



November 30, 2016

# Government Contracts 101

The Basics of Contracting  
with the Federal Government

Lawrence M. Prosen  
202.481.9940  
[lprosen@kilpatricktownsend.com](mailto:lprosen@kilpatricktownsend.com)

# Who & Why?

## Lawrence M. Prosen

- Degree in Architecture, History, and JD
- 19+ years practicing law
  - All in Construction and Government Contracts
  - Experience in all aspects of Government Contracts: Satellite Services (Iraq and Afghanistan); Afghani Cell Towers; Tank Range (Kuwait); Military Storage Base (Israel)
  - Agencies: GSA, DOD (NAVFAC, Corps of Engineers, Air Force, Coast Guard, PENREN, DISA, ISEC, etc.); IRS, CIA, State Dept. OBO; Architect of the Capitol, White House, DOT, etc.
  - 33 States, 24 Countries

# Topics of Discussion

- Government Contracts – An Introduction
- The Process
- Bid Protests
- Small Business Issues
  - HUB Zone, 8(a) set-aside/preferences
- Civil & Criminal Matters
  - Debarment/suspension/false claims
  - Qui Tam Actions
    - Claim Certifications

# The U.S. Government: Did You Know?

- Single largest contracting party and purchaser of goods, property, and services in the world
  - Largest Landlord
  - Largest Buyer of Goods & Services
- Spends more money on scientific research than any other entity, public or private
  - \$140.8 billion in R&D budgeted for 2013
- Spends over \$350 billion annually on Federal procurements – Proposed 2014 Budget Proposes
  - More than \$1 in every \$6 spent by the Fed goes to contractors
  - New 21<sup>st</sup> Century National Infrastructure Bank/Trust
    - PPPs – a New Frontier
    - \$476 billion budgeted over six years for surface transportation reauthorization; over \$1 billion for Next Gen Air Transportation System
  - Over \$607 billion to state and local governments in 2011 ([www.cbo.gov](http://www.cbo.gov))

# Did You Know?

## The U.S. Government is the Largest Spender of Money and Buyer of Goods & Services

**OVERVIEW OF AWARDS BY FY 2008 – 2017**

**“T” as in Trillions of Dollars**

Fiscal Year	Contracts	Grants	Loans	Other Financial Assistance	Total
2017	\$15,558,053,841	\$37,586,803,244	\$12,480,855,000	\$15,110,000,211	\$68,267,338,151
2016	\$416,062,383,267	\$653,692,066,070	\$2,731,682,539	\$1,719,138,255,753	\$2,791,624,287,629
2015	\$439,345,838,977	\$616,727,574,473	\$4,659,072,360	\$1,783,598,455,984	\$2,844,330,941,794
2014	\$446,258,007,718	\$603,428,673,520	\$6,224,736,051	\$1,715,292,316,839	\$2,771,203,734,128
2013	\$463,720,800,622	\$521,610,369,771	\$1,945,810,560	\$1,931,156,859,082	\$2,918,433,840,035
2012	\$519,947,053,883	\$543,109,199,604	(\$126,006,020)	\$2,646,888,495,980	\$3,709,818,743,447
2011	\$539,203,505,575	\$572,567,549,243	\$2,449,856,434	\$2,177,665,178,357	\$3,291,886,089,608
2010	\$540,229,986,232	\$623,251,805,314	\$2,814,570,337	\$1,318,644,489,865	\$2,484,940,851,748
2009	\$540,807,043,932	\$675,656,396,411	\$692,311,721	\$1,731,543,482,366	\$2,948,699,234,430
2008	\$541,239,462,181	\$420,736,501,314	\$438,530,307	\$1,122,121,266,840	\$2,084,535,760,642

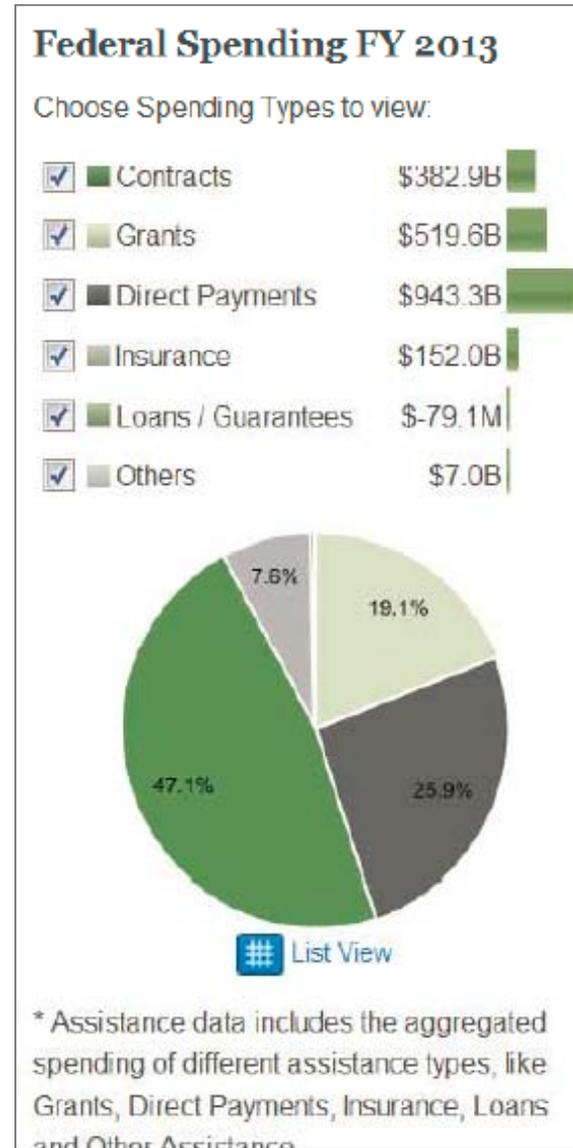
# What Does The Government Buy?



# Federal Procurement Spending

- FY 2016 Federal Spending:
  - Contracts = \$416.1 Billion
  - Grants = \$653.7 Billion
  - ~ \$1.1 TRILLION
  
- All States and Localities estimated to have received total Federal Grants of:
  - 2011 - \$607 billion
  - 2012 - \$585 billion
  - 2013 - \$561 billion (estimated)

Source: [www.usaspending.gov](http://www.usaspending.gov)



# The Process

## Procurement Process

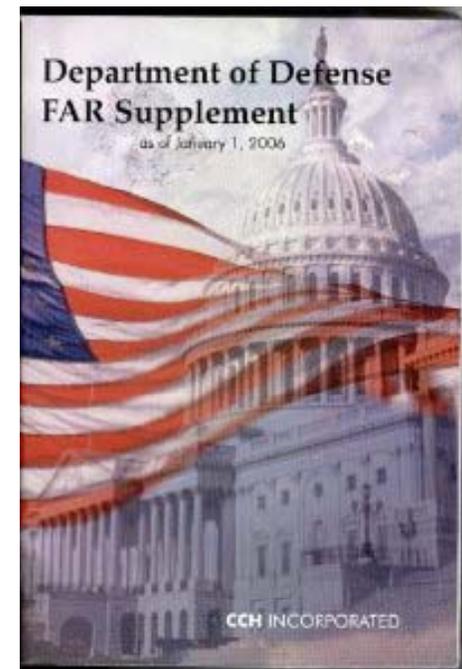
- Strives for full, open competition and all bidders/offeror's compete on an equal footing/level playing field
  - Does not always work this way

# The Process

- The Public Players
- Forget what you learned in school about contract law
  - Public regulations mandate contract provisions and are generally **NOT** subject to negotiation
- Primarily the Executive Branch
  - Contracts are governed by the FAR & Agency-Specific FAR Supplements
    - GSA, DoD, etc. – most Agencies have their own supplemental regulations
    - GSA Federal Supply Schedule – Pre-approval of product and price – **Supplies, Goods & Services**
  - But also Congress, FAA, and Judiciary/Architect of the Capitol
  - State/County – public entities
    - WMATA, MWAA, CTA, Various Airports, Bridges and Highway Projects

# The Process

- We're Not in Law School Anymore
  - This is not a more “traditional” commercial contract
- DID YOU KNOW?
  - Public regulations mandate contract provisions and are almost universally not subject to negotiation or revision
  - Provisions and clauses may be read into the contract



# FAR & FAR Supplements

- ☐ Title 48 - Federal Acquisition Regulations System  
Parts 1 - 9905. October 1, 2001.  
Table Of Contents
  - ☐ Chapter 1 - FEDERAL ACQUISITION REGULATION (Continued) (Parts 1 - 99)
  - ☐ Chapter 2 - DEPARTMENT OF DEFENSE (Parts 201 - 253)
  - ☐ Chapter 3 - HEALTH AND HUMAN SERVICES (Parts 301 - 370)
  - ☐ Chapter 4 - DEPARTMENT OF AGRICULTURE (Parts 401 - 453)
  - ☐ Chapter 5 - GENERAL SERVICES ADMINISTRATION (Parts 501 - 552)
  - ☐ Chapter 6 - DEPARTMENT OF STATE (Parts 601 - 653)
  - ☐ Chapter 7 - AGENCY FOR INTERNATIONAL DEVELOPMENT (Parts 701 - 753)
  - ☐ Chapter 8 - DEPARTMENT OF VETERANS AFFAIRS (Parts 801 - 871)
  - ☐ Chapter 9 - DEPARTMENT OF ENERGY (Parts 901 - 970)
  - ☐ Chapter 10 - DEPARTMENT OF THE TREASURY (Parts 1033 - 1499)
  - ☐ Chapter 15 - ENVIRONMENTAL PROTECTION AGENCY (Parts 1501 - 1553)
  - ☐ Chapter 16 - OFFICE OF PERSONNEL MANAGEMENT FEDERAL EMPLOYEES HEALTH BENEFITS ACQUISITION REGULATION (Parts 1601 - 1653)
  - ☐ Chapter 17 - OFFICE OF PERSONNEL MANAGEMENT (Part 1733)
  - ☐ Chapter 18 - NATIONAL AERONAUTICS AND SPACE ADMINISTRATION (Parts 1801 - 1872)
  - ☐ Chapter 19 - BROADCASTING BOARD OF GOVERNORS (Parts 1901 - 1953)
  - ☐ Chapter 20 - NUCLEAR REGULATORY COMMISSION (Parts 2001 - 2052)
  - ☐ Chapter 21 - OFFICE OF PERSONNEL MANAGEMENT, FEDERAL EMPLOYEES GROUP LIFE INSURANCE FEDERAL ACQUISITION... (Parts 2101 - 2152)
  - ☐ Chapter 23 - SOCIAL SECURITY ADMINISTRATION (Part 2301)
  - ☐ Chapter 24 - DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (Parts 2401 - 2453)
  - ☐ Chapter 25 - NATIONAL SCIENCE FOUNDATION (Parts 2501 - 2532)
  - ☐ Chapter 28 - DEPARTMENT OF JUSTICE (Parts 2801 - 2852)
  - ☐ Chapter 29 - DEPARTMENT OF LABOR (Parts 2901 - 2953)
  - ☐ Chapter 34 - DEPARTMENT OF EDUCATION ACQUISITION REGULATION (Parts 3401 - 3452)
  - ☐ Chapter 35 - PANAMA CANAL COMMISSION (Parts 3501 - 3570)
  - ☐ Chapter 44 - FEDERAL EMERGENCY MANAGEMENT AGENCY (Parts 4401 - 4452)
  - ☐ Chapter 51 - DEPARTMENT OF THE ARMY ACQUISITION REGULATIONS (Parts 5108 - 5152)
  - ☐ Chapter 52 - DEPARTMENT OF THE NAVY ACQUISITION REGULATIONS (Parts 5215 - 5252)
  - ☐ Chapter 53-Department of the Air Force Federal Acquisition Regulation Supplement - Reserved
  - ☐ Chapter 54 - DEFENSE LOGISTICS AGENCY, DEPARTMENT OF DEFENSE (Parts 5416 - 5452)
    - ☐ Part 5416 - TYPES OF CONTRACTS
    - ☐ Part 5433 - PROTESTS, DISPUTES AND APPEALS
    - ☐ Part 5452 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES
  - ☐ Chapter 57 - AFRICAN DEVELOPMENT FOUNDATION (Part 5706)
  - ☐ Chapter 61 - GENERAL SERVICES ADMINISTRATION BOARD OF CONTRACT APPEALS (Parts 6101 - 6105)
  - ☐ Chapter 63 - DEPARTMENT OF TRANSPORTATION BOARD OF CONTRACT APPEALS (Parts 6301 - 6302)
  - ☐ Chapter 99 - COST ACCOUNTING STANDARDS BOARD, OFFICE OF FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND... (Parts 9900 - 9905)

**DOD (Army, Navy, Air Force, DLS); HHS; USDA; State; OPM; DOE; VA; USAID; etc.**

# Government Contracts: Some Fundamental Ground Rules

- FAR – Federal Acquisition Regulations
  - Competitively Bid or Negotiated – Can be whole other presentation
  - Most of contract is non-negotiable; force and effect of law
  - Clauses not in the contract may still be read into the contract
  - Flow-down requirements to subcontractors
  - Prescribed claims and disputes procedures – IMPORTANT TO KNOW HOW THESE WORK!!
    - Timeliness & Waiver/Accord & Satisfaction
  - Small Business, Subcontracting/MBE requirements
  - Prompt Pay and Bonding Issues (no mechanic's lien rights)
- Other Issues
  - Policy and Audit Rights
  - Criminal and Civil Exposure – Can't defraud the Government
- States have similar structures

# The *Christian* Doctrine: The “Prego Principle” – It’s In There

- *G.L. Christian & Assoc. v. United States*,  
213 F.2d 418 (Ct. Cl. 1963)
  - Government contracting regulations have the force and effect of law and the contracting officer cannot remove or alter mandatory clauses
    - “Ignorance of the Law is No Excuse”
- In other words – regardless of whether or not a clause is express or inserted by reference, a court can interpret the contract as if all mandatory clauses are present even if not



# The *Christian* Doctrine: Examples of Some Mandatory Provisions for Prime Contractors

- The Buy-American Act – FAR 52.225(1)-(4)
- The Payment Clause – FAR 52.232(1)-(7)
- Termination for Default – FAR 49.401; 52.249-10
- Equal Opportunity and Affirmative Action Clauses – FAR 52.222-26
- The Miller Act
- Davis-Bacon Act
- Changes Clause
- Disputes Clause
- **BUT NOT the Termination for Convenience Clause**

# The Process

- TYPES of Contracting – IFB and RFP
- Commercial Items
  - Commercial Off The Shelf/Non-Developmental Item (COTS/NDI)
  - GSA/FSS Schedules
- Task Order/IDIQ Contracts
  - a/k/a JOC (Job Order Contracts); MATOCs (Multiple Award Task Order Contracts) and a plethora of other names
  - **THIS IS THE HOT VEHICLE, WHY?**
    - **Because it allows the Agency/USG to limit the range of competition and reduce possibility of protests down the line; tends to speed up award of contracts/TOs/JOCs**

# Types of Government Contracts

- Fixed Price
- Cost Reimbursement
- Cost-Plus-Fixed-Fee
- Time & Materials
- Commercial Item
- GSA Schedule - FSS
- **Cost-Plus-Percentage-of-Cost – ILLEGAL**

# Specifications – The “Types”

- Specifications / Solicitations
  - Design Specifications – Risk on Owner – It’s a recipe with an implied warranty
    - *Spearin* Doctrine
    - Design/Bid/Build
  - Performance Specification – Risk on Contractor – Stated parameters must be achieved by contractor
    - Design/Build

# Two Main Types of Procurement

1. Procurement through traditional sealed bidding = IFB (Invitation for Bid)
  - Award to low, responsive, responsible bidder
  
2. Procurement through negotiation = RFP (Request for Proposal)
  - Proposals & Negotiations
  - Best and Final Offers (BAFO)
    - Best Value – Cost Technical Trade-Off – Price always must be considered, but not be most important
    - Low Cost Technically Acceptable – If you are technically acceptable, then lowest price wins

SOLICITATION OFFER, AND AWARD (Commission, Agreement, or Repair)		1. SOLICITATION NO.	2. TYPE OF SOLICITATION <input type="checkbox"/> SEALED BID (IFB) <input type="checkbox"/> NEGOTIATED (RFP)	3. DATE ISSUED	4. PAGE OF PAGE
<b>IMPORTANT</b> - The "offer" section on the reverse must be fully completed by offeror.					
5. CONTRACT NO.		6. REQUESTOR/PURCHASER REQUEST NO.		7. PROJECT NO.	
8. ISSUED BY		9. CODE	10. ADDRESS OFFER TO		
11. FOR INFORMATION CALL		12. NAME		13. TELEPHONE NO. (Include area code) (NO COLLECT CALLS)	
<b>SOLICITATION</b>					
NOTE: In sealed bid solicitations "offer" and "offer" read "bid" and "bidder".					
BY THE GOVERNMENT RECEIVES PERFORMANCE OF THE ABOVE CONTRACTS IN THESE DOCUMENTS (SEE ADDENDUM NO. 200)					
11. The Contractor shall begin performance within _____ calendar days and complete it within _____ calendar days after receiving <input type="checkbox"/> award, <input type="checkbox"/> notice to proceed. This performance period is <input type="checkbox"/> mandatory, <input type="checkbox"/> negotiable. (See _____)					
12. "YES" indicates within how many calendar days after award in item 11B. <input type="checkbox"/> YES <input type="checkbox"/> NO					
13. ADDITIONAL SOLICITATION REQUIREMENTS:					
A. Sealed offers in original and _____ copies to perform the work required are due at the place specified in item 8 by _____ (hour) local time _____ (date). If this is a sealed bid solicitation, offers must be publicly opened at that time. Sealed envelopes containing offers shall be marked to show the offeror's name and address, the solicitation number, and the date and time offers are due.					
B. An offer guarantee <input type="checkbox"/> is, <input type="checkbox"/> is not required.					
C. All offers are subject to the (1) work requirements, and (2) other provisions and clauses incorporated in the solicitation in full text or by reference.					
D. Offers expiring less than _____ calendar days for Government acceptance after the date offers are due will not be considered and will be rejected.					
MAR 1940-01-09-007		1440-191		STANDARD FORM 1440 (REV. 4-83) Prescribed by GSA FPMR (41 CFR) 101-11.6	

# Sealed Bidding/Bid Protests

- Invitation for Bids – The Protest Process
  - Correcting IFB Deficiencies before bid opening
  - Correcting Award Decisions – Bidder non-responsive or late bid after opening or award

# Sealed Bidding/Bid Protests

- Bid Preparation
  - Instructions to bidders - HAVE YOU READ?
    - Bids must be completed correctly or non-responsive
  - The complete bid package/solicitation - DO YOU HAVE?
    - Bound by all references or incorporated documents
  - Acknowledge ALL amendments - DID YOU?
    - Material Amendment impacts price, quantity, quality, or delivery
  - Aids outside bid package NO OR LITTLE WEIGHT

# Sealed Bidding

- Bid Opening
  - Procedures
    - Right to be present for opening
      - Recent exception for CIA-based project
  - Late bids – government mishandling is the only exception to timeliness rule
  - May trigger time for, and basis of, protest

# Sealed Bidding

- Eligibility For Award
  - Bid responsiveness – Did Bid properly and fully respond to the IFB?
    - Signatures? Bond (if applicable)? Proper Name on Bond? etc.
  - Responsibility of bidders – \$\$, Employees, Facilities – Do You Have The Ability To Perform the Work? Not a concern for URS, but others
    - No basis for protest absent fraud

# Sealed Bidding

- Issuance of Award
  - May trigger time and basis of protest
  - Mistakes in bids – basis for correction/rescission – Federal (and state) regulations
    - Low bidder – evidence of intended bid but for mistake
    - 2<sup>nd</sup> – Intended price evident on face of the bid



## Competitive Negotiation – WHY??

- Cheapest is NOT always best:

*"It's a very sobering feeling to be up in space and realize that one's safety factor was determined by the lowest bidder on a government contract."*

*Alan Shepard*

*"As I hurtled through space, one thought kept crossing my mind: Every part of this capsule was supplied by the lowest bidder." John Glenn*

- Allows Government to get what it wants even if not the cheapest

# Competitive Negotiation

- Requests for Proposals or Quotations
  - Gives agency more flexibility in selecting awardee
    - More of a modern business approach
      - IFB was the “old” way the Government did it
- Response Preparation – details regarding past experience, project schedule, project team resumes
  - Must raise all patent questions in a timely fashion or WAIVED
  - “Patent” – What would a reasonable offeror/contractor be expected to discover?

# Competitive Negotiation

- Timeliness of Response – **CANNOT** Be Late
  - Only exception is Govt. mishandling
- Written/Oral Discussions with one or all?
  - MUST be meaningful discussions
- Best and Final Offers
- Post-Award Notice and Debriefing
  - CICA Stay if timely requested

## § 1103. Selection procedure

(a) IN GENERAL.—These procedures apply to the procurement of architectural and engineering services by an agency head.

- (b) ANNUAL STATEMENTS.—The agency head shall encourage firms to submit annually a statement of qualifications and performance data.

(c) EVALUATION.—For each proposed project, the agency head shall evaluate current statements of qualifications and performance data on file with the agency, together with statements submitted by other firms regarding the proposed project. The agency head shall conduct discussions with at least 3 firms to consider anticipated concepts and compare alternative methods for furnishing services.

(d) SELECTION.—From the firms with which discussions have been conducted, the agency head shall select, in order of preference, at least 3 firms that the agency head considers most highly qualified to provide the services required. Selection shall be based on criteria established and published by the agency head.

# USG *Loves* Design/Build

- FAR Subpart 36.3 – Two-Phase Design/Build Selection Procedures
  - Traditionally did Single Phase
    - MAJOR CASH OUTLAY – needed to effectively do complete design and submit as part of proposal
  - NOW – USG more likely to do two phase - 10 USC § 2305a & 41 USC § 253m
    - FAR requires Two-Phase when:
      - Expects 3 or more offerors;
      - Design must be done before developing price/cost proposals and significant expense expected to prepare offers
- Design Build Efficiency & Jobs Act of 2013, H.R. 2750, 113<sup>th</sup> Congress – Would mandate two-phase on contracts in excess of \$750,000

## 2 Phase Design/Build Procedures

- Can have one solicitation to cover both phases OR separate solicitations
- PHASE 1: Evaluation Factors
  - Technical Approach – NOT detailed design/technical info
  - Technical Qualifications
  - Past performance of Offeror's team including A/E
  - Other appropriate factors excluding cost/price
  - Identify Phase 2 factors
  - Statement of maximum number of offerors to be admitted to Phase 2 – competitive range
- PHASE 2:
  - Submission of technical and price proposals – DESIGN & COST

# OCIs – Organizational Conflicts of Interest

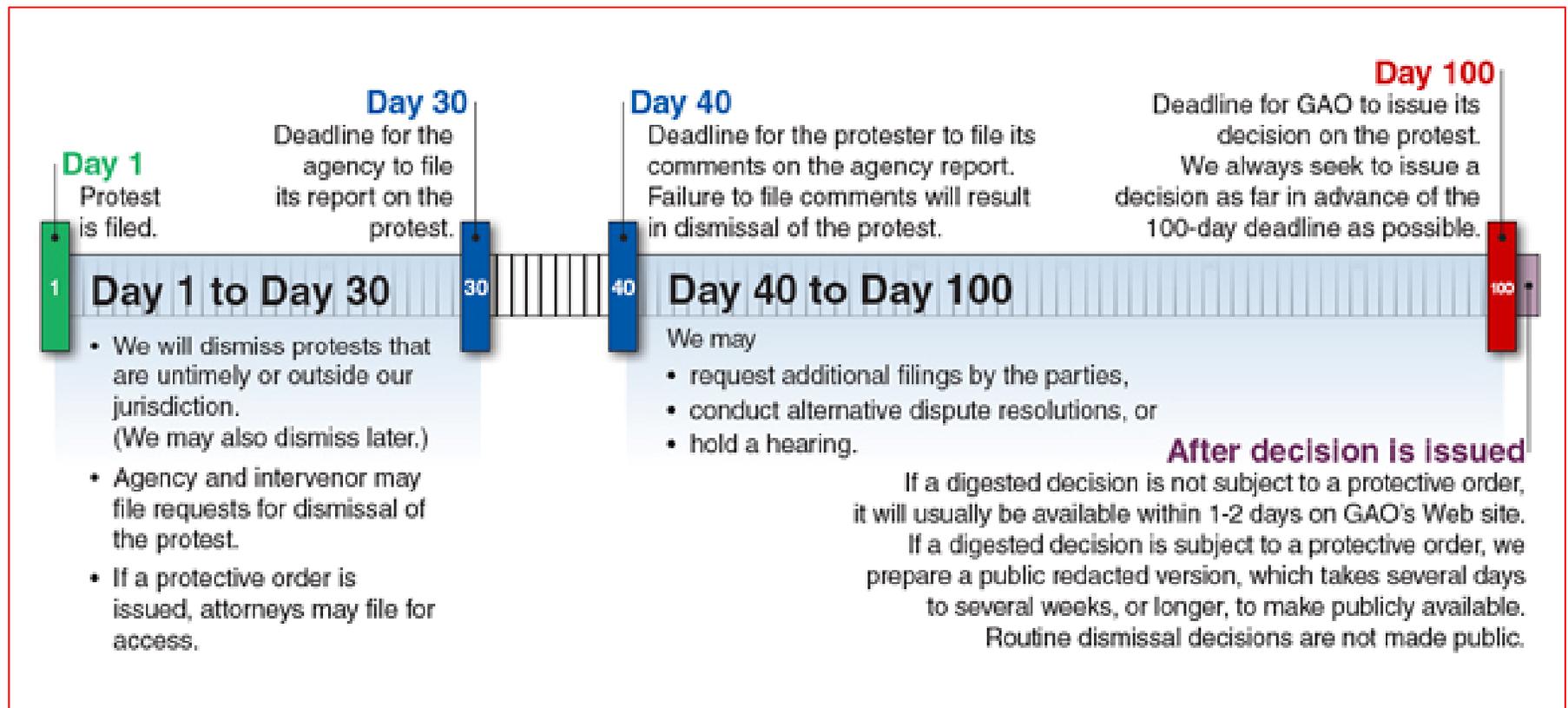
- Contractor that participates in preparation of specifications or is on evaluation team *may not* bid on follow-on work arising therefrom
- If URS is on an A/E Evaluation Board (FAR 36.602-2) it would likely be barred from bidding/proposing on the work
- FAR Subpart 9.5 “OCIs”
  - Providing systems engineering & technical direction
  - Preparing specifications or work statements
  - Providing evaluation services
  - Obtaining access to proprietary information
- CAN MITIGATE IN LIMITED CIRCUMSTANCES

# Bid Protests

- What is a bid protest?
  - Administrative Remedy afforded by Competition In Contracts Act (“CICA”) – a due process right
  - Agency makes the rules, but it must also follow them
    - (so must offerors)
    - TWO TYPES:
      - Pre-Award
        - Solicitation defects
      - Post-Award
        - Award deficiencies
  - Bid protests – Agency-level, GAO, U.S. Court of Federal Claims – FAA: ODRA

# Bid Protests – Timing Is Key

## Untimely = Waiver



Source: [www.gao.gov](http://www.gao.gov)

# Bid Protests

- SOME bases of protest
  - Sealed Bid/IFB
    - Lateness
    - Non-responsive
    - Defective bid package
      - Bid not signed or improperly signed
      - Defective bid bond
      - Blanks
      - Improper bidder name
      - Failure to attach/recognize addenda
    - Illegality
    - **NOTE: Responsibility Determination generally *not* basis of appeal**

# Bid Protests – Some Basis of Protest

- Negotiated Procurement/RFP
  - Failure to follow stated evaluation criteria
  - Improper technical evaluation
  - Unequal discussions
  - Failure to identify weakness/significant weakness or strengths
  - Technical leveling
  - Improper bundling
  - Awardee not best value
  - Failure to respond to all requirements
  - Lack of technical capabilities
  - Failure to adequately document files

# Protests: Discretion is Still the Rule of the Day

**Bid Protest Statistics for Fiscal Years 2011-2015**

	FY2015	FY2014	FY 2013	FY 2012	FY 2011
Cases Filed <sup>1</sup>	2,639 (up 3%) <sup>2</sup>	2,561 (up 5%)	2,429 (down 2%)	2,475 (up 5%)	2,353 (up 2%)
Cases Closed <sup>3</sup>	2,647	2,458	2,538	2,495	2,292
Merit (Sustain + Deny) Decisions	587	556	509	570	417
Number of Sustains	68	72	87	106	67
Sustain Rate	12%	13%	17%	18.6%	16%
Effectiveness Rate <sup>4</sup>	45%	43%	43%	42%	42%
ADR <sup>5</sup> (cases used)	103	96	145	106	140
ADR Success Rate <sup>6</sup>	70%	63	66%	60%	62%
Hearings <sup>7</sup>	3.10% (31 cases)	4.70% (42 cases)	3.36% (31 cases)	6.17% (56 cases)	8% (46 cases)

Updated December 2012

# Protests: The Basics You Need To Know

- TIMELINESS IS EVERYTHING
- You DO Typically Want to get the CICA Stay – WHY?
  - **Requires** agency to suspend award and/or performance
    - Best method to get leverage and some semblance of control
  - Protest filing deadline is *typically* ten (10) days from when protester knew or had reason to know of adverse agency action
    - **RFP Situation – Request debriefing within 3 days**
    - **Must file Protest within 5 days after debriefing closed to obtain CICA stay**
  - Protester must have standing (be an interested party)
  - Protester must have been prejudiced by adverse agency action
  - Awardee CAN typically intervene in Protest as “Intervenor”

# Contract Administration – Post-Award

- Security clearance and approval requirements
- Performance / Scheduling problems / Acceleration
- Contract Interpretation Problems
- Subcontractor / Supplier problems
- Name Change and/or Novation Agreements
- Licensing issues
- Fraud investigations

# False Claims / *Qui Tam*

- What are “False Claims” or “*Qui Tam*” Actions?
  - “Relator” - Person with knowledge of fraud against the USG
    - Whistleblower Statutes & Regulations Protect Relator/Whistleblower
- Process
  - “Relator” files in name of Government - Complaint filed “Under Seal”
  - Government Investigation (FBI, DOJ, IG, DCAA) - Defendant has no knowledge
- Government decides within 60 days whether to “intervene”; Complaint Unsealed negotiations begin (intervenes ~1/3 of time)
  - Why Important? Who pays to litigate?
  - Relator can proceed alone; Government can intervene later

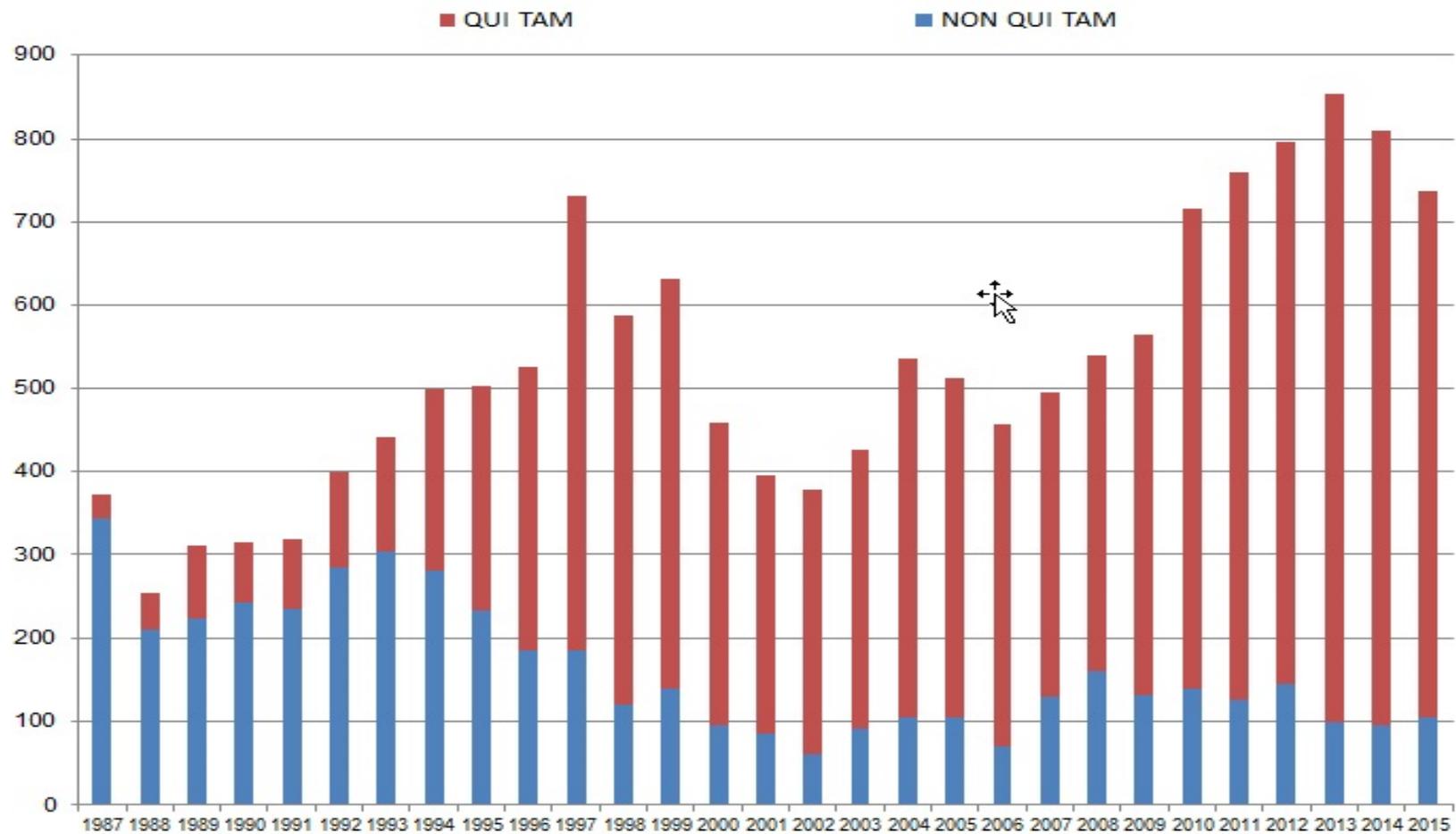
## False Claims / *Qui Tam* – So What??!!

- Penalty: \$5,000 to \$10,000 for each offense + treble damages
- Timeliness: 6 years after violations or 3 years after violations are known
- Relator Recovery: With DOJ: 15 – 25% / Without DOJ: 25 – 30%
- Over \$20 billion recovered



# FCA – Why Should We Care?

## Significant Uptick



# FCA – Why Should We Care?

**FRAUD STATISTICS - OVERVIEW**  
October 1, 1987 - September 30, 2015  
Civil Division, U.S. Department of Justice

FY	NEW MATTERS <sub>1</sub>		SETTLEMENTS AND JUDGMENTS <sub>2</sub>					RELATOR SHARE AWARDS <sub>3</sub>		
	NON QUI TAM	QUI TAM	NON QUI TAM TOTAL	QUI TAM			TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL
				WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED	TOTAL				
2013	61	173	102,903,274	312,631,949	6,833,687	319,465,636	422,368,910	62,237,726	1,593,156	63,830,881
2014	56	200	2,623,432,486	682,030,614	6,009,185	688,039,799	3,311,472,285	76,300,384	1,287,632	77,588,016
2015	73	175	426,451,871	258,330,872	674,516,850	932,847,722	1,359,299,593	39,746,064	201,678,887	241,424,951
<b>TOTAL</b>	<b>2,583</b>	<b>2,902</b>	<b>5,995,877,371</b>	<b>4,242,577,754</b>	<b>928,290,630</b>	<b>5,170,868,384</b>	<b>11,166,745,755</b>	<b>660,457,051</b>	<b>272,814,866</b>	<b>933,271,917</b>

2014	56	200	2,623,432,486	682,030,614	6,009,185
2015	73	175	426,451,871	258,330,872	674,516,850

76,300,384	1,287,632	77,588,016
39,746,064	201,678,887	241,424,951

Source: [http://www.justice.gov/civil/docs\\_forms/C-FRAUDS\\_FCA\\_Statistics.pdf](http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf)

# FAR Provisions

- Whistleblower Protections
  - FAR Part 3 – Improper Business Practices & Personal Conflicts of Interest
    - FAR 3.903 – Whistleblower Protection Policy
    - FAR 3.906 – Remedies:
      - Reprisal = Abatement Order; Reinstatement of Person; Order to Pay Damages (including Attorney’s and Expert Fees);
      - Failure to comply = Referral to the DOJ for Order to Enforce
  - FAR 3.907 & FAR clause 52.203-15 – Recovery Act
    - Implements Recovery Act prohibition against non-Federal employers discharging, demoting, or discriminating against an employee as a reprisal for disclosing *certain covered information to certain categories of Government officials or a person with supervisory authority over the employee.*

## Implied Certification – Enter *Escobar*

- FCA traditionally arose from formal, express certification – Payment applications, contract documents, self-certification as small, etc.
- NOW can be implied from conduct:

We first hold that, at least in certain circumstances, the implied false certification theory can be a basis for liability. Specifically, liability can attach when the defendant submits a claim for payment that makes specific representations about the goods or services provided, but knowingly

## Implied Certification – Enter *Escobar*

fails to disclose the defendant's noncompliance with a statutory, regulatory, or contractual requirement. In these circumstances, liability may attach if the omission renders those representations misleading.

We further hold that False Claims Act liability for failing to disclose violations of legal requirements does not turn upon whether those requirements were expressly designated as conditions of payment. Defendants can be liable for violating requirements even if they were not expressly designated as conditions of payment. Conversely, even when a requirement is expressly designated a condition of payment, not every violation of such a requirement gives rise to liability. What matters is not the label the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision.

## State, Local, and *Quasi*-Public Owners

- Same general principals and issues as Federal Procurement, BUT can be more complicated because often localities lack the full panoply of regulations, laws, and codes to cover all issues
- NOTE: If you are suspended or debarred at the federal level, it may also apply to state and local governments

# The Process – SBA/Small Business Programs

- Can Be A Whole Other Topic
- Related Issues and Public Policies
  - Small Business Set Aside Preferences
    - Set Aside Qualification – Issues of Affiliation
    - Size Standards – NAILS – \$\$ limits
    - Set-Aside/Size Status Protests HUBZone and 8(a) Programs and Protests
      - SDB price preferences
      - Mentor-Protégé program – Large Company Mentors a Small Company
        - Gains 8(a) benefit
        - **May expand Mentor/Protégé Program to other SBA Programs *in the future***



# QUESTIONS?

Lawrence M. Prosen

202.481.9940

[lprosen@kilpatricktownsend.com](mailto:lprosen@kilpatricktownsend.com)

Kilpatrick, Townsend & Stockton LLP

607-14<sup>th</sup> Street, N.W., Suite 900

Washington, D.C. 20005

A large, stylized triangle graphic on the left side of the slide. The triangle is composed of several concentric, slightly offset layers of different colors: dark blue, black, grey, and red. The red layer is the largest and forms the base of the triangle. Inside the triangle, a list of city names is written in white, sans-serif capital letters, arranged vertically from top to bottom.

ATLANTA  
AUGUSTA  
CHARLOTTE  
DALLAS  
DENVER  
LOS ANGELES  
NEW YORK  
RALEIGH  
SAN DIEGO  
SAN FRANCISCO  
SEATTLE  
SHANGHAI  
SILICON VALLEY  
STOCKHOLM  
TOKYO  
WALNUT CREEK  
WASHINGTON D.C.  
WINSTON-SALEM

[www.kilpatricktownsend.com](http://www.kilpatricktownsend.com)