now starting to utilize separate contract vehicles for small businesses only. For example, a recent government-wide acquisition contract called Alliant had two components, with one

specifically reserved for small businesses. This trend is expected to continue as more agencies incorporate the principles from *Delex* into their procurements. Although some commentators have questioned whether *Delex* was correctly decided, the GAO has issued several rulings confirming its decision.

Size Appeal of SES-TECH Global Solutions

Another important case involved size issues in an Office of Hearings and Appeals appeal cited as *Size Appeal of SES-TECH Global Solutions*, SBA No. SIZ-4951 (2008). This appeal confirmed important parameters regarding the application of the SBA's 8(a) joint venture regulations to joint ventures for non-8(a) contracts. The appellant was a joint venture seeking to compete for a small business set-aside contract. A disappointed bidder filed a size protest against the joint venture, and the SBA subsequently investigated whether the joint venture complied with the 8(a) joint venture regulations. The SBA determined that the joint venture failed to comply with the 8(a) joint venture regulations and therefore was ineligible for the contract it had been awarded.

On appeal, the Office of Hearings and Appeals reversed the SBA's decision. The Office of Hearings and Appeals found that because the procurement was for a small business contract, not an 8(a) contract, the SBA was wrong to review the joint venture under the 8(a) joint venture regulations. According to the ruling, the 8(a) joint venture regulations are only applicable to joint ventures that pursue 8(a) contracts.

The effect of the *SES-TECH* decision was positive for small and large businesses seeking to utilize joint ventures for federal procurements because the ruling made the process simpler for small business contracts. However, the impact of the case may be short-lived because as part of the SBA's sweeping proposals in October 2009 to overhaul its regulations, the SBA may require all joint ventures, whether pursuing small or 8(a) contracts, to adhere to the 8(a) joint venture regulations.

Rothe Development Corp. v. Department of Defense

Finally, the U.S. Court of Appeals for the Federal Circuit decided an important case in late 2008, cited as *Rothe Dev. Corp. v. Dep't of Def.*, 545 F.3d 1023 (Fed. Cir. 2008). The Federal Circuit found Section 1207 of the National Defense Authorization Act of 1987, codified at 10 U.S.C. § 2323 (2006), to be unconstitutional because, as reenacted in 2006, it authorizes the Department of Defense to operate race-based contracting programs without sufficient statistical evidence of discrimination. To implement this ruling, the Federal Circuit remanded the case to the District Court for the Western District of Texas, instructing the district court to enjoin application of the current 10 U.S.C. § 2323. In response, the district court issued a broad injunction on February 26, 2009, that effectively eliminated 10 U.S.C. § 2323 and all of the preferences it establishes for socially and economically disadvantaged small businesses (including 8(a) firms), historically black colleges and universities, minority institutions, Hispanic-serving institutions, and qualified HUBZone small business concerns.

Because of the *Rothe* decision, in March 2009, the Department of Defense issued a memorandum indicating that its agencies should no longer use 8(a) contracts. This dramatic step drew an immediate response from the SBA, which reminded the Department of Defense that the *Rothe* decision pertained only to a statute that authorized the department to operate race-based procurement programs and goals; *Rothe* did not address race-based procurement programs and government-wide goals for small and disadvantaged businesses under the Small Business Act. See 15 U.S.C. § 644(g)(1) (2006). Consequently, the effect of the *Rothe* decision was narrower than the Department of Defense's interpretation because the *Rothe* ruling did not disturb the government-wide minority contracting goals, only the department-based programs.

After hearing from the SBA regarding the scope of the *Rothe* decision, the Department of Defense retracted its directive against the use of 8(a) contracts. Nevertheless, *Rothe* was viewed by many as a shot across the bow of the Small Business Act's race-based procurement programs and goals. Indeed, the decision may serve as a guide for a future challenge to the race-based procurement programs authorized under the Small Business Act. This is why contractors should be aware of the *Rothe* decision and how it

may affect set-aside procurements and spur congressional action in the future.

Conclusion: Government Contracts Law in a Dynamic Environment

As in many areas of the law, the field of government contracting and the federal government's acquisition processes are in a near-constant state of flux. This is what makes the practice of government contracts law at once engaging and challenging. Especially for new contractors and practitioners, keeping up with the changes may seem daunting. But clients and customers are looking for solutions that reflect an understanding of the current government contracting environment and anticipate the directions in which it is headed. Therefore, while this takes commitment, the effort is well spent; ultimately, staying current on procurement policy, legislation, and regulations is the key to navigating the government contracting process successfully.

Lawyers can keep up with the latest changes in government contracts law by regularly monitoring the Federal Register as well as periodicals, newsletters, and industry groups that cover government contracting. Government contracts legal practitioners should also monitor changes in the law by regularly reviewing the Web sites of the GAO, the U.S. Court of Federal Claims, and the U.S. Court of Appeals for the Federal Circuit for recent opinions in government contracts cases and bid protests.

In addition, lawyers who are new to the government contracting area should take certain steps to further their professional development. First, you should work to obtain a good understanding of the FAR. Second, you should learn to become adept at bid protest litigation, since such litigation is the bread and butter of much of the government contracts bar. You should also take the opportunity to network with other lawyers in the government contracts bar, both in the private and the public sector. For example, the American Bar Association Section of Public Contract Law is an excellent resource for professional development in terms of keeping up with new developments in government contracting, increasing one's profile in the government contracts bar, learning from more experienced lawyers, and having the opportunity to provide input on issues the government contracting community is now facing or will face down the road. The

Government Contracts and Litigation Section of the District of Columbia Bar and the Government Contracts Section of the Federal Bar Association provide similar opportunities.

Key Takeaways

- Be prepared for the new insourcing realities by obtaining the agency's cost analysis to confirm that it was performed accurately, exploring whether you have grounds to challenge insourcing via a protest or lawsuit under the Administrative Procedure Act, and refusing to ignore the cost implications of losing key employees and having to backfill positions on short notice.
- Help prepare one's clients to comply with the new mandatory disclosure rule by creating compliance manuals and codes of ethics and conduct.
- Ensure the accuracy of the information in a client's FAPIIS entry, and more importantly, ensure the client is performing its contracts well and is promptly dealing with performance issues that could lead to contract termination. Mistaken or bad data could be the difference between winning and losing a contract.
- Become familiar with the new E-Verify requirements, and take proactive measures with one's clients to ensure they fully comply with E-Verify's mandate.
- Become prepared to encounter in one's practice increasing numbers of SBA enforcement actions as well as bid protests before the GAO and/or the U.S. Court of Federal Claims.
- Assist contractors, both large and small, in planning for the SBA's proposed changes to the 8(a) regulations, with a particular view toward changes to the Mentor/Protégé Program and joint venture regulations.

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