

## Chapter 29

# FEDERAL GOVERNMENT CONSTRUCTION CONTRACTS

Charles R. Lucy, Esq., Editor and Author (2007)\*  
*Holland & Hart LLP*

### SYNOPSIS

#### § 29.1 INTRODUCTION

#### § 29.2 SOURCES OF FEDERAL CONSTRUCTION LAW

#### § 29.3 FEDERAL CONTRACT BASICS

§ 29.3.1—Uniform Contract Format

§ 29.3.2—Required Provisions And Clauses

#### § 29.4 PROCUREMENT PROCESS

§ 29.4.1—Sealed Bidding

§ 29.4.2—Competitive Negotiation

§ 29.4.3—Debriefings

§ 29.4.4—Additional Requirements

#### § 29.5 PROTESTS

§ 29.5.1—Agency Appeal

§ 29.5.2—Comptroller General/Government Accountability Office Appeal

§ 29.5.3—U.S. Court Of Federal Claims

#### § 29.6 SOCIAL POLICY CONSIDERATIONS

§ 29.6.1—Labor Standards

§ 29.6.2—Award Preferences

§ 29.6.3—The Buy American Act

#### § 29.7 ECONOMIC CONSIDERATIONS

§ 29.7.1—Cost Principles

§ 29.7.2—Cost Accounting Standards

§ 29.7.3—Bonding Requirements

**§ 29.8 PERFORMANCE**

- § 29.8.1—Changes
- § 29.8.2—Differing Site Conditions
- § 29.8.3—Delays

**§ 29.9 PAYMENT**

- § 29.9.1—Prompt Payment Act
- § 29.9.2—Retainage And Set-Off
- § 29.9.3—Payment Limits

**§ 29.10 TERMINATION**

- § 29.10.1—Termination For Convenience
- § 29.10.2—Termination For Default
- § 29.10.3—Termination By Contractor

**§ 29.11 DISPUTES**

- § 29.11.1—Board Of Contract Appeals
- § 29.11.2—U.S. Court Of Federal Claims
- § 29.11.3—Appellate Review
- § 29.11.4—Appeal Alternatives

**§ 29.12 SUBCONTRACTOR ISSUES**

- § 29.12.1—Government Control
- § 29.12.2—Payment
- § 29.12.3—Claims And Disputes

**§ 29.13 CONCLUSION**

**EXHIBITS**

- Exhibit 29A—Acronym Glossary
- Exhibit 29B—Mandatory Flow-Down Provisions

**§ 29.1 • INTRODUCTION**

The primary objective of this Chapter is to provide practitioners with a general overview of the federal procurement process while offering a brief discussion of some of the issues that commonly arise over the life of a federal construction contract. As an initial matter, it is important to note that the field of federal government procurement law is vast and impossible to treat in

detail within the confines of this Chapter. As a result, this section offers only a limited discussion that is focused exclusively on government construction contracts.

The hallmark of contracting with the federal government is regulation. The “freedom of contract” principles that govern contracts between private parties are all but non-existent in contracts to which the government is a party. Further, although similarities do exist in the regulations governing contracts to which a state through one of its agencies is a party and those to which the federal government is a party, there are also many differences. Throughout this Chapter, the similarities and differences that exist among private, state, and federal government contracts are indicated as appropriate.

## § 29.2 • SOURCES OF FEDERAL CONSTRUCTION LAW

Federal procurement law consists of many statutes, executive orders, and regulations.<sup>1</sup> These statutes, orders, and regulations, as interpreted by various U.S. judicial and administrative tribunals,<sup>2</sup> comprise the body of law governing construction contracts to which the United States through its executive agencies is a party. Although federal statutes relating to procurement are incorporated throughout the U.S. Code, Title 41 is the primary source of federal public contracting authority.<sup>3</sup>

The Federal Acquisition Regulation (FAR) compiles the relevant statutes, executive orders, and regulations at Title 48 of the Code of Federal Regulations.<sup>4</sup> The FAR establishes a system of uniform policies, procedures, and contract clauses used by all executive agencies for federal procurement.<sup>5</sup> The FAR is composed of 53 parts in 8 subchapters. Parts 1 through 51 contain the rules that must be followed in order to obtain, and participate in, a contractual relationship with the government.<sup>6</sup> Part 52 contains solicitation provisions and contract clauses,<sup>7</sup> and part 53 contains standard forms used in government contracts.<sup>8</sup>

It is important to note that, although state law governs contractual relationships between private parties or contracts to which the state or one of its agencies is a party, the application of state law is very restricted when contracting with the federal government.<sup>9</sup> For example, it is typically improper to rely on the Uniform Commercial Code (UCC) or *Corbin on Contracts* to govern construction contracts to which the federal government through an executive agency is a party.<sup>10</sup>

## § 29.3 • FEDERAL CONTRACT BASICS

Before beginning an overview of the federal procurement process, some background information regarding federal contract basics is appropriate. This section provides a brief introduction to the format of most government contracts and the required provisions and clauses included in all federal procurement contracts.

**§ 29.3.1—Uniform Contract Format**

In the federal procurement process, contracting officers (CO) prepare invitations for bids, requests for proposals, and government contracts according to a uniform contract format whenever practicable.<sup>11</sup> Contractors hoping to do business with the federal government should be familiar with the uniform contract format so they can quickly locate important information included therein. The uniform contract format organizes information in four parts: Part I—The Schedule consists of sections A through H; Part II—Contract Clauses consists of section I; Part III—List of Documents, Exhibits, and Other Attachments consists of section J; and Part IV—Representations and Instructions consists of sections K through M. Each of these parts contains important information necessary to preparing a bid or proposal and performing the contract.

Sections B and C contain the description and specifications of the subject of the procurement.<sup>12</sup> Understanding this information is crucial to preparing an appropriate bid or proposal. Section I includes the required and applicable contract clauses.<sup>13</sup> Although this list appears daunting, the contractor must be familiar with this section to ensure proper performance of the contract. Section K contains provisions requiring contractor representations and certifications.<sup>14</sup> Section L includes other information necessary to preparing a responsive bid or proposal.<sup>15</sup> COs have the power to reject bids or proposals not prepared and submitted exactly as directed in the invitation for bids or requests for proposals as non-responsive.<sup>16</sup> Section M indicates the evaluation factors for the award.<sup>17</sup> The contractor should pay special attention to this information because understanding the factors the government will rely on in evaluating bids or proposals will help the contractor prepare an appropriate bid or proposal.<sup>18</sup>

**§ 29.3.2—Required Provisions And Clauses**

FAR § 52.301 contains a matrix that indicates which FAR provisions and clauses are mandatory, required when applicable, and optional in government contracts. The CO must insert the required provisions and clauses in all solicitations and contracts. The CO must insert the provisions and clauses that are required when applicable where the prerequisite conditions specified for applicability are fulfilled.

If the CO fails to insert any required provision or clause into a procurement contract, the provision or clause may nonetheless be part of the contract by operation of the *Christian Doctrine*. Under the *Christian Doctrine*, a federal procurement contract is read to contain all required provisions and clauses even where a required provision or clause was actually omitted from the contract.<sup>19</sup>

**§ 29.4 • PROCUREMENT PROCESS**

Entering a contractual relationship with the federal government follows a unique process dissimilar to the process followed to contract with a private party or state government.<sup>20</sup> The federal government utilizes a highly regulated and complex procurement process to ensure expenditure of the public's funds in a fiscally responsible, equitable manner that provides the best value to

the government and the promotion of social policy. This section briefly discusses the federal government's procurement process.

The Competition in Contracting Act (CICA)<sup>21</sup> requires “full and open competition” in the federal government's procurement process.<sup>22</sup> Full and open competition occurs when, to the extent consistent in fulfilling the government's requirements efficiently,<sup>23</sup> “all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement.”<sup>24</sup> The federal government utilizes two basic procurement methods to fulfill CICA's competition requirement when procuring construction projects: sealed bidding and competitive negotiation.

#### **§ 29.4.1—Sealed Bidding**

Like all federal procurement procedures, the sealed bidding process<sup>25</sup> is highly regulated. Consequently, strict compliance with the relevant regulations is absolutely crucial to the submission of an acceptable sealed bid. The sealed bidding method must be used where time allows, the award will be made on the basis of price, discussions with bidders are not necessary, and the CO reasonably expects to receive more than one sealed bid.<sup>26</sup> For construction contracts expected to exceed \$100,000, the CO begins the sealed bidding process by issuing a presolicitation notice to stimulate the interest of as many prospective bidders as possible.<sup>27</sup> Next, the procuring agency issues an invitation for bids (IFB).<sup>28</sup> An IFB contains standard forms that clearly describe the government's specifications for the particular procurement in a manner that ensures potential bidders are able to respond to the agency's need.<sup>29</sup>

Once created, the CO publicizes the IFB early enough to give prospective bidders time to prepare and submit bids.<sup>30</sup> Notably, the federal government currently uses [www.fedbizopps.gov](http://www.fedbizopps.gov) as the primary source to publicize procurement activities and serve as a gateway to facilitate the procurement process.

Occasionally, the CO may need to amend or cancel the IFB due to a deficiency or changes made to the contract.<sup>31</sup> If the CO discovers a deficiency after publicizing a procurement but prior to award, the CO may simply amend the IFB to correct the problem.<sup>32</sup> However, if a deficiency comes to light after bid opening, the CO must decide whether to award the contract despite the deficiency or to cancel the contract and resolicit the procurement.<sup>33</sup> The CO may cancel the IFB before opening of bids only where the cancellation is clearly in the public interest.<sup>34</sup>

Once the procuring agency creates and publicizes the IFB, potential contractors prepare bids for submission. The agency considers only responsive bids for award.<sup>35</sup> Therefore, the contractor should prepare the bid in exact compliance with the terms of the solicitation to avoid submitting a non-responsive bid. A bid containing any material<sup>36</sup> deviation from the requirements as specified in the solicitation could result in rejection of the bid as non-responsive. Generally, late bids are not considered.<sup>37</sup>

On the date and time specified in the IFB, the CO publicly opens the bids. The CO then awards the contract to the bidder whose bid is most advantageous to the government.<sup>38</sup> This is usually the lowest priced, responsive, responsible bidder.<sup>39</sup>

**§ 29.4.2—Competitive Negotiation**

Where sealed bidding is not appropriate, the CO may use competitive negotiations<sup>40</sup> to facilitate full and open competition.<sup>41</sup> When using competitive negotiations, the procuring agency issues a request for proposals (RFP) as opposed to an IFB.<sup>42</sup> The purpose of a RFP is to communicate the government's requirements and solicit proposals from prospective contractors.<sup>43</sup> The procedures for publicizing a RFP are very similar to those for an IFB.<sup>44</sup> The contractor should also exercise the same care exercised to prepare a bid when preparing a proposal.<sup>45</sup> Typically, late proposals are not considered.<sup>46</sup>

Occasionally, the CO may need to amend or cancel an RFP. The CO must amend the RFP any time the government changes its requirements or the terms and conditions of the solicitation.<sup>47</sup> The CO must cancel the RFP and recompet the procurement where an amendment is so substantial that it exceeds what offerors could have reasonably anticipated.<sup>48</sup>

There are very important differences between the sealed bidding and competitive negotiation processes. Unlike the process used for sealed bidding, the FAR encourages continuing dialogue between the government and offerors throughout the competitive negotiation process.<sup>49</sup> As a result, the government must have discussions with all offerors within the competitive range<sup>50</sup> unless the RFP states that the government intends to make the award without discussions.<sup>51</sup> Discussions are intended to promote bargaining<sup>52</sup> and usually result in revisions to an offeror's initial proposal.<sup>53</sup>

A recent and important development in competitive negotiation discussions is the use of reverse auctions. Until 1997, the FAR specifically prohibited the use of auction techniques in competitive negotiations.<sup>54</sup> However, in 1997 a FAR rewrite "opened the door for federal agencies to use online auction techniques."<sup>55</sup> In an auction, a prospective buyer bids on a desired item. The buyer then re-bids by increasing the original bid in response to other bidders until only the highest bidder remains. A reverse auction is similar in principal, but instead of prospective buyers increasing bids to purchase an item, prospective sellers try to enter the lowest bid<sup>56</sup> to induce a potential buyer to purchase their services. Reverse auctions take place electronically online and are considered part of the discussions the government is entitled to have with offerors under FAR § 15. Ideally, the discussions used in competitive negotiations provide the government with the best possible value for the funds expended.

After the discussions, the CO evaluates each finalized proposal and the offeror's ability to perform the prospective contract successfully.<sup>57</sup> The CO evaluates the proposals in accordance with the process and criteria specified in the RFP.<sup>58</sup> Based on the evaluation, the Source Selection Authority (SSA) selects the contractor that represents the best value to the government and the contract is then awarded to that firm.<sup>59</sup>

**§ 29.4.3—Debriefings**

Offerors eliminated from consideration prior to the award, or not awarded the contract, are entitled to a debriefing from the CO to explain the reasons for their elimination. The CO must notify offerors when their offers are excluded from the competitive range.<sup>60</sup> After receiving this notice, the offeror has three days to request a pre-award debriefing.<sup>61</sup> The CO should conduct the

debriefing as soon as is practical<sup>62</sup> to explain the basis for the CO's determination to exclude the offeror.<sup>63</sup>

Within three days of making an award, the CO must also notify all unsuccessful offerors in the competitive range that their proposals were not accepted.<sup>64</sup> After receiving this notice, the offeror has three days to request a post-award debriefing.<sup>65</sup> If possible, the CO should conduct the debriefing within five days to explain the agency's contract award decision.<sup>66</sup>

#### **§ 29.4.4—Additional Requirements**

Before a contractor can receive a contract award, the contractor must register in the Central Contractor Registration (CCR) database.<sup>67</sup> The purpose of the CCR is to increase the visibility of vendor sources and establish a common source of vendor data for the government.<sup>68</sup> The contractor must also submit Annual Representations and Certifications.<sup>69</sup> Finally, before awarding the contract, the CO must determine that the contractor is responsible, since the CO can award contracts to responsible contractors only.<sup>70</sup> A contractor is considered responsible only after the CO makes an affirmative determination of contractor responsibility<sup>71</sup> according to the standards provided by the FAR.<sup>72</sup>

## **§ 29.5 • PROTESTS**

A contractor that submits a bid or proposal in response to an IFB or RFP can protest certain actions of the procuring agency. The procuring agency, the Comptroller General, and the U.S. Court of Federal Claims can all hear protests.<sup>73</sup> All protests are either pre-award protests or post-award protests. Whether a protest is considered pre-award or post-award impacts filing deadlines, the agency's response, and the remedies available to the protester. All protests begin when an interested party<sup>74</sup> makes a written objection to a solicitation, the cancellation of a solicitation, an award or proposed award of a contract, or a termination or cancellation of the award of a contract based on improprieties concerning the award of the contract.<sup>75</sup> This section briefly discusses the protest process in each of the three available venues.

#### **§ 29.5.1—Agency Appeal**

Agency appeals provide the least formal, least expensive, and quickest forum available to pursue a protest.<sup>76</sup> Still, the CO and protester should use open and frank discussion to resolve conflicts before submitting a protest to the agency.<sup>77</sup> Once submitted, the agency should provide for the informal, inexpensive, procedurally simple, and expeditious<sup>78</sup> resolution of protests.<sup>79</sup> Although the protest is not required to be in a certain form, it must be written, concise, logically presented to facilitate review,<sup>80</sup> and contain all information relevant to the action.<sup>81</sup>

#### **Pre-award Protest**

A protester must file a pre-award protest before the date of bid opening or the closing date for receipt of proposals.<sup>82</sup> If the agency receives the protest by this deadline, the contract will not be awarded unless there are urgent and compelling reasons to do so.<sup>83</sup> To remedy a pre-award

protest, the CO will amend the solicitation to correct the problem therein or the agency will award the contract to the proper contractor if it determines that there is no issue warranting correction.

### **Post-award Protest**

Most protests are post-award protests made by unsuccessful offerors. A protester must file a post-award protest no later than 10 days after the basis for the protest is known or should have been known, whichever is earlier.<sup>84</sup> If the agency receives the protest within 10 calendar days following the award of the contract, or five days after a required debriefing, contract performance must be suspended immediately pending the resolution of the protest.<sup>85</sup> If a post-award agency protest is meritorious, the CO may void the awarded contract or terminate the awarded contract for convenience.<sup>86</sup>

### **§ 29.5.2—Comptroller General/Government Accountability Office Appeal**

The Comptroller General heads the Government Accountability Office (GAO).<sup>87</sup> Protests made to the Comptroller General are conducted through the GAO.<sup>88</sup> The process for pursuing a protest at the GAO is more formal than the agency appeal process described above.<sup>89</sup> Like an agency protest, any interested party may file a GAO protest.<sup>90</sup> Again, the protest need not be in a particular form, but it must be written, concise, and logically arranged.<sup>91</sup> The protest must be addressed to the GAO's General Counsel,<sup>92</sup> and the protester must provide a complete copy of the protest to the procuring agency no later than one day after the filing with the GAO.<sup>93</sup>

### **Pre-award Protest**

The protester must file a pre-award protest before the date of bid opening or the date specified in the solicitation for receipt of initial proposals.<sup>94</sup> If the GAO receives the protest by this deadline and provides notice to the CO, the CO cannot award the contract.<sup>95</sup>

### **Post-award Protest**

The protester must file post-award protests within 10 days of when the basis for the protest is known or should have been known, whichever is earlier, or within 10 days of a required debriefing.<sup>96</sup> However, performance will be automatically suspended only if the GAO receives the protest and notifies the procuring agency within 10 days of the award or within five days of a required debriefing, whichever is later.<sup>97</sup> If the protester initially filed a timely protest with an agency, the protester must file the protest with the GAO within 10 days of the protester's acquiring knowledge or constructive knowledge of the adverse agency decision.<sup>98</sup>

If the GAO determines that the procuring agency's actions do not comply with statute or regulation, it will recommend a course of corrective action to the agency.<sup>99</sup>

### **§ 29.5.3—U.S. Court Of Federal Claims**

The U.S. Court of Federal Claims (COFC) also has jurisdiction to consider protests.<sup>100</sup> Only an interested party has standing to file a protest at the COFC.<sup>101</sup> The protest procedure is governed by the COFC's rules,<sup>102</sup> the Federal Rules of Evidence, and the COFC's General Order No. 38. These rules specify the protest procedures the protester must follow from filing the complaint<sup>103</sup> through receiving a decision from the court. If a protest is successful,<sup>104</sup> the COFC will

grant appropriate relief.<sup>105</sup> If the protest is not successful, the protester may file a motion for reconsideration<sup>106</sup> or appeal the decision to the U.S. Court of Appeals for the Federal Circuit.<sup>107</sup>

### **Important Protest Issues at COFC**

Unlike agency and GAO protests, a protester filing a protest at the COFC must give the Department of Justice, the clerk of the COFC, the contracting agency, and any apparent awardee notice of the protest 24 hours in advance.<sup>108</sup> Although the rules do not specify a filing deadline, protestors should file protests as soon as possible.<sup>109</sup> Also, the protester should move for a temporary restraining order or preliminary injunction as soon as possible after filing the complaint because the COFC does not automatically issue a stay suspending contract award or performance pending resolution of the appeal.<sup>110</sup>

## **§ 29.6 • SOCIAL POLICY CONSIDERATIONS**

The federal government uses the procurement process not only to obtain goods and services at the best value, but to implement certain social and economic policies as well.<sup>111</sup> As a result, government contracts are subject to several requirements and preferences<sup>112</sup> that private contracts are not. For example, contractors must follow specific labor standards and are subject to the awarding preferences of the government.

### **§ 29.6.1—Labor Standards**

The Davis-Bacon and related Acts (DBRA)<sup>113</sup> and the Contract Work Hours and Safety Standards Act (CWHSSA)<sup>114</sup> dictate labor rates and standards unique to government contracts.<sup>115</sup> The DBRA covers contracts for domestic construction projects in excess of \$2,000 to which the United States or District of Columbia is a party.<sup>116</sup> The DBRA requires that all mechanics and laborers<sup>117</sup> working on the site of work of a government construction project receive minimum wages.<sup>118</sup> For purposes of DBRA, minimum wages<sup>119</sup> are the prevailing wages for similarly situated mechanics and laborers on similar contracts in the surrounding geographic region as determined by the Secretary of Labor.<sup>120</sup> Additionally, the DBRA requires contractors and subcontractors to stipulate that mechanics and laborers will be paid in accordance with the prescribed minimum wages at least once a week.<sup>121</sup>

The CWHSSA requires contractors to calculate an hourly rate of pay for every mechanic and laborer based on a standard 40-hour workweek and pay mechanics and laborers not less than one-and-one-half times the hourly rate of pay per hour worked in excess of 40 hours in a week.<sup>122</sup> The CWHSSA covers contracts that may involve employing mechanics and laborers within the United States, to which the United States or one of its agents is a party, or which is financed in some part by the United States or its agent.<sup>123</sup> The CWHSSA applies to contracts of \$100,000 or more.<sup>124</sup> If a contractor fails to pay mechanics and laborers in accordance with the CWHSSA, it is liable to the employee for the unpaid wages and to the federal government for liquidated damages.<sup>125</sup> The CWHSSA also prohibits contractors from requiring any mechanic or laborer to work in surroundings that are unsanitary, hazardous, or dangerous to the health or safety of the worker.<sup>126</sup>

**§ 29.6.2—Award Preferences**

The federal government also utilizes preferences and requirements in procurement to further social policy. One important preference in government construction contracts favors small business concerns.<sup>127</sup> The preference for small business concerns furthers the “policy of the Government to provide maximum practicable opportunities in its acquisitions to small businesses.”<sup>128</sup> A small business concern is a business that is independently owned and operated, is not dominant in its field of operation, and qualifies as a small business under the size standard applicable to its industry.<sup>129</sup>

If qualified as a small business concern, a business may receive preferential treatment by obtaining contracts set aside exclusively for participation by small business concerns.<sup>130</sup> Contracts for supplies or services estimated to exceed \$3,000 but not more than \$100,000 are automatically totally set aside unless the CO determines there is no reasonable expectation of receiving competitive bids from two or more small business concerns.<sup>131</sup> Contracts for supplies or services estimated to exceed \$100,000 must also be totally set aside if the CO determines offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns and the award will be made at fair market price.<sup>132</sup>

**§ 29.6.3—The Buy American Act**

The Buy American Act (BAA),<sup>133</sup> as implemented by the FAR,<sup>134</sup> presents a crucial requirement in federal construction contracts. The BAA requires that contractors use only domestic construction materials performing construction contracts in the United States unless specifically excepted from doing so.<sup>135</sup> It is imperative that a contractor keep this requirement in mind when preparing a bid or offer on a construction contract. If the government refuses to accept unauthorized use of foreign construction materials, the contractor may have to remove the foreign material and replace it with domestic material that is frequently more expensive.<sup>136</sup> The contractor may also face suspension or debarment.<sup>137</sup> Additionally, the procuring agency may lower the contract price, terminate the contract for default, or, if the noncompliance appears to be fraudulent, refer the contractor to the Department of Justice for criminal investigation.<sup>138</sup>

**§ 29.7 • ECONOMIC CONSIDERATIONS****§ 29.7.1—Cost Principles**

Contractors on federal contracts are also subject to FAR cost principles and must comply with accounting practices not used in conducting commercial business.<sup>139</sup> The FAR cost principles establish guidelines used to determine what costs the government considers allowable, and therefore recoverable by the contractor. The FAR cost principles “are not liberal; they forbid allocation to Government contracts of some true costs of doing business.”<sup>140</sup> Consequently, an understanding of these principles is crucial when contracting with the federal government.

Most government construction contracts are fixed-price contracts.<sup>141</sup> Although a fixed-price contract may allow for incentives,<sup>142</sup> the contract price is not subject to adjustment based on the contractor’s cost experience.<sup>143</sup> For fixed-price contracts, the FAR cost principles are applica-

ble when changes are negotiated or a contract is terminated.<sup>144</sup> FAR 31.2 contains the cost principles relevant to construction contracts. A cost is allowable if it complies with reasonableness,<sup>145</sup> allocability,<sup>146</sup> the Cost Accounting Standards, the terms of the contract, and any limitations provided in subpart 31.2.<sup>147</sup>

### § 29.7.2—Cost Accounting Standards

The Cost Accounting Standards (CAS)<sup>148</sup> dictate how a contractor must maintain an accounting system and account for certain types of cost.<sup>149</sup> The CAS apply to negotiated contracts over \$650,000.<sup>150</sup> The Cost Accounting Standards clause<sup>151</sup> must be inserted in contracts covered by the CAS.<sup>152</sup> The CAS require a contractor to:

- (1) Disclose in writing the contractor's cost accounting practices by submission of a Disclosure Statement;
- (2) Follow the cost accounting practices consistently in accumulating and reporting costs;
- (3) Comply with all CAS in effect on the date of award of the contract; and
- (4) Agree to an adjustment of the contract price if the contractor fails to comply with an applicable CAS or cost accounting practice that results in increased costs paid by the United States.<sup>153</sup>

Contractors doing business with the federal government may also be subject to the Truth in Negotiations Act (TINA).<sup>154</sup> TINA applies to any negotiated contract, subcontract, or modification of a negotiated or sealed-bid contract or subcontract expected to exceed \$650,000.<sup>155</sup> Where applicable, TINA requires that contractors and subcontractors submit cost or pricing data to the government and certify that the data submitted are current, accurate, and complete to the best of his or her knowledge.<sup>156</sup> This assists the CO in determining the reasonableness of the contractor's suggested pricing. Regardless of the dollar amount, TINA does not apply to a contract or subcontract where the price agreed upon is based on adequate competition or set by law, for the acquisition of a commercial item, or waived by the head of the procuring activity.<sup>157</sup> If a contractor submits defective cost or pricing data and, as a result, the government overpays on the contract, the contractor is liable for recoupment of the amount overpaid as well as interest and penalties.<sup>158</sup>

### § 29.7.3—Bonding Requirements

The need to terminate a contract for default or assess liquidated damages against a contractor is an ever-present possibility in construction projects that puts the government at risk of incurring financial loss. To avoid such loss and to protect the payment rights of subcontractors and suppliers, the Miller Act requires contractors to post performance and payment bonds with a satisfactory surety on any construction contract exceeding \$100,000.<sup>159</sup> Both corporate and individual sureties can be satisfactory.<sup>160</sup> The CO determines the acceptability of an individual surety by ensuring that the surety's pledged assets are sufficient to cover the bond obligation.<sup>161</sup>

#### Performance Bonds

A performance bond secures performance and fulfillment of the contractor's obligations under the contract.<sup>162</sup> The amount of the performance bond must equal the total contract price plus any increases unless the CO determines that a lesser amount is adequate for the protection of

the government.<sup>163</sup> In the case of default, the surety issuing the bond will usually submit a proposal to complete the outstanding work.<sup>164</sup> The CO should accept the surety's offer unless the CO believes the parties proposed to complete the work are not competent to complete the work or determines that the surety's proposal is not in the government's best interest.<sup>165</sup> The damages recoverable by the government under the performance bond against the surety include the cost of completion, liquidated damages, warranty claims, and interest.<sup>166</sup>

### **Payment Bonds**

A payment bond assures that everyone supplying labor or material on work performed under the contract receives payment as required by law.<sup>167</sup> The payment bond must equal the total amount payable by the terms of the contract unless the CO determines that a bond for the whole amount is impractical.<sup>168</sup> The payment bond covers certain subcontractors and suppliers who furnished labor or material in performance of a contract that have not been paid in full within 90 days after the day the last of the labor or material was furnished or supplied.<sup>169</sup> First-tier subcontractors<sup>170</sup> and suppliers, as well as some second-tier subcontractors and suppliers,<sup>171</sup> receive protection under the Miller Act. Third-tier subcontractors and suppliers are not protected under the Miller Act. A party bringing a claim on a payment bond must do so no later than one year after the last day that labor was performed or materials were supplied.<sup>172</sup> A second-tier contractor or supplier may bring a civil action on the payment bond only if the party provides the prime contractor with written notice within 90 days of last performing labor or furnishing supplies.<sup>173</sup> A payment bond may cover claims for labor, materials, equipment, services, loans, delay damages, and interest.<sup>174</sup> Further discussion of the Miller Act is found in Chapter 12, "Sureties."

### **Federal Acquisition Streamlining Act**

The FAR implements the Federal Acquisition Streamlining Act (FASA)<sup>175</sup> to govern contracts priced between \$30,000 and \$100,000.<sup>176</sup> Performance and payment bonds are not required on these contracts; instead the CO must select at least two payment protections to shield the government from loss.<sup>177</sup> Potential protections include a payment bond, an irrevocable letter of credit, a tripartite escrow agreement, certificates of deposit, U.S. bonds or notes, or certified cashier's checks, bank drafts, money orders, or currency.<sup>178</sup>

## **§ 29.8 • PERFORMANCE**

After entering into a contract with the federal government, the contractor must perform according to the contract's terms. The government specifications the contractor uses to perform carry an implied warranty that following the specifications will produce a satisfactory result.<sup>179</sup> Therefore, although the government is entitled to strict compliance with the terms of the contract, the government may bear liability if defective specifications interfere with contractor performance.<sup>180</sup> To oversee proper performance, the government must take steps to ensure that the contractor's services meet the contract requirements.<sup>181</sup> If the contractor fails to perform properly, the government can terminate the contract for default,<sup>182</sup> reject nonconforming construction, modify the contract, reduce the price, or, where appropriate, assess liquidated damages.<sup>183</sup>

As with commercial contracts, issues often arise during the performance of government contracts that affect the rights and obligations of the contractor and government. This section briefly discusses some performance-impacting issues that are peculiar to government contracts.

### § 29.8.1—Changes

Changes to an agreement often become necessary after contract formation. Usually, the contracting parties must mutually agree to alter the terms of an executed contract. This is also true of government contracts; however, in government contracting, if the parties are unable to reach an agreement regarding proposed changes, the CO may unilaterally alter the original contract to reflect the government's wishes.<sup>184</sup> After a contract change, the contractor may request an equitable adjustment and has a duty to continue performance of the changed contract while the equitable adjustment request is pending. This section briefly discusses potential contract changes and their limitations.

All contracts to which the federal government is a party contain a Changes clause.<sup>185</sup> The Changes clause authorizes the CO to make changes within the general scope of an executed contract.<sup>186</sup> A change not within the general scope of the contract is a cardinal change and is not authorized by the Changes clause.<sup>187</sup> The Changes clause authorizes only the CO to make changes to a contract.<sup>188</sup> Contract changes can be formal<sup>189</sup> or constructive.<sup>190</sup> A change can be made bilaterally by agreement of the parties<sup>191</sup> or, where necessary, unilaterally by the CO.<sup>192</sup>

After any change, the CO must make an equitable adjustment in the contract price, the delivery schedule, or both, and modify the contract.<sup>193</sup> The contractor is entitled to an equitable adjustment equal to the difference between the actual costs incurred in completing the changed work and the reasonable costs of performing the work as originally specified.<sup>194</sup> Similarly, if the change produces a decrease in contract cost, the CO is entitled to adjust the contract price downward to account for that change.<sup>195</sup>

Where possible, the equitable adjustment is made by mutual agreement. If necessary, though, the CO will determine the equitable adjustment unilaterally.<sup>196</sup> In some cases, specific government agencies require that a Request for Equitable Adjustment be certified.<sup>197</sup> In the event of a failure to agree to an equitable adjustment, the contractor's sole remedy is the submission of a claim under the Contract Disputes Act.<sup>198</sup>

After a contract change, the contractor has a duty to continue performing the contract as changed even where the contractor disputes the change.<sup>199</sup> If the contractor fails to continue performance of the changed contract, the CO may terminate the contract for default.<sup>200</sup> However, the contractor may not be obligated to continue performing the contract as changed if the CO gives no clear direction regarding continuing performance, if the government's action leaves the contractor in an untenable position,<sup>201</sup> or the change is not within the general scope of the contract.<sup>202</sup>

### § 29.8.2—Differing Site Conditions

An equitable adjustment may also be appropriate where the contractor encounters differing site conditions. The term "differing site conditions" refers to subsurface or otherwise concealed conditions existing at the time a contract is awarded. There are two basic kinds of differing

site conditions recognized in government contracts: Type I conditions and Type II conditions. Type I conditions are conditions actually encountered that are different than those represented in the contract.<sup>203</sup> Type II conditions are conditions actually encountered that are different than those usually encountered given the nature and location of the work.<sup>204</sup>

The CO must insert the Differing Site Conditions clause<sup>205</sup> into all fixed-price construction contracts exceeding \$100,000.<sup>206</sup> The Differing Site Conditions clause protects the federal government and contactors alike by allocating the risk of differing site conditions to the government.<sup>207</sup> The clause provides that the contactor must immediately give the government written notice of any differing site condition encountered before the condition is disturbed.<sup>208</sup> After receiving notice, the CO will investigate the site condition.<sup>209</sup> If the CO determines that the site condition does differ and causes an increase or decrease in the contractor's cost or time required for contract completion, the CO must make an equitable adjustment.<sup>210</sup> Conditions created by acts of God, unusually severe weather, or acts of the government in its sovereign capacity are not considered differing site conditions.<sup>211</sup>

The contractor may have a duty to investigate the construction site to avoid encountering differing site conditions. The CO must insert the Site Investigation and Conditions Affecting the Work clause<sup>212</sup> in all fixed-price construction contracts exceeding \$100,000.<sup>213</sup> The contractor is required to investigate the construction site before submitting a bid or proposal where the contract includes the Site Investigation clause or the solicitation instructs the contractor to investigate.<sup>214</sup> The contractor's site investigation need only be reasonable. The government is expected to cooperate with the contractor's investigation by allowing access, time, and information necessary to the investigation.<sup>215</sup> If the contractor fails to conduct a reasonable site investigation, the contractor may be considered to have assumed the risk of any differing site conditions that a reasonable inspection would have uncovered and may not be entitled to any equitable adjustment based on the undiscovered condition.<sup>216</sup>

### **§ 29.8.3—Delays**

The FAR allocates the risk and costs of delays in construction projects among the parties according to the underlying cause of the delay. Construction contract delays are categorized as excusable, compensable, or inexcusable.<sup>217</sup> This section briefly discusses construction contract delays and their consequences.

#### **Excusable Delays**

Some construction contract delays are excusable. When a delay is excusable, the contractor is entitled to a contract completion deadline extension to complete contract performance.<sup>218</sup> A delay is excusable if it is the result of unforeseeable causes beyond the control and without the fault or negligence of the contractor.<sup>219</sup> Excusable delays include weather delays,<sup>220</sup> labor strikes<sup>221</sup> and shortages, subcontractor delays,<sup>222</sup> and acts of another contractor.<sup>223</sup> To receive an extension to complete the contract, the contractor must notify the CO of any delay within 10 days of the beginning date of the delay.<sup>224</sup> The delay must also be on the critical path,<sup>225</sup> not concurrent with any other delay caused by the contractor,<sup>226</sup> and must cause a delay in the overall project.<sup>227</sup>

**Compensable Delays**

If a delay is a compensable delay, the contractor is entitled to a contract completion deadline extension and recovery of increased costs. A government suspension of work may constitute a compensable delay. The government may suspend work by ordering the contractor to suspend, delay, or interrupt all or part of the contract work for a period the CO determines convenient for the government.<sup>228</sup> The government can also suspend work constructively. Constructive suspension occurs where the CO's action, or failure to act within the time specified in the contract, suspends, delays, or interrupts the contractor's performance.<sup>229</sup>

When the government causes a delay, the contractor may recover increased costs caused by the delay.<sup>230</sup> In order to recover increased costs based on a suspension order, the contractor must show the delay was unreasonable.<sup>231</sup> In order to recover increased costs based on a constructive suspension, the contractor must show that the delay was unreasonable and caused by the government.<sup>232</sup>

A contractor's recovery of increased costs is subject to limitation. For government-directed and constructive suspensions, the claim for increased costs must be submitted in writing as soon as is practicable after the termination of the delay but no later than the final close-out payment under the contract.<sup>233</sup> Increased costs are recoverable only where the government, exclusive of any other factor, caused the delay<sup>234</sup> and the task delayed is on the critical path.<sup>235</sup> Profits are never recoverable.<sup>236</sup> Additionally, for constructive suspensions, increased costs incurred more than 20 days before the contractor notified the CO of the perceived suspension are excluded.<sup>237</sup>

**Inexcusable Delays**

A delay caused by the fault or negligence of a contractor is an inexcusable delay. As a contractor may be entitled to recover increased costs caused by government delays, the government may be able to recover liquidated damages based on contractor caused delays. The government may recover liquidated damages from a contractor where the parties' contract contains the Liquidated Damages clause.<sup>238</sup> The CO should insert the Liquidated Damages clause only in contracts where the time of delivery or performance is such an important factor in the award of the contract that the government may reasonably expect to suffer damage if the delivery or performance is delinquent, and the extent or amount of the damage would be difficult or impossible to ascertain or prove.<sup>239</sup> Liquidated damages should not be used punitively.<sup>240</sup>

**§ 29.9 • PAYMENT**

Requesting and receiving payment from the government for contract performance is highly regulated. The forms of payment available to a contractor on a government contract include a lump-sum payment received after the contractor has completed performance of its contractual obligations,<sup>241</sup> and progress payments received at previously agreed upon intervals of contract completion.<sup>242</sup>

Progress payments are common in construction contracts due to the often large sum of money a project requires the contractor to expend prior to its completion. The Payments under Fixed-Price Construction Contracts clause, found in all construction contracts, indicates the process a contractor must follow to receive a progress payment.<sup>243</sup> The clause requires the contractor to submit a request for payment that itemizes the amount of work covered therein.<sup>244</sup> The request must also include a listing of (1) the amount included for work performed by each subcontractor under the contract; (2) the total amount of each subcontract under the contract; and (3) the amounts previously paid to each such subcontractor under the contract.<sup>245</sup> The CO may require that the request include other “supporting data” as well.<sup>246</sup> Additionally, the contractor must certify the request as provided by the language of the payment clause.<sup>247</sup>

### **§ 29.9.1—Prompt Payment Act**

Regardless of whether the contract provides for a lump sum or progress payment, the government is required to make prompt payment on all proper invoices.<sup>248</sup> If the government fails to make payment promptly, the contractor is entitled to recover interest on the late payments.<sup>249</sup>

Once the contractor fulfills the proper invoice requirements, he or she is entitled to prompt payment as specified in the Prompt Payment for Construction Contracts clause.<sup>250</sup> The due date for making a progress payment is 14 days after the designated billing office receives a proper payment request.<sup>251</sup> Final payments are due by the 30th day after the designated billing office receives a proper invoice from the contractor or the 30th day after the government accepts the work or services completed by the contractor, whichever is later.<sup>252</sup> The government considers the date the check was drafted or electronic funds were transferred the date of payment.<sup>253</sup> If the government fails to make payment by the required date, the contractor is entitled to interest on the subsequent late payments.<sup>254</sup> If the government makes payment earlier than the required date, a prompt payment discount may apply as specified by contract.

### **§ 29.9.2—Retainage And Set-Off**

Retainage and set-off are two issues that may affect payment. FAR § 32.103 allows the government to retain a portion of a payment that is due where “satisfactory progress has not been achieved by the contractor.”<sup>255</sup> The CO determines the percentage of the payment to be retained on a case-by-case basis, but retainage cannot exceed 10 percent of the approved estimated amount in accordance with the terms of the contract.<sup>256</sup> Any payment amount retained must be remitted upon completion of the contract.<sup>257</sup> Such a payment must be made within 30 days after the CO releases the contractor or as specified in the contract.<sup>258</sup>

The government may also exercise its common law right of set-off.<sup>259</sup> Set-off occurs when the government does not make a payment, or a portion of a payment, due to the contractor because the contractor owes the government money on another contract.<sup>260</sup> A contractor is at risk of having a payment set off if, after receiving a demand for payment, the contractor does not pay, request deferment of the collection, or suggest an installment plan within 30 days.<sup>261</sup> If set-off occurs, the CO must give the contractor an explanation of the set-off.<sup>262</sup>

**§ 29.9.3—Payment Limits**

Many construction projects are subject to specific appropriation limits set by Congress. As a result, funds available for any given project may be subject to a ceiling.<sup>263</sup> If the contractor exceeds the ceiling without first making proper arrangements, the contractor is at risk of not receiving payment for the amount in excess of the limit. To avoid this, contractors should notify the CO when the project reaches 75 percent of the relevant appropriation.<sup>264</sup>

**§ 29.10 • TERMINATION****§ 29.10.1—Termination For Convenience**

One of the most important issues government contractors need to understand is the federal government's ability to terminate contractual obligations for its convenience. In most private contracts unilateral cancellation would likely constitute breach of that contract.<sup>265</sup> To avoid this result, the CO includes a Termination for the Government's Convenience clause<sup>266</sup> in all fixed-price construction contracts expected to exceed \$100,000.<sup>267</sup> The clause allows the government to terminate any contract, or a portion thereof, without fault if the CO determines that the contract is no longer in the government's interest.<sup>268</sup>

A contract may be expressly or constructively terminated for convenience. To expressly terminate a contract for convenience, the CO must provide the contractor with a detailed written notice explaining the termination.<sup>269</sup> Constructive termination for convenience often occurs where the government improperly terminates a contract for default.<sup>270</sup> After a contract is terminated for convenience, the Termination Contracting Officer (TCO) is responsible for negotiating a settlement with the contractor.<sup>271</sup> To facilitate a negotiated settlement, the TCO must examine the settlement proposal of the contractor.<sup>272</sup> Next, the TCO should make every effort to promptly negotiate a settlement and enter into the settlement agreement with the contractor.<sup>273</sup>

After receiving the notice of termination, the contractor has an obligation to comply precisely with the notice and the termination clause contained in the contract.<sup>274</sup> Additionally, if the termination is partial, the contractor must continue to perform the remaining, non-terminated portion of the contract.<sup>275</sup>

In the event of termination of a contract for convenience, the federal government's objective is to make the contractor financially whole.<sup>276</sup> The guiding principal in contractor recovery is fair compensation<sup>277</sup> and "use of business judgment, as distinguished from strict accounting principals, is the heart of a settlement."<sup>278</sup> Through the settlement, the contractor may be able to recover some special termination costs, settlement expenses, and profits. Special termination costs include pre-contract costs,<sup>279</sup> initial costs,<sup>280</sup> termination inventory costs,<sup>281</sup> and post-termination costs.<sup>282</sup> Settlement expenses allowed are the costs reasonably necessary to the preparation and presentation of settlement claims to the TCO.<sup>283</sup> The contractor may also be able to recover reasonable profits unless completion of the contract would have resulted in a loss.<sup>284</sup>

Optimally, the contractor and TCO will reach a negotiated settlement by agreement.<sup>285</sup> However, if a complete negotiated settlement cannot be reached, the TCO must make a unilateral determination of the amount the contractor is entitled to recover.<sup>286</sup> Regardless of whether the TCO and contractor reach a negotiated settlement or the TCO renders a final settlement decision, or a combination of both, the contractor's total recovery cannot exceed the contract price as reduced by previous payments and the price of work not terminated.<sup>287</sup> If the contractor is unhappy with the TCO's final decision, the contractor is free to dispute the decision following the Contract Disputes Act dispute process.<sup>288</sup>

### **§ 29.10.2—Termination For Default**

The federal government can terminate a contractor's right to proceed with contract performance by written notice<sup>289</sup> if the contractor's performance is delayed and, consequently, threatens the timely completion of the project or if the contractor fails to complete the work within the specified time.<sup>290</sup> The government's decision to terminate the contractor's right to proceed is guided by the FAR<sup>291</sup> but is ultimately at the discretion of the CO.<sup>292</sup> The federal government cannot terminate the contractor's right to proceed if the delay was caused by unforeseeable causes beyond the control and without the fault or negligence of the contractor<sup>293</sup> or if the CO extends the time for completion.<sup>294</sup> The contractor can also argue that substantial performance makes the termination inappropriate.<sup>295</sup>

Following termination for default, the government will usually execute a reprocurement contract for the completion of the project. If the procuring agency is not able to execute the reprocurement contract at or below the original contract price, the agency may recover the excess expense from the original contractor or the performance bond posted by the original contractor.<sup>296</sup> The government is also entitled to liquidated damages as provided in the Liquidated Damages clause for delays.<sup>297</sup>

In the event of a partial termination for default, the contractor is entitled to compensation, and may also seek an equitable adjustment, for the work not terminated.<sup>298</sup> As above, the contractor must continue to perform the non-terminated portion of the contract even where the contractor disputes the termination or the final settlement decision.<sup>299</sup> Failure to continue performance may result in termination for default or liability for liquidated damages on the portion of the contract not terminated.

### **§ 29.10.3—Termination By Contractor**

A contractor is entitled to terminate a contract where the government makes a cardinal change to the agreement, thus breaching the contract.<sup>300</sup> Although possible,<sup>301</sup> such a termination is risky because if the change made by the government is actually within the scope of the contract, the contractor is deemed to have breached the contract and will be held liable accordingly. The safer alternative is to continue performance of the changed contract and pursue any claims later.<sup>302</sup>

## § 29.11 • DISPUTES

Private contract disputes and state government contract disputes are not unique and may also arise when contracting with the federal government. Not surprisingly, the federal dispute process is highly regulated under the Contract Disputes Act (CDA) which specifies federal contract dispute procedures.<sup>303</sup>

The first step in the dispute process is the presentation of a written claim to the CO.<sup>304</sup> The CO should attempt to resolve all contractual issues in controversy by mutual agreement of the parties.<sup>305</sup> However, if mutual agreement is not possible, the CO must render a final decision on the matter.<sup>306</sup> If the final decision is adverse to the contractor, the contractor may appeal the decision to the appropriate board of contract appeals or file suit against the government at the U.S. Court of Federal Claims (COFC).<sup>307</sup>

### § 29.11.1—Board Of Contract Appeals

If the CO issues a final decision that is adverse to the contractor, the contractor may appeal the decision to the appropriate board of contract appeals (BCA)<sup>308</sup> by filing a Notice of Appeal within 90 days of the adverse decision.<sup>309</sup> Once the contractor begins pursuing the appeal with the BCA, the contractor cannot pursue the appeal at the COFC.<sup>310</sup> If the BCA receives the Notice of Appeal prior to the filing deadline, the BCA will docket the appeal. The contractor must then file a complaint, and the government will file an answer. Discovery will ensue, followed by hearings and a decision.

Assuming the appeal was timely filed, abbreviated proceedings may be available as a more expedient and less expensive means to resolve the claim.<sup>311</sup> Typically, either party may opt for an abbreviated proceeding by waiving the hearing and submitting the case on the record.<sup>312</sup> Also, an accelerated or expedited appeal may be available for claims where the amount in controversy is relatively small.<sup>313</sup>

### § 29.11.2—U.S. Court Of Federal Claims

The CDA also provides contractors with direct access to challenge a CO's adverse decision at the COFC. To appeal, the contractor must file a complaint within one year of receiving the CO's adverse decision.<sup>314</sup> As with the decision to go to a BCA, the decision to pursue an appeal at the COFC is binding and irrevocable. The jurisdiction, pretrial, trial, and decision procedures used by the COFC are substantially similar to those used by the various BCAs.<sup>315</sup> The contractor files the complaint and the government files an answer. Next, there are pretrial orders and conferences, discovery, motions, trial, post-trial briefs, and, finally, a decision.

### § 29.11.3—Appellate Review

Either party may appeal an adverse BCA or COFC decision to the U.S. Court of Appeals for the Federal Circuit.<sup>316</sup> A party appealing a decision from a BCA must file a Petition for Review within 120 days of receiving the adverse BCA decision.<sup>317</sup> Upon review, the Federal Circuit considers the BCA's findings of fact final and conclusive; however, it does not consider the BCA's findings of law final or conclusive.<sup>318</sup> A party appealing a decision of the COFC must

file a Notice of Appeal within 60 days of the adverse COFC judgment or order.<sup>319</sup> The Federal Circuit reviews the COFC's decision for errors of law but will not set aside findings of fact unless the findings are clearly erroneous.<sup>320</sup>

The parties' briefs are key documents in appeals before the Federal Circuit.<sup>321</sup> The appellant's brief must be filed within 60 days of the date the appeal is docketed.<sup>322</sup> The appellee's brief must be filed within 40 days of the date the appellant's brief was filed.<sup>323</sup> Both parties must observe the requirements governing the briefs' form and content.<sup>324</sup> The Federal Circuit renders a decision based on the parties' briefs and the record from the earlier proceedings. If either party is unhappy with the decision, that party may file a motion for rehearing<sup>325</sup> or attempt to appeal further to the US Supreme Court.<sup>326</sup>

#### **§ 29.11.4—Appeal Alternatives**

Alternative dispute resolution (ADR) is an expeditious and less expensive method of resolving an appeal. Unlike some of the abbreviated proceedings discussed above, ADR is not subject to any amount in controversy limit.<sup>327</sup> Although ADR may not be appropriate in all cases,<sup>328</sup> each agency is authorized to settle appeals using ADR if both parties agree to such a proceeding.<sup>329</sup>

## **§ 29.12 • SUBCONTRACTOR ISSUES**

A subcontract is any contract entered into by a subcontractor to furnish supplies or services for the performance of a prime contract or subcontract.<sup>330</sup> This section briefly discusses the issues of government control, payment, and claims and disputes as related to government subcontracts.

#### **§ 29.12.1—Government Control**

Subcontracts are a common and important component of federal procurement. As a result, the federal government exercises some control over subcontracts to ensure that subcontracts performed on government projects serve the public's interest. The government uses flow-down provisions as a primary method to exercise this control. Flow-down provisions are FAR provisions that are inserted into subcontracts to ensure the performance of important federal requirements. Many contractors simply insert every prime contract FAR provision into all related subcontracts.<sup>331</sup> This practice, although common, is not required. The FAR identifies only certain provisions as mandatory flow-down provisions.<sup>332</sup> Flow-down provisions further the federal government's procurement policy and protect the government's interests by ensuring that the subcontractor is liable to the contractor as the contractor is to the government.<sup>333</sup>

The government's requirement for full and open competition also extends to subcontracts. With some limitations, the Competition in Subcontracting clause requires contractors to select subcontractors on a competitive basis.<sup>334</sup> Also, if a prime construction contract exceeds \$1 million and has subcontracting possibilities, the contractor must develop a small business and small disadvantaged business subcontracting plan.<sup>335</sup> Additionally, the government has the right to require a

contractor to obtain the government's consent before entering into any subcontract;<sup>336</sup> however, this consent is not typically necessary for federal construction projects.<sup>337</sup>

### **§ 29.12.2—Payment**

The payment procedures used on government subcontracts are similar to the prime contract procedures.<sup>338</sup> For example, subcontractors are entitled to prompt payment, but are also subject to retainage. Subcontractors are entitled to receive prompt payment from contractors according to the terms of the subcontract. The FAR requires subcontracts of all tiers to contain a Prompt Payment clause.<sup>339</sup> The clause must require contractors and subcontractors to pay subcontractors for satisfactory performance no more than seven days after receiving payment from the government for the performance, and pay subcontractors interest on all payments not made properly.<sup>340</sup> The FAR also applies the retainage principle to subcontractors by allowing a contractor to retain a specified percentage of each progress payment otherwise due to the subcontractor without cause and without incurring any obligation to pay interest on the later payment of the retained amount.<sup>341</sup>

Subcontractors having trouble recovering payment from a contractor may apply to the CO for assistance in obtaining payment<sup>342</sup> or pursue a Miller Act claim against the payment bond posted by the contractor.<sup>343</sup>

### **§ 29.12.3—Claims And Disputes**

#### **Subcontractor Versus Government**

In a typical government-contractor-subcontractor relationship, the subcontractor has no privity of contract with the government.<sup>344</sup> As a result, the subcontractor cannot directly pursue a contract claim against the government. However, the subcontractor may be able to pursue a contract claim against the government through the contractor. This is known as a pass-through claim. Pass-through claims allow for efficient resolution of contract disputes where a lack of privity poses a problem. The *Severin* Doctrine limits the availability of pass-through claims by allowing the claims only where the contractor has not been released of liability to the subcontractor.<sup>345</sup> The contractor and subcontractor usually preserve this liability by agreement.<sup>346</sup> The FAR governs the subcontractor's pass-through claim because the claim, in effect, becomes the contractor's claim against the government.

#### **Subcontractor Versus Contractor**

In general, state law governs subcontracts between contractors and subcontractors. Therefore, if a conflict arises between a contractor and subcontractor, it is resolved according to applicable state law with reference to the terms of the subcontract. This is one of the rare occurrences in the government contract arena where state law and commercial contract principles are applicable.

## § 29.13 • CONCLUSION

The formation and administration of federal government construction contracts involves a complex array of statutory and regulatory requirements designed to ensure full and open competition, competitive pricing, and the advancement of designated social objectives. While the complexity of these rules can appear daunting, there are numerous sources available to provide assistance.<sup>347</sup>

---

\* With special thanks to Mr. Craig Willis (DU Law 2008), for his invaluable research and writing contributions to this Chapter.

## NOTES

1. It is important to note that many executive agencies issue supplements to the FAR. Although these supplements cannot contradict the FAR unless specifically authorized by law to do so, they do implement agency-specific regulations. Consequently, a contractor should be aware that these supplements may provide for additional requirements in contracting with a specific executive agency that are not discussed in this Chapter. The agency supplements are found, following Chapter 1, throughout Title 48 of the Code of Federal Regulations.

2. The judicial bodies with jurisdiction to interpret federal procurement law are the U.S. Supreme Court, the U.S. Court of Appeals for the Federal Circuit, the U.S. Court of Federal Claims, the U.S. Comptroller General, and the four Boards of Contract Appeals.

3. 41 U.S.C. §§ 5 through 707. 10 U.S.C. is also a major source of statutes governing procurement contracts where military agencies are a party.

4. 48 C.F.R. §§ 1.1 through 53.3.

5. 48 C.F.R. § 1.101.

6. 48 C.F.R. §§ 1.1 through 51.205.

7. 48 C.F.R. §§ 52.000 through .301.

8. 48 C.F.R. §§ 53.000 through .302.

9. James F. Nagle, "Introduction," in *Federal Government Construction Contracts 2* (Adrian L. Bastianelli III, Andrew D. Ness & Joseph D. West eds., American Bar Association, 2003).

10. There are exceptions to this principle. *Id.* at 343 ("Courts and boards often turn to the [UCC] and apply [] common law principals to government contracts."); *id.* at 2 ("Sometimes it is necessary to review state law, such as those regarding warranties, under the state's UCC.").

11. FAR § 14.201-1(a), 48 C.F.R. § 14.201-1(a), FAR § 15.204-1, 48 C.F.R. § 15.204-1.

12. FAR §§ 14.201-2(b) and (c), 48 C.F.R. §§ 14.201-2(b) and (c), FAR §§ 15.204-2(b) and (c), 48 C.F.R. §§ 15.204-2(b) and (c).

13. FAR § 14.201-3, 48 C.F.R. § 14.201-3, FAR § 15.204-3, 48 C.F.R. § 15.204-3.

14. FAR § 14.201-5(a), 48 C.F.R. § 14.201-5(a), FAR § 15.204-5(a), 48 C.F.R. § 15.204-5(a).

15. FAR § 14.201-5(b), 48 C.F.R. § 14.201-5(b), FAR § 15.204-5(b), 48 C.F.R. § 15.204-5(b).

16. *Matter of: Kentucky Bridge and Dam, Inc.*, B-235806, 89-2 Comp. Gen. Proc. Dec. P56.

17. FAR § 14.201-5(c), 48 C.F.R. § 14.201-5(c), FAR § 15.204-5(c), 48 C.F.R. § 15.204-5(c).

18. This information can also be very important should a contractor pursue a protest. *See* § 29.5, "Protests," in this Chapter.

19. *G. L. Christian & Assocs v. U.S.*, 312 F.2d 418, 424 (Ct. Cl. 1963).

20. While the State of Colorado has adopted, in large measure, the Model Procurement Code, it would be dangerous to rely on its provisions as a template for the federal procurement process.

21. Pub. L. No. 98-369, 98 Stat. 1175 (codified as amended in scattered sections of 10 U.S.C., 31 U.S.C., and 41 U.S.C.).

22. 41 U.S.C. § 253(a)(1)(A), FAR § 6.102, 48 C.F.R. § 6.102. FAR § 6.001 specifies where full and open competition is not required. The government may utilize competition that is not full and open where appropriate as specified in FAR §§ 6.302 through .302-7, 48 C.F.R. §§ 6.302 through .302-7.

23. FAR § 6.101(b), 48 C.F.R. § 6.101(b).

24. 41 U.S.C. § 403(6).

25. FAR § 14, 48 C.F.R. § 14.

26. FAR § 6.401(a), 48 C.F.R. § 6.401(a), FAR § 14.103-1(a), 48 C.F.R. § 14.103-1(a), 41 U.S.C. § 253(a)(2)(A). The CO must use sealed bid procedures for construction contracts that meet the requirements unless the contract will be performed outside the United States. FAR § 36.103(a), 48 C.F.R. § 36.103(a).

27. FAR § 36.213-2, 48 C.F.R. § 36.213-2. FAR § 36.213-2(b) indicates the minimum information required to be included in the presolicitation notice. The CO may also issue a presolicitation notice for contracts not exceeding \$100,000. FAR § 36.213-2(a), 48 C.F.R. § 36.213-2(a).

28. FAR § 14.101, 48 C.F.R. § 14.101.

29. FAR § 14.101(a), 48 C.F.R. § 14.101(a). For construction contracts, the proper IFB form is determined by the estimated price of the contract. Most higher-priced construction contracts will use Standard Form 1442. FAR § 53.301-1442, 48 C.F.R. § 53.301-1442.

30. FAR § 14.101(b), 48 C.F.R. § 14.101(b). IFBs must be publicized by distribution to prospective bidders, posting in public places, and other appropriate means.

31. The government will use Standard Form 30 to amend an IFB when making changes in quantity, specifications, delivery schedules, opening dates, etc., or to correct a defective or ambiguous invitation. FAR § 14.208(a), 48 C.F.R. § 14.208(a).

32. FAR § 14.208, 48 C.F.R. § 14.208.

33. FAR § 14.404-1, 48 C.F.R. § 14.404-1. An IFB may be cancelled only for compelling reasons. FAR § 14.404-1(a), 48 C.F.R. § 14.404-1(a).

34. FAR § 14.209, 48 C.F.R. § 14.209. Cancellation is clearly in the public interest where there is no longer a requirement for the supplies or services, or where amendments to the invitation would be of such magnitude that a new invitation is desirable.

35. FAR § 14.301(a), 48 C.F.R. § 14.301(a). A responsive bid is a bid that complies in all material aspects with the IFB. Since responsiveness is determined after bid opening, there is no opportunity to revise the bid unless it is resubmitted prior to opening.

36. A condition that affects the price, quantity, quality, or delivery of items offered goes to the substance of a bid and is material. FAR § 14.404-2(e), 48 C.F.R. § 14.404-2(e).

37. A late bid may be considered if (1) the bid is received before the award is made; (2) the CO determines that accepting the late bid will not unduly delay the acquisition; and (3) the bid was transmitted by an electronic commerce method authorized by the IFB, and was received at the initial point of entry of the government by 5:00 p.m. on the day prior to the date specified for the receipt of bids, or the bid was received and under government control prior to the time set for receipt of bids. FAR § 14.304(b)(1), 48 C.F.R. § 14.304(b)(1). A bidder is well advised not to rely upon any of the preceding exceptions to save a late bid.

38. FAR § 14.408-1(a), 48 C.F.R. § 14.408-1(a).

39. *Id.* Contractors should consider the effect of possible immunity from local taxation when preparing a bid for a federal procurement project. *U.S. v. New Mexico*, 455 U.S. 720, 735 (1982); see Kenneth B. Weckstein & David I. Kempler, "Tax Considerations in Government Contracting," Briefing Papers No. 85-10 (Oct. 1985).

40. FAR § 15, 48 C.F.R. § 15.

41. FAR § 6.401(b), 48 C.F.R. § 6.401(b). Currently, negotiated procurements are the most favored form of federal government procurement for a variety of reasons, including a preference for best value

awards. In Colorado, a competitive sealed proposal process can be used where an officer or agent at a level above the procurement officer determines, in writing, that the use of competitive sealed bidding is either not practicable or not advantageous to the state. C.R.S. § 24-103-203(1).

42. FAR § 15.203(a), 48 C.F.R. § 15.203(a).

43. FAR § 15.203(a) specifies the information that must be included in an RFP. Additionally, the RFP must disclose the factors the procuring agency will consider in awarding the contract, and the factors' relation to cost or price. FAR §§ 15.304(d) and (e), 48 C.F.R. §§ 15.304(d) and (e).

44. See § 29.4.1, "Sealed Bidding."

45. Although the proposal preparation requires the same precision and attention to detail, prospective contractors may utilize strategies not used in preparing a bid when preparing a proposal.

46. FAR § 15.208(b)(1), 48 C.F.R. § 15.208(b)(1) (establishing the same exceptions at n. 37, *supra*, and adding an additional exception where the late proposal was the only one received).

47. FAR § 15.206(a), 48 C.F.R. § 15.206(a). Amendments made before the date for receipt of proposals must be provided to all parties that received the solicitation. FAR § 15.206(b), 48 C.F.R. § 15.206(b). Amendments made after the date for receipt of proposals must be provided to all offerors within the competitive range. FAR § 15.206(c), 48 C.F.R. § 15.206(c).

48. FAR § 15.206(e), 48 C.F.R. § 15.206(e). An RFP may also be cancelled for reasons similar to those necessary to cancel an IFB. See Donald P. Arnavas, *Government Contract Guidebook* (West Group, 3d ed. 2001) at 6-7.

49. See FAR § 15, 48 C.F.R. § 15.

50. The competitive range consists of the most highly rated proposals based on the ratings of each proposal against all evaluation criteria in the RFP. FAR § 15.306(c)(1), 48 C.F.R. § 15.306(c)(1).

51. FAR § 15.306(a)(3), 48 C.F.R. § 15.306(a)(3).

52. FAR § 15.306(d)(3), 48 C.F.R. § 15.306(d)(3).

53. FAR § 15.001, 48 C.F.R. § 15.001.

54. FAR §§ 15.610(e)(2)(i) through (iii) (1997).

55. Thomas F. Burke, "Online Reverse Auctions," Briefing Papers No. 00-11 (Oct. 2000).

56. In a reverse auction, the bid is the amount of compensation the seller is willing to accept in exchange for its product or services.

57. FAR § 15.305(a), 48 C.F.R. § 15.305(a). For contracts exceeding \$1 million or \$100,000 if entered after January 1, 1999, the CO must consider the offeror's past performance unless the CO documents why consideration of past performance is not appropriate. FAR § 15.304(c)(3), 48 C.F.R. § 15.304(c)(3); see FAR § 15.305(a)(2)(iii), 48 C.F.R. § 15.305(a)(2)(iii).

58. FAR § 15.304(d), 48 C.F.R. § 15.304(d).

59. FAR § 15.302, 48 C.F.R. § 15.302. Typically, the CO will be designated as the SSA unless the agency head appoints another individual to act in that capacity.

60. FAR § 15.306(c)(3), 48 C.F.R. § 15.306(c)(3).

61. FAR § 15.505(a)(1), 48 C.F.R. § 15.505(a)(1). A pre-award debriefing is generally given prior to award, but may be delayed until after award upon request or for compelling reasons documented in the contract file.

62. FAR § 15.505(b), 48 C.F.R. § 15.505(b).

63. The debriefing must include (1) the agency's evaluation of significant elements in the proposal, (2) a summary of the rationale for eliminating the offeror from the competition, and (3) reasonable responses to relevant questions about whether proper source selection procedures were followed by the agency. FAR § 15.505(e), 48 C.F.R. § 15.505(e).

64. FAR § 15.503(b), 48 C.F.R. § 15.503(b). The notice must include the number of offerors solicited; the number of proposals received; the name and address of each offeror receiving an award; the items, quantities, and unit price of each award; and the reasons the offeror's proposal was not accepted.

65. FAR §§ 15.506(a)(1) and (4), 48 C.F.R. §§ 15.506(a)(1) and (4).

66. FAR § 15.506(a)(2), 48 C.F.R. § 15.506(a)(2). The debriefing information must include (1) the government's evaluation of the significant weakness or deficiencies in the offeror's proposal; (2) the overall

evaluated cost or price and technical rating of the successful offeror as compared to the offeror being debriefed; (3) the overall ranking of all offerors; (4) a summary of the rationale for the award; and (5) reasonable responses to relevant questions about whether proper source selection procedures were followed. FAR § 15.506(d), 48 C.F.R. § 15.506(d).

67. FAR § 4.1100, 48 C.F.R. § 4.1100. FAR § 4.1102(a) specifies six exceptions to the registration requirement.

68. FAR § 4.1100, 48 C.F.R. § 4.1100.

69. FAR § 4.1200, 48 C.F.R. § 4.1200. Prospective contractors must complete the Representations and Certifications electronically at <http://orca.bpn.gov> at least once annually.

70. FAR § 9.103(a), 48 C.F.R. § 9.103(a).

71. FAR § 9.103(b), 48 C.F.R. § 9.103(b).

72. To be considered responsible, a prospective contractor must (1) have adequate financial resources to perform the contract, or the ability to obtain them; (2) be able to comply with the required or proposed delivery or performance schedule; (3) have a satisfactory performance record; (4) have a satisfactory record of integrity and business ethics; (5) have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them; (6) have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them; and (7) be otherwise qualified and eligible to receive an award under applicable laws and regulations. FAR § 9.104-1, 48 C.F.R. § 9.104-1.

73. A decision to pursue a protest in one forum does not limit the protester to only that forum; however, to keep as many options open as possible, the protester must keep track of the various filing deadlines.

74. An interested party is an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or failure to award a contract. 31 U.S.C. § 3551(2), FAR § 33.101, 48 C.F.R. § 33.101.

75. 31 U.S.C. § 3553(1), FAR § 33.101, 48 C.F.R. § 33.101.

76. *Arnavas, supra* n. 48, at 7-3. Colorado's procurement code also allows a protester to pursue a protest at the purchasing agency. C.R.S. § 24-109-201.

77. FAR § 33.103(b), 48 C.F.R. § 33.103(b).

78. Agencies should do their best to resolve protests within 35 days of filing. FAR § 33.103(g), 48 C.F.R. § 33.103(g). Note the federal timeline is not as stringent as in Colorado, where a written decision regarding the protest must be rendered within seven working days after the protest is filed. C.R.S. § 24-109-102.

79. FAR § 33.103(c), 48 C.F.R. § 33.103(c). A protester may request independent review by a party at a level above the CO who has not had any previous personal involvement in the procurement. FAR § 33.103(d)(4), 48 C.F.R. § 33.103(d)(4). This review may be available as a substitute for the CO's decision or as an appeal of an adverse decision made by the CO. It is very important to note that this review does not extend the deadline for timely filing a protest at the GAO that will trigger an automatic suspension of contract performance.

80. FAR § 33.103(d)(1), 48 C.F.R. § 33.103(d)(1).

81. The protest must include the following information: (1) name, address, fax, and telephone numbers of protester; (2) solicitation or contract number; (3) detailed statement of the legal and factual grounds for the protest, to include a description of resulting prejudice to the protester; (4) copies of relevant documents; (5) request for a ruling by the agency; (6) statement as to the form of relief requested; and (7) all information establishing that the protester is an interested party for the purpose of filing a protest and all information establishing the timeliness of the protest. FAR 33.103(d)(2), 48 C.F.R. § 33.103(d)(2).

82. FAR § 33.103(e), 48 C.F.R. § 33.103(e). A protest based on alleged impropriety in the solicitation is a pre-award protest.

83. FAR § 33.103(f)(1), 48 C.F.R. § 33.103(f)(1). In Colorado, if a pre-award protest based on a competitive sealed proposal is received, the contract is not awarded until resolution of the pre-award protest. C.R.S. § 24-103-203(7).

84. FAR § 33.103(e), 48 C.F.R. § 33.103(e). Note the difference between the federal and Colorado protest filing deadline. In Colorado, a protester must file an agency protest within seven working days of the date when the protester knew, or should have known, the basis for the protest. C.R.S. § 24-109-102.

85. FAR § 33.103(f)(3), 48 C.F.R. § 33.103(f)(3). Performance need not be suspended if continued performance is justified for urgent and compelling reasons or to be in the best interests of the government. Note that in Colorado, there is no stay of performance during post-award protests. C.R.S. § 24-109-103.

86. FAR § 49, 48 C.F.R. § 49. *See* § 29.10.1, "Termination For Convenience," in this Chapter.

87. The GAO was formerly referred to as the General Accounting Office.

88. Note that in Colorado, there is no option equivalent to a GAO protest; however, a protester may appeal an adverse decision of the head of a purchasing agency regarding a protested solicitation or award to the executive director as long as the protester has not already initiated an action in the District Court for the City and County of Denver. C.R.S. § 24-109-201. To appeal to the executive director, the protester must file the appeal within 10 working days of the date that the adverse decision is mailed. C.R.S. § 24-109-203(1).

89. The GAO hears protests according to its bid protest regulations. 4 C.F.R. § 21, FAR § 33.104, 48 C.F.R. § 33.104. Failure to follow these procedures may result in dismissal of the protest.

90. 4 C.F.R. § 21.1(a).

91. 4 C.F.R. §§ 21.1(b) and (f). A protest filed with GAO shall (1) include the name, street address, e-mail address, and telephone and fax numbers of the protester; (2) be signed by the protester or its representative; (3) identify the contracting agency and the solicitation and/or contract number; (4) set forth a detailed statement of the legal and factual grounds of protest, including copies of relevant documents; (5) set forth all information establishing that the protester is an interested party for the purpose of filing a protest; (6) set forth all information establishing the timeliness of the protest; (7) specifically request a ruling by the Comptroller General of the United States; and (8) state the form of relief requested. 4 C.F.R. § 21.1(c). In addition, a protest filed with the GAO may (1) request a protective order; (2) request specific documents, explaining the relevancy of the documents to the protest grounds; and (3) request a hearing, explaining the reasons that a hearing is needed to resolve the protest. 4 C.F.R. § 21.1(d).

92. Specifically, the protest must be addressed to General Counsel, Government Accountability Office, 441 G Street, N.W., Washington, DC 20548, Attention: Procurement Law Control Group. 4 C.F.R. § 21.1(b).

93. 4 C.F.R. § 21.1(e), FAR § 33.104(a)(1), 48 C.F.R. § 33.104(a)(1). The protester should address the copy to the individual specified in the IFB or RFP, or, if none is specified, to the CO.

94. 4 C.F.R. § 21.2(a)(1). Pre-award protests are protests based on alleged solicitation improprieties that are apparent before bid opening or the date set for receipt of initial proposals and protests based on alleged improprieties not apparent in the original solicitation, but incorporated into the solicitation.

95. 4 C.F.R. § 21.6, 31 U.S.C. § 3553(c), FAR § 33.104(b), 48 C.F.R. § 33.104(b). The CO may award the contract if the head of the contracting agency finds that urgent and compelling circumstances that significantly impact the government's interest will not permit waiting and the award is likely to occur within 30 days of the written finding.

96. 4 C.F.R. § 21.2(a)(2).

97. 4 C.F.R. § 21.6, 31 U.S.C. § 3553(d), FAR § 33.104(c), 48 C.F.R. § 33.104(c). The head of the procuring agency may authorize contract performance pending the GAO's decision if it is in the government's interest or urgent and compelling circumstances will not allow waiting for the GAO's decision. FAR § 33.104(c)(2), 48 C.F.R. § 33.104(c)(2).

98. 4 C.F.R. § 21.2(a)(3). It is very important to note that pursuing an agency protest does not extend the filing deadline for obtaining a stay at the GAO. FAR § 33.103(f)(4), 48 C.F.R. § 33.103(f)(4). Also, in the event that the procuring agency's regulations provide for a more stringent filing timeline, the agency's rule controls.

99. The GAO will recommend that the contracting agency implement any combination of (1) refraining from exercising options under the contract; (2) terminating the contract; (3) recompeting the contract; (4) issuing a new solicitation; (5) awarding a contract consistent with statute and regulation; (6) any other recommendations the GAO determines necessary to promote compliance. 4 C.F.R. § 21.8(a). The

GAO may also recommend that the contracting agency pay the protester the costs of (1) filing and pursuing the protest, and (2) bid and proposal preparation. 4 C.F.R. § 21.8(d).

100. 28 U.S.C. § 1491(b). COFC has jurisdiction to consider (1) objections to a solicitation or to a proposed or actual award of a contract, and (2) alleged violations of a statute or regulation with a procurement or proposed procurement. Note that, in Colorado, a protester may appeal an adverse agency decision made by the head of the purchasing agency or the executive director to the District Court for the City and County of Denver. C.R.S. § 24-109-205.

101. The Administrative Dispute Resolution Act does not define “interested party.” Pub. L. No. 104-320, 110 Stat. 3870. To determine if a protester is an interested party, the court considers whether (1) the protester has suffered sufficient injury-in-fact; (2) the injury is fairly traceable to the agency’s decision and is likely to be redressed by a favorable decision; and (3) the interests sought to be protected are within the zone of interests to be protected by the statute in question. *Am. Fedn. of Govt. Employees v. U.S.*, 46 Fed. Cl. 586, 595-97 (Ct. Cl. 2000).

102. The COFC rules follow the Federal Rules of Civil Procedure closely.

103. The complaint must state the nature of the relief sought and include a civil cover sheet. Fed. Cl. R. 8, 10.

104. To be successful, the COFC must determine that agency actions were arbitrary, capricious, and an abuse of discretion, or not otherwise in accordance with law. 28 U.S.C. § 1491(b)(4), 5 U.S.C. § 706.

105. Available remedies include declaratory judgment injunctive relief, recovery of bid preparation and proposal costs, 28 U.S.C. § 1491(b)(2); recovery of miscellaneous costs, 28 U.S.C. §§ 1920, 2412(a)(1); and recovery of attorney fees, 28 U.S.C. § 2412(b).

106. The protester must file the motion within 10 days of the entry of judgment. Fed. Cl. R. 59(a)(1), (b).

107. The protester must file a notice of appeal with the COFC clerk within 60 days of the adverse judgment or order. Fed. Cl. R. 72.

108. R. Ct. Fed. Cl. Gen. Order 38.

109. James F. Nagle and Laura Kleisle, “Bid Protests,” in *Federal Government Construction Contracts*, *supra n. 9*, at 171. In Colorado, to appeal an adverse agency or executive director decision, the protester must file the appeal with the district court within 10 days of receiving the decision. C.R.S. § 24-109-206.

110. Arnavas, *supra n. 48*, at 7-16.

111. *Id.* at 8-2.

112. *Id.*, at Chapter 8 for a more exhaustive discussion of the many requirements and preferences generally pertinent to government contracts.

113. 40 U.S.C. §§ 3141, *et seq.*, FAR § 22.4, 48 C.F.R. § 22.4.

114. 40 U.S.C. §§ 3701, *et seq.*, FAR § 22.3, 48 C.F.R. § 22.3.

115. Some states have adopted what are known as Little Davis-Bacon Acts based on the federal law. Although Colorado did pass a Little Davis-Bacon Act, the law was repealed in 1985.

116. 40 U.S.C. § 3142(a) (also applies to contracts for alteration and/or repair including painting and decorating).

117. 29 C.F.R. § 5.2(m) (2007). The terms “laborer” or “mechanic” include workers whose duties are manual or physical in nature as distinguished from mental or managerial. Wage determinations for mechanics and laborers are categorized according to the craft of each worker.

118. 40 U.S.C. § 3142(a), FAR §§ 22.404-2(a) and (b), 48 C.F.R. §§ 22.4042(a) and (b). Minimum wage determinations should be included in the solicitation and incorporated into the contract.

119. 40 U.S.C. §§ 3141(2) (minimum wages include the basic hourly rate of pay and fringe benefits).

120. 40 U.S.C. § 3142(b).

121. 40 U.S.C. § 3142(c). Note also that any deficiency in payments made by the contractor may be withheld by the CO to make up the difference between the wages required by the contract and those actually received by the workers.

122. 40 U.S.C. § 3702(a).

123. 40 U.S.C. § 3701(b)(1).
124. 40 U.S.C. § 3701(b)(3)(iii).
125. 40 U.S.C. § 3702(b)(2). Liquidated damages are computed according to § 3703(b)(1), and payments may be withheld to satisfy the liabilities of the contractor according to §§ 3703(b)(2) and (3).
126. 40 U.S.C. § 3704(a)(1).
127. FAR § 19, 48 C.F.R. § 19.
128. FAR § 19.201(a), 48 C.F.R. § 19.201(a). This Chapter discusses the government's preference for small businesses generally. Some small businesses may receive a greater preference than ordinary small businesses based on ownership and/or geographic factors.
129. FAR § 19.001, 48 C.F.R. § 19.001. *See* FAR § 19.102, "Size Standards," 48 C.F.R. § 19.102.
130. FAR § 19.5, 48 C.F.R. § 19.5, *see* FAR § 19.502-3, 48 C.F.R. § 19.502-3. Although partial set-asides are also available to small business concerns on many government contracts, partial set-asides do not apply to construction contracts.
131. FAR § 19.502-2(a), 48 C.F.R. § 19.502-2(a).
132. FAR § 19.502-2(b), 48 C.F.R. § 19.502-2(b).
133. 41 U.S.C. §§ 10(a) through (d).
134. FAR § 25.2, 48 C.F.R. § 25.2.
135. FAR § 25.201, 48 C.F.R. § 25.201. Using foreign construction materials may be acceptable if requiring domestic materials is impracticable or inconsistent with public interest, the particular material is not available in the United States, or the cost of the domestic material is unreasonable. FAR § 25.202(a), 48 C.F.R. § 25.202(a). Trade agreements may also supply an exception to the BAA. FAR § 25.202(c), 48 C.F.R. § 25.202(c), *see* FAR § 25.4, 48 C.F.R. § 25.4.
136. FAR § 25.206(c)(2), 48 C.F.R. § 25.206(c)(2).
137. FAR § 25.206(c)(3), 48 C.F.R. § 25.206(c)(3).
138. FAR §§ 25.206(c)(3) and (4), 48 C.F.R. §§ 25.206(c)(3) and (4).
139. Arnavas, *supra n.* 48, at 9-2.
140. *Lockheed Aircraft Corp. v. U.S.*, 375 F.2d 786, 792 (Ct. Cl. 1967).
141. FAR § 36.207(a), 48 C.F.R. § 36.207(a).
142. FAR §§ 16.403(b) and 16.404, 48 C.F.R. §§ 16.403(b) and 16.404.
143. FAR § 36.207(a), 48 C.F.R. § 36.207(a).
144. Arnavas, *supra n.* 48, at 9-3.
145. FAR § 31.201-2(a)(1), 48 C.F.R. § 31.201-2(a)(1). A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business. FAR § 31.201-3, 48 C.F.R. § 31.201-3.
146. FAR § 31.201-2(a)(2), 48 C.F.R. § 31.201-2(a)(2). A cost is allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship. A cost is allocable to a government contract if it is incurred specifically for the contract; benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown. FAR § 31.201-4, 48 C.F.R. § 31.201-4.
147. FAR § 31.201-2(a)(5), 48 C.F.R. § 31.201-2(a)(5), FAR § 31.205, 48 C.F.R. § 31.205 (lists selected costs that receive special treatment).
148. 48 C.F.R. §§ 9904.401-.420, FAR § 30, 48 C.F.R. § 30.
149. Carl Lee Vacketta, *Federal Government Contract Overview* § IV(A)(2), [www.findlaw.com/1999/Jan/1/241470.html](http://www.findlaw.com/1999/Jan/1/241470.html) (last visited July 23, 2007).
150. Sealed bid contracts, contracts not in excess of \$650,000, and contracts with small businesses are exempt from all Cost Accounting Standards requirements. 48 C.F.R. 9903.201-1(b), FAR § 30.000, 48 C.F.R. § 30.000. Until recently, the threshold amount necessary for application of the CAS was \$550,000 but the threshold was amended by Final Rule 72 Fed. Reg. 32809 to \$650,000 effective on June 14, 2007.
151. FAR § 52.230-2, 48 C.F.R. § 52.230-2.
152. FAR § 30.201-4(a), 48 C.F.R. § 30.201-4(a).
153. FAR § 52.230-2, 48 C.F.R. § 52.230-2.

154. 41 U.S.C. § 254b.
155. FAR § 15.403-4(a), 48 C.F.R. § 15.403-4(a), 71 Fed. Reg. 57363 (Sept. 28, 2006). Note that the dollar threshold for the applicability of TINA may be adjusted every five years.
156. 41 U.S.C. §§ 254b(a)(1)(A) and (B), FAR § 15.403-4, 48 C.F.R. § 15.403-4.
157. 41 U.S.C. § 254b(b)(1), FAR § 15.403-1(c), 48 C.F.R. § 15.403-1(c).
158. 41 U.S.C. § 254b(f).
159. FAR § 28.102-1(a), 48 C.F.R. § 28.102-1(a) implementing 40 U.S.C. §§ 3131 through 3134. Note that, unlike some public contracts with the State of Colorado, no bid bond is required in federal procurement.
160. A corporate surety is satisfactory if it appears on the Department of Treasury Circular 570. FAR § 28.202(a)(1), 48 C.F.R. § 28.202(a)(1).
161. FAR § 28.203(a), 48 C.F.R. § 28.203(a). An individual surety must also furnish a security interest in assets to be considered acceptable. An offeror may submit up to three individual sureties per bond for the consideration of the CO. FAR § 28.203(b), 48 C.F.R. § 28.203(b).
162. FAR § 28.001, 48 C.F.R. § 28.001, 40 U.S.C. § 3131(b)(1).
163. FAR § 28.102-2(b), 48 C.F.R. § 28.102-2(b).
164. FAR § 49.404, 48 C.F.R. § 49.404.
165. FAR § 49.404(c), 48 C.F.R. § 49.404(c).
166. Daniel E. Toomey & Tamara M. McNulty, “Surety Bonds,” in *Federal Government Construction Contracts*, *supra n. 9*, at 588-89.
167. FAR § 28.001, 48 C.F.R. § 28.001, 40 U.S.C. § 3131(b)(2).
168. FAR § 28.102-2(b)(2), 48 C.F.R. § 28.102-2(b)(2). If the CO determines that requiring a bond for the whole amount payable by the terms of the contract is impractical, the CO may set the amount of the bond; however, the bond cannot be for an amount less than the performance bond.
169. 40 U.S.C. § 3133(b)(1).
170. A subcontractor is an entity that provides both labor and material. FAR § 44.101, 48 C.F.R. § 44.101.
171. Second-tier subcontractors and suppliers are those in privity of contract with the first-tier subcontractors or suppliers. Second-tier subcontractors and suppliers are covered by the Miller Act only if they provide services to first-tier subcontractors.
172. 40 U.S.C. § 3133(b)(4).
173. 40 U.S.C. § 3133(b)(2).
174. Daniel E. Toomey & Tamara M. McNulty, “Surety Bonds,” in *Federal Government Construction Contracts*, *supra n. 9*, at 598-600. *See also* § 12.4.3, “Types Of Claims Covered,” in this publication for a discussion of recovering attorney fees from the surety of a payment bond.
175. Pub. L. No. 103-355, 108 Stat. 3243 (codified in scattered section of 10 U.S.C. and 41 U.S.C.).
176. FAR § 28.102-1(b), 48 C.F.R. § 28.102-1(b).
177. *Id.*
178. *Id.*
179. *United States v. Spearin*, 248 U.S. 132, 136 (1918). The government may include exculpatory language in the contract that transfers liability to the contractor to avoid the implied warranty. The disclaimer is enforceable, but narrowly construed. *See* Donald P. Arnava, “Exculpatory Clauses,” Briefing Papers No. 98-10 (Sept. 1998).
180. “The term defective specifications usually refers to a defect or inconsistency in the specifications so severe that performance of the contract as stated cannot be attained by any contractor—or can be obtained only at an exorbitant cost.” Arnava, *supra n. 48*, at 13-5.
181. FAR § 46.102, 48 C.F.R. § 46.102.
182. *See* § 29.10.2, “Termination For Default,” in this Chapter.
183. But the doctrine of substantial performance may prevent the government from terminating the contract for default on account of minor deviations from the contract specifications. To qualify as substan-

tial performance, the contractor must show a high percentage of completion and that the project is available for its intended use. *See* Arnavas, *supra n.* 48, at 13-12 to -15.

184. FAR § 43.201, 48 C.F.R. § 43.201. Typically, changes are made using Standard Form 30. FAR § 43.301, 48 C.F.R. § 43.301.

185. FAR § 52.243-1, Alternate I for contracts for services but not supplies; Alternate II for contracts for services and supplies. 48 C.F.R. § 52.243-1.

186. FAR § 52.243-1(a), 48 C.F.R. § 52.243-1(a).

187. *Id.* If the CO makes cardinal changes, the government is considered to have breached the contract. Note that, if the FAR § 52.233-1, Alternate I is included in the contract, the contractor must continue performance of the changed contract even in the event of a cardinal change.

188. FAR § 52.243-1, 48 C.F.R. § 52.243-1. The government is bound only by changes made by employees with actual authority to make changes. *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947). Other government employees have limited authority to represent the CO. If asked to make changes the contractor believes alter the contract, the contractor should immediately notify the CO of the proposed change prior to commencing the proposed work.

189. A formal change is a change made utilizing the Changes clause contained in the contract. A formal change can originate with the government or the contractor.

190. A constructive change is a change made by “action or inaction by the CO or other government representative authorized to order changes that is not a formal change order but has the effect of requiring the contractor to perform additional work beyond the contract’s requirements.” Arnavas, *supra n.* 48, at 15-21.

191. A change is bilateral if the parties agree to the change and accompanying equitable adjustment. FAR § 43.103(a), 48 C.F.R. § 43.103(a). One method the government uses to encourage contractors to suggest contract changes that may reduce the contract price is the Value Engineering clause, FAR § 52.248-3, 48 C.F.R. § 52.248-3. The Value Engineering clause allows the contractor to share in instant contract savings realized as a result of the contractor’s value engineering change proposals. FAR §§ 52.248-3(a) and (f), 48 C.F.R. §§ 52.248-3(a) and (f).

192. A change is unilateral if the parties cannot agree to the change and accompanying equitable adjustment and only the CO signs the contract modification. FAR § 43.103(b), 48 C.F.R. § 43.103(b). Only the CO, not the contractor, can unilaterally change a contract.

193. FAR § 52.243-1(b), 48 C.F.R. § 52.243-1(b). It is important to note that the Truth In Negotiations Act (TINA) will apply to contract changes expected to exceed \$650,000. *See* § 29.7.2, “Cost Accounting Standards” for a discussion of the TINA.

194. The contractor is also entitled to overhead and profit as part of an equitable adjustment that increases the contract’s price, as well as an extension of the period of contract performance if the change impacts the contract schedule. The contractor may also be able to recover costs of preparing the equitable adjustment proposal.

195. FAR § 52.243-1(b), 48 C.F.R. § 52.243-1(b).

196. *Id.*

197. *See* DFARS § 243.204-70, 48 C.F.R. §§ 243.204-70, 252.243-7002, 48 C.F.R. § 252.243-7002.

198. FAR § 52.243-1(e), 48 C.F.R. § 52.243-1(e). *See* § 29.11, “Disputes,” in this Chapter.

199. FAR § 52.243-1(e), 48 C.F.R. § 52.243-1(e).

200. FAR § 52.233-1(i), 48 C.F.R. § 52.233-1(i).

201. Arnavas, *supra n.* 48, at 15-13 to -14.

202. FAR § 52.233-1(i), 48 C.F.R. § 52.233-1(i), 41 U.S.C. § 605(b).

203. To prove Type I differing site conditions, the contractor must show that (1) the contract documents positively indicated the site conditions that form the basis of the claim; (2) the contractor reasonably interpreted the contract; (3) the contractor reasonably relied upon its interpretation of the contract documents; (4) the conditions actually encountered differed materially from those indicated in the contract; (5) the conditions encountered were unforeseeable based on all the information available at the time of bidding;

and (6) the contractor was damaged as a result of the material variation between the expected and the encountered conditions. Arnavas, *supra* n. 48, at 28-8.

204. To prove Type II differing site conditions, the contractor must show (1) the recognized and usual conditions at a job site; (2) the actual physical conditions; (3) the differences between the actual conditions and the usual conditions; and (4) the fact that the different conditions caused an increase in contract performance. Arnavas, *supra* n. 48, at 28-11.

205. FAR § 52.236-2, 48 C.F.R. § 52.236-2.

206. FAR § 36.502, 48 C.F.R. § 36.502.

207. FAR § 52.236-2, 48 C.F.R. § 52.236-2. This protects the government from exaggerated bids and the contractor from unexpected costs resulting from differing site conditions.

208. FAR § 52.236-2(a), 48 C.F.R. § 52.236-2(a).

209. FAR § 52.236-2(b), 48 C.F.R. § 52.236-2(b).

210. *Id.* The contractor cannot receive an equitable adjustment after the final payment under the contract is made. FAR § 52.236-2(d), 48 C.F.R. § 52.236-2(d).

211. Arnavas, *supra* n. 48, at 28-13 and -14.

212. FAR § 52.236-3, 48 C.F.R. § 52.236-3.

213. FAR § 36.503, 48 C.F.R. § 36.503.

214. FAR § 52.236-3, 48 C.F.R. § 52.236-3.

215. The government's failure to cooperate may allow the contractor to recover unforeseen costs even where no site investigation took place. *See, e.g., Pavement Specialists, Inc.*, ASBCA 17410, 1973 ASBCA LEXIS 356 (granting contractor recovery where denied access to conduct site inspection by the government).

216. *R.J. Crowley, Inc.*, GSBCA 11080, 1991 GSBCA LEXIS 480.

217. Andrew D. Ness, "Delay, Suspension of Work, and Acceleration," in *Federal Government Construction Contracts*, *supra* n. 9, at 414.

218. FAR § 52.249-10(b)(2), 48 C.F.R. § 52.249-10(b)(2).

219. FAR § 52.249-10(b), 48 C.F.R. § 52.249-10(b).

220. The weather causing the delay must be unusually severe and occur before or during the period for performance. To show the weather encountered was unusually severe, the contractor must present weather records.

221. FAR 22.101-2(b), 48 C.F.R. § 22.101-2(b). A delay caused by a strike that the contractor could not reasonably prevent can be excused; however, it cannot be excused beyond the point at which a reasonably diligent contractor could have acted to end the strike. The contractor must also make reasonable efforts to avoid the delay caused by labor strikes.

222. The delay must be unforeseeable, beyond the control, and not caused by the fault or negligence of the subcontractor or prime contractor. FAR § 52.249-10(b), 48 C.F.R. § 52.249-10(b).

223. FAR § 52.249-10(b)(1)(iii), 48 C.F.R. § 52.249-10(b)(1)(iii) (unique to construction contracts).

224. FAR § 52.249-10(b)(2), 48 C.F.R. § 52.249-10(b)(2).

225. Many construction contracts are planned and scheduled using the critical path method. Tasks on the critical path are those that must be completed before work on other tasks can proceed.

226. If a delay on the critical path is caused by the government and the contractor, it is considered a concurrent delay. Generally, where a delay is concurrent, the contractor cannot recover increased costs from the government, and the government cannot recover liquidated damages from the contractor. FAR § 52.242-14(b), 48 C.F.R. § 52.242-14(b).

227. Arnavas, *supra* n. 48, at 29-17. Where both are present, the contractor has the duty to apportion excusable and inexcusable delays.

228. FAR § 52.242-14(a), 48 C.F.R. § 52.242-14(a).

229. FAR § 52.242-14(b), 48 C.F.R. § 52.242-14(b). Government actions that may result in a constructive suspension include a delay in issuing notice to proceed; in making the work site available; in issuing change orders; in responding to contractor questions; in approving shop drawings, samples or models, caused by defective government specifications or drawings; or caused by improper government administration of the contract. Arnavas, *supra* n. 48, at 29-6 to -9.

230. Recoverable costs include overhead costs incurred during the delay; demobilization and remobilization costs; idle time; increased costs of labor and materials pursuant to FAR § 52.216-4, Economic Price Adjustment—Labor and Material; insurance and bond premiums; increased costs of performing during adverse weather conditions; loss of efficiency; and interest on borrowings. Arnava, *supra* n. 48, at 29-10 to -13.

231. Delays resulting from government fault (*i.e.*, defective specifications) are always unreasonable. If a delay lasts long enough, it may be considered a cardinal delay constituting a breach of contract.

232. The contractor must show that the government did something it should not have done, or did not do something it should have done that adversely affected the contractor's performance. Arnava, *supra* n. 48, at 29-5.

233. FAR § 52.242-14(c), 48 C.F.R. § 52.242-14(c).

234. FAR § 52.242-14(b), 48 C.F.R. § 52.242-14(b).

235. Arnava, *supra* n. 48, at 29-15 to -16.

236. FAR § 52.242-14(b), 48 C.F.R. § 52.242-14(b). It is important to note that if a particular situation is compensable under the Changes clause (FAR § 52.243-1, 48 C.F.R. § 52.243-1), the contractor can recover profits.

237. FAR § 52.242-14(c), 48 C.F.R. § 52.242-14(c).

238. FAR § 52.211-12, 48 C.F.R. § 52.211-12.

239. FAR § 11.501(a), 48 C.F.R. § 11.501(a).

240. FAR § 11.501(b), 48 C.F.R. § 11.501(b). Liquidated damages are used to compensate the government for probable damages. The liquidated damages rate must be a reasonable forecast of just compensation and should include the cost of government inspection and superintendence.

241. FAR §§ 36.207(a)(1), 32.905(a), 52.232-27(a)(1)(ii), 48 C.F.R. §§ 36.207(a)(1), 32.905(a), 52.232-27(a)(1)(ii).

242. FAR §§ 36.207(a)(2), 32.901(a), 32.904(d)(1)(i), 52.232-5(b), 48 C.F.R. §§ 36.207(a)(2), 32.901(a), 52.232-5(b).

243. FAR § 52.232-5, 48 C.F.R. § 52.232-5.

244. FAR § 52.232-5(b), 48 C.F.R. § 52.232-5(b).

245. FAR § 52.232-5(b)(1), 48 C.F.R. § 52.232-5(b)(1).

246. *Id.*

247. FAR § 52.232-5(c), 48 C.F.R. § 52.232-5(c).

248. FAR § 52.232-27, 48 C.F.R. § 52.232-27. A proper invoice must include (1) name and address of the contractor; (2) invoice date and number; (3) contract number or other authorization for work or services performed (including order number and contract line number); (4) description of work or services performed; (5) delivery and payment terms; (6) name and address of contractor official to whom payment is to be sent (must be the same as that in the contract or in a proper notice of assignment); (7) name (where practicable), title, phone number, and mailing address of person to notify in the event of a defective invoice; (8) for progress payments, substantiation of the amounts requested and certification in accordance with the requirements of the Payments Under Fixed-Price Construction Contracts clause; (9) Taxpayer Identification Number if required by the contract; (10) electronic funds transfer banking information if required by the contract; and (11) any other information or documentation required by the contract. FAR § 32.905(b)(1), 48 C.F.R. § 32.905(b)(1), FAR § 52.232-27(a)(2), 48 C.F.R. § 52.232-27(a)(2). In the event that an invoice does not comply with the requirements, the designated billing office must return the defective invoice within seven days with an explanation of the defect. FAR § 32.905(b)(3), 48 C.F.R. § 32.905(b)(3), FAR § 52.232-27(a)(2), 48 C.F.R. § 52.232-27(a)(2).

249. FAR § 32.907, 48 C.F.R. § 32.907, FAR § 52.232-27(a)(3), 48 C.F.R. § 52.232-27(a)(3).

250. FAR § 32.906, 48 C.F.R. § 32.906, FAR § 52.232-27, 48 C.F.R. § 52.232-27. The government will not make any payment earlier than seven days prior to the due date unless the agency head determines otherwise.

251. FAR § 32.904(d)(1)(i), 48 C.F.R. § 32.904(d)(1)(i), FAR § 52.232-27(a)(1)(i)(A), 48 C.F.R. § 52.232-27(a)(1)(i)(A).

252. FAR § 32.904(d)(1)(iii), 48 C.F.R. § 32.904(d)(1)(iii), FAR § 52.232-27(a)(1)(ii)(A), 48 C.F.R. § 52.232-27(a)(1)(i)(A).
253. FAR § 52.232-27, 48 C.F.R. § 52.232-27.
254. FAR § 32.907(a), 48 C.F.R. § 32.907(a), FAR § 52.232-27(a)(3), 48 C.F.R. § 52.232-27(a)(3).
255. FAR § 32.103, 48 C.F.R. § 32.103.
256. *Id.*
257. *Id.*
258. FAR § 32.904(d)(1)(ii), 48 C.F.R. § 32.904(d)(1)(ii), FAR § 52.232-27(a)(1)(i)(B), 48 C.F.R. § 52.232-27(a)(1)(i)(B).
259. FAR § 32.611, 48 C.F.R. § 32.611.
260. *Id.*
261. FAR § 32.612, 48 C.F.R. § 32.612.
262. FAR § 32.611, 48 C.F.R. § 32.611.
263. FAR § 32.704, 48 C.F.R. § 32.704.
264. FAR §§ 52.232-20 and 52.232-22, 48 C.F.R. §§ 52.232-20 and 52.232-22.
265. Arnavas, *supra n.* 48, at 20-2.
266. FAR § 52.249-2, Alternate I, 48 C.F.R. § 52.249-2, Alternate I.
267. FAR § 49.502(a)(2), 48 C.F.R. § 49.502(a)(2).
268. FAR § 52.249-2(a), 48 C.F.R. § 52.249-2(a). When terminating a contract for convenience, the government may not abuse its discretion or act in bad faith, which can be very difficult to prove.
269. FAR § 52.249(a), 48 C.F.R. § 52.249(a). FAR § 49.102(a) lists the information that must be included in the written notice, including any special instructions and steps the contractor should take to minimize impact on personnel.
270. FAR § 52.249-10(c), 48 C.F.R. § 52.249-10(c). If, after termination for default, it is determined that the contractor was not in default or the default was excusable, the termination is treated as issued for convenience. Constructive termination for convenience may also take place where the procuring agency takes action to cancel a contract or prevent continuing performance without utilizing the Termination for Convenience clause.
271. FAR § 49.101(d), 48 C.F.R. § 49.101(d).
272. FAR § 49.105(a), 48 C.F.R. § 49.105(a).
273. *Id.*
274. FAR § 49.104, 48 C.F.R. § 49.104. Compliance usually requires the contractor to (1) immediately stop working and placing subcontracts on the terminated portion of the contract; (2) terminate all subcontracts related to the terminated portion of the prime contract; (3) immediately advise the TCO of any special circumstances precluding the stoppage of work; (4) if the termination is partial, perform the continued portion of the contract and submit promptly any request for an equitable adjustment of price for the continued portion, supported by evidence of any increase in the cost; (5) take necessary or directed action to protect and preserve property in the contractor's possession in which the government has or may acquire an interest and, as directed by the TCO, deliver the property to the government; (6) promptly notify the TCO in writing of any legal proceedings growing out of any subcontract or other commitment related to the terminated portion of the contract; (7) settle outstanding liabilities and proposals arising out of termination of subcontracts, obtaining any approvals or ratifications required by the TCO; (8) promptly submit (within one year from the effective date of the termination) the contractor's own settlement proposal, supported by appropriate schedules; and (9) dispose of terminated inventory, as directed or authorized by the TCO. FAR § 52.249-2(b), 48 C.F.R. § 52.249-2(b), Arnavas, *supra n.* 48, at 20-12.
275. FAR § 52.249-2(b)(7), 48 C.F.R. § 52.249-2(b)(7).
276. *American Machine & Foundry Co.*, ASBCA 8862, 65-1 BCA par. 4654 at p. 22,247.
277. FAR § 49.201(a), 48 C.F.R. § 49.201(a), FAR § 49.113, 48 C.F.R. § 49.113 (requiring application of FAR cost principals in determining fair compensation).
278. FAR § 49.201(a), 48 C.F.R. § 49.201(a).
279. FAR § 31.205-32, 48 C.F.R. § 31.205-32. Pre-contract costs mean costs incurred before the effective date of the contract directly pursuant to the negotiation and in anticipation of the contract award

when such incurrence is necessary to comply with the proposed contract delivery schedule. These costs are allowable to the extent that they would have been allowable if incurred after the date of the contract.

280. FAR § 31.205-42(c), 48 C.F.R. § 31.205-42(c). Initial costs include starting load costs not fully absorbed because of termination and preparatory costs incurred in preparing to perform the terminated contract.

281. FAR § 31.205-26, 48 C.F.R. § 31.205-26.

282. FAR § 31.205-42(b), 48 C.F.R. § 31.205-42(b). Costs that cannot be discontinued immediately following the effective date of termination are generally allowable if the contractor has made all reasonable efforts to discontinue the costs.

283. FAR § 31.205-42(g)(1)(i)(A), 48 C.F.R. § 31.205-42(g)(1)(i)(A) (includes legal and accounting fees necessarily incurred to prepare and present settlement claims and to terminate and settle subcontracts).

284. FAR § 52.249-2(f), 48 C.F.R. § 52.249-2(f), *see* FAR 49.202(b), 48 C.F.R. § 49.202(b).

Anticipatory profit may not be claimed or recovered.

285. FAR § 49.201(b), 48 C.F.R. § 49.201(b).

286. FAR § 52.249-2 Alternate I, (g), 48 C.F.R. § 52.249-2, Alternate I, (g). If the TCO and contractor reach only a partial settlement agreement, the TCO must unilaterally decide what recovery the contractor is entitled to receive regarding the portion the parties could not agree on. The CO must execute a no-cost settlement agreement where the contractor has not incurred costs for the terminated portion of the contract or the contractor is willing to waive the costs incurred and no amounts are due the government under the contract. FAR § 49.109-4, 48 C.F.R. § 49.109-4.

287. FAR § 52.249-2(f), 48 C.F.R. § 52.249-2(f).

288. FAR § 52.249-2(j), 48 C.F.R. § 52.249(j), *see* § 29.11, "Disputes."

289. Termination for default is infrequent in federal construction contracts, and the recovery of liquidated damages for delays or termination for convenience are much more common.

290. FAR § 52.249-10(a), 48 C.F.R. § 52.249-10(a). The government may also exercise its common-law right of anticipatory breach to terminate the contractor's right to proceed. FAR § 52.249-10(d), 48 C.F.R. § 52.249-10(d).

291. FAR § 49.402-3(f), 48 C.F.R. § 49.402-3(f).

292. FAR § 49.402-3, 48 C.F.R. § 49.402-3.

293. FAR § 52.249-10(b)(1), 48 C.F.R. § 52.249-10(b)(1) (listing examples of such causes).

294. FAR § 52.249-10(b)(2), 48 C.F.R. § 52.249-10(b)(2).

295. Larry D. Harris, "Termination for Default," *in Federal Government Construction Contracts*, *supra* n. 9, at 344-46 (substantial completion is determined by reference to the percentage of overall completion and availability for use).

296. FAR § 52.249-10(a), 48 C.F.R. § 52.249-10(a).

297. *See* § 29.8.3, "Delays."

298. FAR § 52.249-2(l), 48 C.F.R. § 52.249-2(l).

299. FAR § 52.233-1(i), 48 C.F.R. § 52.233-1(i).

300. FAR § 52.243-1, 48 C.F.R. § 52.243-1. *See* § 29.8.1, "Changes."

301. *Keeter Trading Co. v. United States*, 2007 U.S. Claims LEXIS 228 (Fed. Cl. 2007).

302. Geoffrey T. Keating, "Changes," *in Federal Government Construction Contracts*, *supra* n. 9, at 241. *See* § 29.11, "Disputes," in this Chapter.

303. 41 U.S.C. §§ 601-13. The CDA applies to any contract covered by the FAR and is implemented in the FAR at FAR § 33.2 and FAR § 52.233-1. 48 C.F.R. §§ 33.2 and 52.233-1.

304. FAR §§ 52.233-1(c) and (d), 48 C.F.R. §§ 52.233-1(c) and (d). The contractor must submit the claim within six years of its accrual. 41 U.S.C. § 605(a), FAR § 33.206(a), 48 C.F.R. § 33.206(a). If a claim exceeds \$100,000, the contractor must certify the claim. 41 U.S.C. § 605(c)(1), FAR § 33.207, 48 C.F.R. § 33.207.

305. FAR § 33.204, 48 C.F.R. § 33.204.

306. FAR § 33.210, 48 C.F.R. § 33.210. When making a unilateral decision, the contractor must (1) review the facts pertinent to the claim; (2) secure assistance from legal and other advisors; (3) coordi-

nate with the contract administration office or contracting office, as appropriate; and (4) prepare a written decision. The written decision must include a (1) description of the claim or dispute; (2) reference to the pertinent contract terms; (3) statement of the factual areas of agreement and disagreement; (4) paragraph asserting the written decision is final and advising the contractor of appeal venues; and (5) demand for payment if the contractor is indebted to the government. FAR § 33.211(a), 48 C.F.R. § 33.211(a).

307. 41 U.S.C. §§ 606, 609(a)(1) and 609(a)(3), FAR § 33.211(a)(v), 48 C.F.R. § 33.211(a)(v).

Note, in Colorado, a contractor may appeal an adverse agency decision to the executive director or the District Court for the City and County of Denver. C.R.S. §§ 24-109-201 and -205. Colorado does not have boards of contract appeals equivalents to handle state public contract disputes.

308. There are currently four Boards of Contract Appeals. The Armed Services Board of Contract Appeals has jurisdiction to decide an appeal from a decision of a CO of the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, or the National Aeronautics and Space Administration relative to a contract made by that department or agency. The Postal Service Board of Contract Appeals and the Board of Contract Appeals of the Tennessee Valley Authority have jurisdiction to decide an appeal from a decision of a CO relative to a contract made by its agency. The Civilian Board of Contract Appeals has jurisdiction to decide an appeal from a decision of a CO or procuring agency other than those under the jurisdiction of another BCA as indicated above. 41 U.S.C. § 607(d).

309. 41 U.S.C. § 606, FAR § 33.211(a)(v), 48 C.F.R. § 33.211(a)(v).

310. However, if the appeal to a BCA is untimely (more than 90 days after receiving the CO's adverse decision), the contractor can pursue the appeal at the COFC.

311. Arnavas, *supra* n. 48, at 23-14.

312. *Id.*

313. 41 U.S.C. §§ 607(f) and 608 limit the availability of accelerated and expedited appeal procedures to claims where the amount in controversy is less than \$50,000, \$100,000, or \$150,000.

314. 41 U.S.C. §§ 609(a)(1) and (3), FAR § 33.211(a)(v), 48 C.F.R. § 33.211(a)(v). In Colorado, to pursue an adverse agency or executive director decision to the district court, the contractor must file the appeal within 20 working days after the decision. C.R.S. § 24-109-206.

315. Arnavas, *supra* n. 48, at 21-12.

316. 41 U.S.C. § 607(g)(1).

317. 41 U.S.C. §§ 607(g)(1)(A) and (B).

318. 41 U.S.C. § 609(b). The court will set aside findings of fact if the decision is tainted by fraud, arbitrariness, caprice, or gross error, or the decision is not supported by the substantial evidence.

319. 28 U.S.C. § 2522.

320. Fed. Cl. R. 52(a).

321. Arnavas, *supra* n. 48 at 24-15.

322. Fed. Cir. R. 31(a).

323. *Id.* The appellant may file an answer to the appellee's response within 14 days.

324. Arnavas, *supra* n. 48, at 24-15. The briefs must include a table of contents, a statement of the issues presented for review, a brief statement of the nature of the case and relevant facts, legal argument with citations to authority, and a short conclusion stating the precise relief sought. Fed. Cir. R. 28(a). The appellee's brief may be subject to different requirements according to Fed. Cir. R. 28(b).

325. The petition must be filed within 14 days after the entry of the judgment. Fed. R. App. P. 40.

326. The appellant must file the appeal with the U.S. Supreme Court within 90 days of receiving the Federal Circuit decision. Note that although possible, it is very unlikely that the U.S. Supreme Court will hear the appeal.

327. 5 U.S.C. § 572(a), *see* Arnavas, *supra* n. 48, at 23-17.

328. 5 U.S.C. § 572(b). The Administrative Dispute Resolution Act requires a government agency to consider not using ADR if (1) a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent; (2) the matter involves or may bear upon significant questions of government policy that require additional procedures before a final resolution may be made, and such a proceeding would not likely serve to develop a recommended policy for the agency; (3) maintaining established policies is of special importance, so that

variations among individual decisions are not increased and such a proceeding would not likely reach consistent results among individual decisions; (4) the matter significantly affects persons or organizations who are not parties to the proceeding; (5) a full public record of the proceeding is important, and a dispute resolution proceeding cannot provide such a record; and (6) the agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the agency's ability to fulfill that requirement.

329. 5 U.S.C. § 572(a). If a party rejects ADR, the CDA requires the rejecting party to explain the decision to the requesting party. 41 U.S.C. § 605(e).

330. FAR § 44.101, 48 C.F.R. § 44.101.

331. Subcontractors are well advised to monitor what flow-down provisions are included in the subcontract, either actually inserted or incorporated by reference, to be certain not to become bound by unnoticed clauses.

332. See Exhibit 29B for a list of mandatory flow-down provisions.

333. Arnavas, *supra* n. 48, at 25-9.

334. FAR § 52.244-5, 48 C.F.R. § 52.244-5.

335. FAR § 19.702(a), 48 C.F.R. § 19.702(a).

336. FAR § 44.201-1(a), 48 C.F.R. § 44.201-1(a). The CO may require consent to subcontract if the CO has determined that an individual consent action is required to protect the government adequately because of the subcontract type, complexity, or value, or because the subcontract needs special surveillance, *i.e.*, subcontracts for critical systems. FAR § 44.2 (48 C.F.R. § 44.2) contains relevant information in the event the government requires consent.

337. Joel S. Rubinstein and Lawrence M. Prosen, "Subcontracting," in *Federal Government Construction Contracts*, *supra* n. 9, at 556.

338. See § 29.9, "Payment."

339. FAR § 52.232-27(c), 48 C.F.R. § 52.232-27(c).

340. *Id.* However, a contractor or subcontractor is not required to pay interest on payments that are late because of a dispute. 31 U.S.C. § 3907(c).

341. FAR § 52.232-27(d)(1), 48 C.F.R. § 52.232-27(d)(1).

342. FAR § 32.112-1, 48 C.F.R. § 32.112-1.

343. See "Payment Bonds" under § 29.7.3 in this Chapter.

344. The insertion of mandatory flow-down provisions and clauses in a subcontract do not give the subcontractor direct access to the government. The CO may not approve any subcontract granting the subcontractor direct access to the government. FAR § 44.203(b)(3), 48 C.F.R. § 44.203(b)(3).

345. *Severin v. United States*, 99 Ct. Cl. 435, 444 (Ct. Cl. 1943).

346. Joel S. Rubinstein and Lawrence M. Prosen, "Subcontracting," in *Federal Government Construction Contracts*, *supra* n. 9, at 569.

347. Resources available for more information are found on-line at [www.eps.gov](http://www.eps.gov), [www.ccr.gov](http://www.ccr.gov), [www.sba.gov](http://www.sba.gov), [www.gao.gov](http://www.gao.gov), [www.arnet.gov](http://www.arnet.gov), <http://farsite.hill.af.mil>, [www.dol.gov/esa/ofccp](http://www.dol.gov/esa/ofccp), and [www.acq.osd.mil](http://www.acq.osd.mil).

**EXHIBIT 29A • ACRONYM GLOSSARY****ACRONYM GLOSSARY**

<b>ADR</b>	Alternative Dispute Resolution
<b>BAA</b>	Buy American Act — 41 U.S.C. §§ 10(a) through (d)
<b>BCA</b>	Board of Contract Appeals
<b>CAS</b>	Cost Accounting Standards — 48 C.F.R. § 99
<b>CDA</b>	Contract Disputes Act — 41 U.S.C. §§ 601 through 613
<b>CCR</b>	Central Contractor Registration database
<b>CICA</b>	Competition in Contracting Act — Pub. L. No. 98-369, 98 Stat. 1175 (codified as amended in scattered sections of 10 U.S.C., 31 U.S.C., and 41 U.S.C.)
<b>CO</b>	Contracting Officer
<b>COFC</b>	United States Court of Federal Claims
<b>CWHSSA</b>	Contract Work Hours and Safety Standards Act — 40 U.S.C. §§ 3701, <i>et seq.</i>
<b>DBRA</b>	Davis-Bacon and related Acts — 40 U.S.C. §§ 3141, <i>et seq.</i>
<b>FAR</b>	Federal Acquisition Regulation — 48 C.F.R. §§ 1.1-53.3
<b>FASA</b>	Federal Acquisition Streamlining Act — Pub. L. No. 103-355, 108 Stat. 3243 (codified in scattered section of 10 U.S.C. and 41 U.S.C.)
<b>GAO</b>	Government Accountability Office
<b>IFB</b>	Invitation for Bids
<b>RFP</b>	Request for Proposals
<b>SSA</b>	Source Selection Authority
<b>TCO</b>	Termination Contracting Officer
<b>TINA</b>	Truth in Negotiations Act — 41 U.S.C. § 254b



**EXHIBIT 29B • MANDATORY FLOW-DOWN PROVISIONS**

**Mandatory Flow-Down Provisions**

A computer word search of the FAR generated the following list of mandatory flow-down provisions. It is very important to note that this list is intended for illustrative purposes only and should in no event be relied upon exclusively in determining what flow-down provisions should be, or actually are, included in a particular subcontract.

FAR provision	FAR clause	Title	Applicability
1	3.503-2	52.203-6 Restrictions on Subcontractor Sales to the Government	Incorporate substance of clause in all subcontracts exceeding \$100,000.
2	3.502-3	52.203-7 Anti-Kickback Procedures	Incorporate substance of clause in all subcontracts exceeding \$100,000.
3	3.808	52.203-11 Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions	Include certification language in all subcontracts exceeding \$100,000.
4	4.404(a)	52.204-2 Security Requirements	Insert terms that conform substantially to clause if subcontract may require access to classified information.
5	14.201-7(a)	52.214-26 Audit and Records—Sealed Bidding	Insert clause in subcontracts procured by sealed bidding exceeding \$650,000.
6	14.201-7(c)	52.214-28 Subcontractor Cost or Pricing Data—Sealed Bidding	Insert the substance of clause in all subcontracts exceeding \$650,000 when entered into.
7	15.209(b)	52.215-2 Audit and Records—Sealed Bidding	Insert clause in subcontracts exceeding \$100,000 and are cost-reimbursement, incentive, time-and-materials, labor-hour, or price redeterminable or any combination of these; or for which cost or pricing data are required, or which the subcontractor is required to furnish cost, funding or performance reports.
8	15.408(d)	52.215-12 Subcontractor Cost or Pricing Data	Insert substance of clause, or 52.215-13 in subcontracts exceeding \$650,000
9	15.408(e)	52.215-13 Subcontractor Cost or Pricing Data—Modifications	Insert clause in subcontracts exceeding \$650,000 on the date entered into or of award, whichever is later.
10	15.408(g)	52.215-15 Pension Adjustments and Asset Reversions	Insert clause in subcontracts requiring cost or pricing data or for which pre-award or post-award cost determination will be subject to Part 31.
11	15.408(j)	52.215-18 Reversion or Adjustment of Plans for Postretirement Benefits Other Than Pensions	Insert clause in subcontracts requiring cost or pricing data or for which pre-award or post-award cost determination will be subject to Part 31.

	<b>FAR provision</b>	<b>FAR clause</b>	<b>Title</b>	<b>Applicability</b>
12	15.408(k)	52.215-19	Notification of Ownership Changes	Insert clause in subcontracts requiring cost or pricing data or for which pre-award or post-award cost determination will be subject to Part 31.2.
13	19.708(a)	52.219-8	Utilization of Small Business Concerns	Insert clause in subcontracts exceeding \$100,000 unless the contract and subcontracts will be performed outside the U.S.
14	22.305	52.222-4	CWHSSA--Overtime Compensation	Insert clause in subcontracts exceeding \$100,000 that may require or involve the employment of laborers or mechanics. Clause must also be inserted by subcontractor in lower-tier subcontracts.
15	22.407(a)	52.222-6	Davis-Bacon Act	Insert clause in subcontracts exceeding \$2,000 within the U.S.
16	22.407(a)	52.222-7	Withholding of Funds	Insert clause in subcontracts exceeding \$2,000 within the U.S.
17	22.407(a)	52.222-8	Payrolls and Basic Records	Insert clause in subcontracts exceeding \$2,000 within the U.S.
18	22.407(a)	52.222-9	Apprentices and Trainees	Insert clause in subcontracts exceeding \$2,000 within the U.S.
19	22.407(a)	52.222-10	Compliance With Copeland Act Requirements	Insert clause in subcontracts exceeding \$2,000 within the U.S.
20	22.407(a)	52.222-11	Subcontract (Labor Standards)	Insert clause in subcontracts exceeding \$2,000 within the U.S.
21	22.407(a)	52.222-12	Contract Termination—Debarment	Insert clause in subcontracts exceeding \$2,000 within the U.S.
22	22.407(a)	52.222-13	Compliance With Davis-Bacon and Related Act Regulations	Insert clause in subcontracts exceeding \$2,000 within the U.S.
23	22.407(a)	52.222-14	Disputes Concerning Labor Standards	Insert clause in subcontracts exceeding \$2,000 within the U.S.
24	22.407(a)	52.222-15	Certification of Eligibility	Insert clause in subcontracts exceeding \$2,000 within the U.S.
25	22.810(a)(1)	52.222-21	Prohibition of Segregated Facilities	Insert clause in subcontracts subject to the Equal Employment Opportunity clause.

	<b>FAR provision</b>	<b>FAR clause</b>	<b>Title</b>	<b>Applicability</b>
<b>26</b>	22.810(b)	52.222-23	Notice for Requirement of Affirmative Action to Ensure Equal Employment Opportunity for Construction.	Insert clause in subcontracts exceeding \$10,000 and containing 52.222-26.
<b>27</b>	22.810(e)	52.222-26	Equal Opportunity	Insert clause in all subcontracts unless exempted by rules, regulations, or orders issued under Executive Order 11246.
<b>28</b>	22.1310(a)(1)	52.222-35	Equal Opportunity for Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans	Insert clause in subcontracts of \$100,000 or more unless exempted by the Secretary of Labor.
<b>29</b>	22.1408(a)	52.222-36	Affirmative Action for Workers with Disabilities	Insert clause in subcontracts exceeding \$10,000 unless exempted by the Secretary of Labor.
<b>30</b>	22.1310(b)	52.222-37	Employment Reports on Special Disabled Veterans, Veterans of the Vietnam Era and Other Eligible Veterans	Insert clause in subcontracts of \$100,000 or more unless exempted by the Secretary of Labor.
<b>31</b>	22.1605	52.222-39	Notification of Employee Rights Concerning Payment of Union Dues or Fees	Insert the substance of clause in all subcontracts exceeding \$100,000 unless exempted on account of special circumstances under authority 29 C.F.R. § 470.3(c).
<b>32</b>	22.1006(a)	52.222-41	Service Contract Act of 1965—As Amended	Insert clause in all subcontracts subject to the Service Contract Act of 1965—As Amended.
<b>33</b>	25.1103(a)	52.225-13	Restrictions on Certain Foreign Purchases	Insert clause in all subcontracts.
<b>34</b>	28.309(a)	52.228-3	Workers' Compensation and War-Hazard Insurance Overseas	Insert similar clause in all public work subcontracts performed outside of the US that are subject to the Defense Base Act.
<b>35</b>	28.309(b)	52.228-4	Workers' Compensation and War-Hazard Insurance Overseas	Insert clause in public works subcontracts performed outside of the US where the Labor Secretary waives the applicability of the Defense Base Act.
<b>36</b>	28.310	52.228-5	Insurance—Work on a Government Installation	Insert clause in subcontracts exceeding \$100,000 that requires work on a Government installation.
<b>37</b>	30.201-4(a)	52.230-2	Cost Accounting Standards	Insert substance of clause in all negotiated subcontracts.

	FAR provision	FAR clause	Title	Applicability
<b>38</b>	30.201-4(b)(1)	52.230-3	Disclosure and Consistency of Cost Accounting Practices	Insert substance of clause in negotiated subcontracts exceeding \$500,000 but less than \$50 million and the offeror elects to use modified CAS coverage.
<b>39</b>	32.908(b)	52.232-27	Prompt Payment for Construction Contracts	Insert prompt payment for subcontractors clause, interest for subcontractors clause, and subcontractor clause flow-down clause in all subcontracts for property or services.
<b>40</b>	36.513	52.236-13	Accident Prevention	Insert clause in subcontracts exceeding \$100,000. Insert Alternate I clause in subcontracts to be performed at Government facilities.
<b>41</b>	48.202	52.248-3	Value Engineering—Construction	Insert an appropriate clause in subcontracts for \$55,000 or more unless an incentive contract is contemplated.