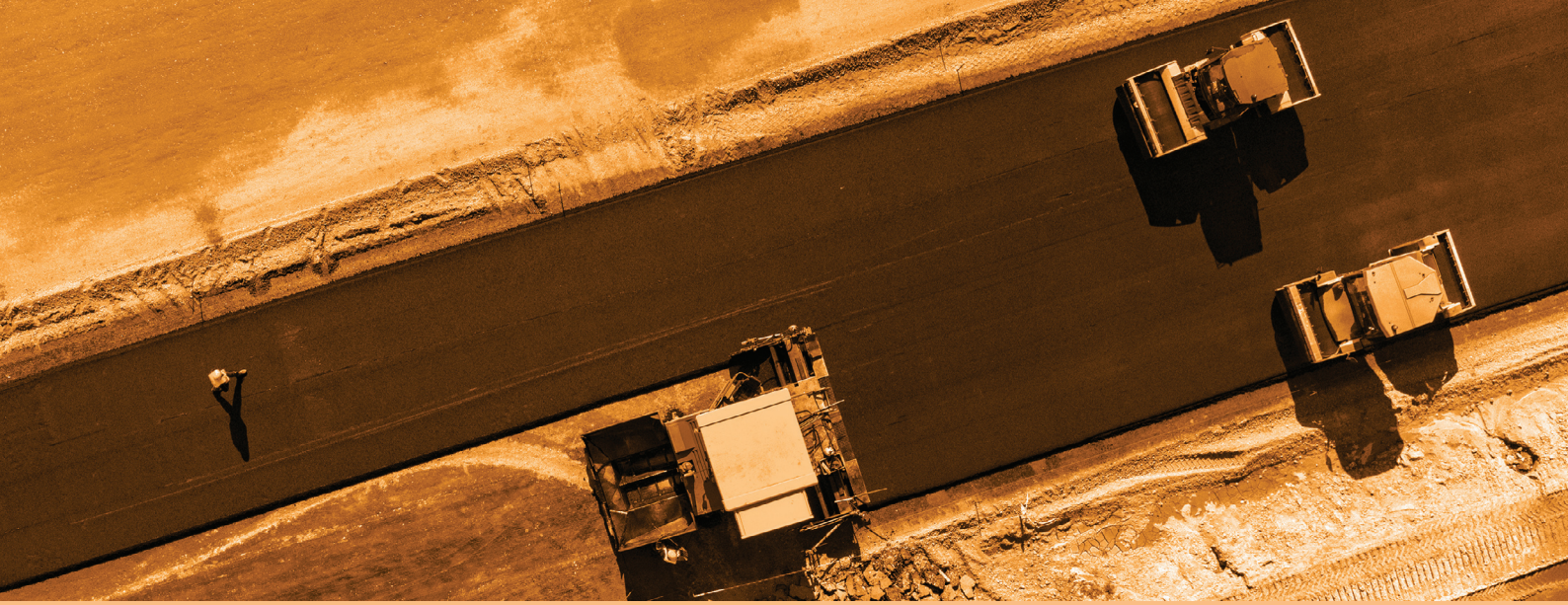


ICLG

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1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

The rules governing federal procurement in the United States are set forth in various statutes, regulations, and decisions that interpret the procurement laws.

The cornerstones of federal procurement are the Competition in Contracting Act of 1984, which enhanced competition in federal procurement and established a variety of acquisition procedures, including competitive negotiation, and the Federal Acquisition Streamlining Act of 1994 and the Federal Acquisition Reform Act of 1995, which simplified the federal procurement process.

Federal procurement is governed primarily by Titles 10 and 41 of the United States Code. The Federal Acquisition Regulation ("FAR") and agency FAR Supplements reflect the regulatory implementation of the governing statutes and provide uniform policies and procedures for most federal agency acquisitions. The FAR is found in Title 48 of the Code of Federal Regulations ("C.F.R.").

The United States is a party to the WTO Government Procurement Agreement ("GPA"). Three submissions from the United States to the WTO (available at http://www.wto.org) provide an overview of federal procurement policies and procedures. *See* World Trade Organization Document No. S/WPGR/W/11/Add.6 to the WTO Working Party on GATS Rules (October 21, 1996); WTO Document No. GPA/23 (July 15, 1998); and WTO Document No. GPA/50 (June 15, 2001).

1.2 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

The guiding principles for federal acquisition are found in FAR 1.102, which states that the "vision for the Federal Acquisition System is to deliver on a timely basis the best value product or service to the customer, while maintaining the public's trust and fulfilling public policy objectives". The keys to fulfilling that vision are, among other things, maximising the use of commercial products and services, using contractors that have a track record of successful past performance or that demonstrate a current superior ability to perform, promoting competition, minimising administrative costs, and conducting business with integrity, fairness, and openness.

1.3 Are there special rules in relation to procurement in specific sectors or areas?

Procurement in the United States is subject to the federal procurement statutes as implemented by the FAR and, where applicable, agency FAR Supplements and other agency guidance. For example, military procurement, which is primarily carried out by the Department of Defense, is subject to special rules found in the Department of Defense FAR Supplement ("DFARS") and in guidance published by the Principal Director, Defense Pricing and Contracting. *See* http://www.acq.osd.mil/dpap.

The FAR contains provisions for the procurement of commercial items (FAR Part 12), as well as for special categories of contracting, including major system acquisitions (FAR Part 34), research and development contracting (FAR Part 35), construction contracting (FAR Part 36), service contracting (FAR Part 37), and acquisition of information technology (FAR Part 39). The National Aeronautics and Space Administration and the Department of Defense can enter into "other transaction agreements" that are not subject to the full panoply of procurement regulations applicable in most federal procurement. *See* 10 U.S.C. § 2371; 51 U.S.C. § 20113(e).

1.4 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

In addition to the sophisticated body of federal procurement law that has developed over the years, general contract law and certain criminal laws also apply to parties that contract with the federal government. Of particular note are the various statutes targeting fraud, waste, and abuse of federal funds. For example, under the civil False Claims Act, 31 U.S.C. §§ 3729–3733, contractors may be subject to trebled damages and statutory penalties for submitting false or fraudulent claims to the government. Similarly, contractors must comply with the post-government employment restrictions set forth in the Procurement Integrity Act, 41 U.S.C. §§ 2101–2107, and implementing FAR and Office of Government Ethics regulations. *See* FAR 3.104; 5 C.F.R. § 2635.

Although government records are generally available to the public under the Freedom of Information Act, 5 U.S.C. § 552, there are exemptions prohibiting the release of contractor trade secrets and confidential commercial information.

Federal tax law can also be relevant to federal procurement. For example, there is a 2% excise tax on payments to a foreign person or foreign business entity under a federal procurement contract for goods produced in a country that is not a party to an "international

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procurement agreement" (e.g., the WTO GPA) or for services provided in a country that is not a party to such an agreement. *See* 26 U.S.C. § 5000C. The Internal Revenue Service has issued regulations implementing Section 5000C, including certain exemptions (*see* 81 Fed. Reg. 55,133 (August 18, 2016)), along with a list of countries with tax treaties exempting nationals of those countries from the tax (*see* www.irs.gov/pub/irs-pdf/iw14.pdf).

1.5 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

The procurement regime in the United States is consistent with the WTO GPA. The European Commission rules on government procurement are not applicable to federal procurement.

2 Application of the Law to Entities and Contracts

2.1 Which categories/types of entities are covered by the relevant legislation as purchasers?

All federal "executive agencies" are covered by the FAR. *See* FAR 1.101, 2.101. However, several federal agencies, such as the Federal Aviation Administration, the U.S. Postal Service, various government-sponsored enterprises (e.g., Fannie Mae, Freddie Mac), and certain federal corporations (e.g., the Federal Deposit Insurance Corporation), are not subject to the FAR and promulgate their own acquisition rules and procedures that are generally similar to those contained in the FAR.

The federal agencies covered by the WTO GPA are listed in GPA Appendix I, United States Annex 1 (as updated by WT/LET/950, submitted June 7, 2014). As noted above, some of those agencies may be exempt from certain procurement laws that are otherwise applicable to "executive agency" procurement.

2.2 Which types of contracts are covered?

The FAR and agency FAR Supplements cover all acquisitions by contract of supplies or services (including construction) by and for the use of the federal government.

2.3 Are there financial thresholds for determining individual contract coverage?

FAR Subpart 25.4 concerns "Trade Agreements" and sets forth the rules for applying the WTO GPA to federal procurement, including certain exceptions. Under FAR 25.402, the value of the acquisition is the determining factor with respect to the applicability of the WTO GPA to federal procurement contracts. These values are adjusted approximately every two years. The current threshold values for federal procurements are US$180,000 for contracts for goods and services and US$6,932,000 for construction contracts. *See* 82 Fed. Reg. 58,248 (December 11, 2017).

There are also certain dollar thresholds that trigger specialised treatment or procedures under the FAR. FAR Part 13 includes simplified rules that allow federal agencies to buy products or services under the simplified acquisition threshold of US$150,000 more quickly, more economically, and with a focus on small businesses. Under FAR Part 19, contracts under US$150,000 are generally required to be set aside for small businesses.

2.4 Are there aggregation and/or anti-avoidance rules?

FAR 25.403(b)(3) expressly provides that agencies may "not divide any acquisition with the intent of reducing the estimated value of the acquisition below the dollar threshold of the WTO GPA". In addition, federal procurement law strongly discourages agencies from unnecessarily or unjustifiably bundling or aggregating contract requirements in order to preclude small or disadvantaged businesses from participating in procurements as prime contractors.

2.5 Are there special rules for concession contracts and, if so, how are such contracts defined?

Concession contracts are not generally used in federal procurement. One notable exception, however, is the Department of the Interior, which regularly uses concession contracts as described in 36 C.F.R. § 51.3.

2.6 Are there special rules for the conclusion of framework agreements?

FAR Subpart 16.5 sets forth the rules governing framework agreements, which are called "indefinite-delivery/indefinite-quantity" ("IDIQ") contracts in federal procurement. Agencies may also use framework-like "blanket purchase agreements", which are governed by FAR Part 13, or Federal Supply Schedule contracts ("Schedule contracts"), which are governed by FAR Subpart 8.4 and managed by the U.S. General Services Administration ("GSA"), to purchase certain goods or services.

2.7 Are there special rules on the division of contracts into lots?

The rules governing small business participation are found in FAR Part 19. Federal agencies are strongly encouraged to conduct procurements in order to maximise small business participation. *See* FAR 19.201.

2.8 What obligations do purchasers owe to suppliers established outside your jurisdiction?

Purchasers must comply with FAR requirements, regardless of the nationality of the tenderers. FAR Subpart 25 governs acquisitions of foreign supplies, services, and construction materials, and, in some cases, domestic sources may receive preference over foreign sources. Under FAR 25.403(a), eligible products from WTO GPA countries and countries with trade agreements with the United States are entitled to non-discriminatory treatment.

3 Award Procedures

3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

There are numerous procedures under the FAR for federal procurement depending upon the nature of the procurement, the type of goods or services being procured, and the procuring agency. Agencies have substantial discretion to choose a particular procurement procedure.

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By far the most common type of procurement procedure is negotiated (or competitive proposal) procurement. Under this procedure (*see* FAR Part 15), tenderers submit their best proposals to the procuring agency in response to the agency's solicitation. The procuring agency then evaluates these proposals and makes an award according to the solicitation's evaluation scheme.

Procedures for sealed bidding, which is not often used in federal procurement, are in FAR Part 14. Other types of procurement procedures include: Schedule contracts (*see* FAR Subpart 8.4); acquisition of commercial items or services (*see* FAR Part 12); simplified acquisition procedures for supplies, services, and commercial items that do not exceed the simplified acquisition threshold (currently US$250,000) (*see* FAR Part 13); and individual task and delivery order competitions under IDIQ contracts (*see* FAR Subpart 16.5), under which the government places orders for specified requirements.

3.2 What are the minimum timescales?

There are no specific minimum timescales for federal procurement. Agencies using the streamlined ordering processes available for task and delivery order contracts may be required to provide "fair notice of the intent to make a purchase" and to provide a "fair opportunity to submit an offer". *See* FAR 16.505(b).

3.3 What are the rules on excluding/short-listing tenderers?

Tenderers may be excluded from a competition at multiple stages of the procurement process. To be eligible for the award of a federal contract, a tenderer must be "presently responsible" as of the date of award, based upon factors set forth in FAR Subpart 9.1. Also, tenderers may be suspended, debarred, or proposed for debarment (i.e., excluded from federal contracting) for a variety of civil or criminal offences or for non-compliance with contract requirements. *See* FAR Subpart 9.4. Excluded tenderers may not be awarded any federal contract or subcontract, absent a "compelling reason" as determined by the Agency Head.

In negotiated procurements, an agency may publish pre-solicitation notices that provide a generalised description of the scope of the acquisition and that allow the agency to advise potential tenderers regarding their potential to be viable competitors. *See* FAR 15.202. An agency may also limit the number of proposals eligible for award by establishing a "competitive range" composed of the most highly rated tenderers. *See* FAR 15.306. Establishing a "competitive range" after an initial evaluation is the most common type of "short-listing" that occurs in federal procurement.

Under FAR Subpart 6.2, a procuring agency may exclude in certain circumstances a particular source from a contract action in order to establish or maintain an alternative source of supply.

3.4 What are the rules on evaluation of tenders? In particular, to what extent are factors other than price taken into account (e.g. social value)?

The rules on evaluating tenders vary depending on the nature of the procurement. Specific evaluation rules for negotiated procurements are found in FAR 15.305, for commercial items or services acquisitions in FAR 12.602, and for simplified acquisition procurements in FAR 13.106-2. For other types of procurements, such as sealed bidding (FAR Part 14) or Schedule contracts (FAR Subpart 8.4), the governing FAR rules should be consulted. Small business participation in a tenderer's subcontracting plan may be used as an evaluation factor. *See* FAR 15.305(a).

3.5 What are the rules on the evaluation of abnormally low tenders?

Agencies may consider performance risk in evaluating tenders. Additionally, solicitations may require an evaluation of whether a tenderer's offer is "realistic", meaning too low. *See generally* FAR 15.404-1.

3.6 What are the rules on awarding the contract?

In competitive procurements, a designated agency official decides which tenderer or tenderers should be awarded a contract based upon an evaluation of cost/price, technical, past performance, and any other source selection criteria set forth in the agency's solicitation. *See* FAR 15.308. The decision must be documented and must include the agency's rationale for any trade-offs made (e.g., why the additional cost of the awardee's proposal is justified by its technical superiority).

The rules governing sealed bidding are set forth in FAR Subpart 14.4; the rules for Schedule contracts are in FAR Subpart 8.4; and the rules for simplified acquisitions are in FAR Subpart 13.1.

3.7 What are the rules on debriefing unsuccessful bidders?

The rules on debriefing unsuccessful bidders vary depending on the type of procurement. For negotiated procurements, the rules are set forth in FAR Subpart 15.5. In procurements other than negotiated procurements, unsuccessful bidders may be entitled only to a "brief explanation" of the basis for the award decision. *See, e.g.*, FAR 8.405-2(d) (Schedule contracts); and FAR 13.106-3(d) (simplified acquisition procedures). For individual task and delivery order competitions under multiple award IDIQ contracts over US$5 million, the rules in FAR Subpart 15.5 apply. *See* FAR 16.505(b)(6).

3.8 What methods are available for joint procurements?

The term "joint procurement" is not usually associated with federal procurement. However, through a process called "cooperative purchasing", certain state and local government agencies may purchase information technology products, software, and other services, as well as certain alarm and signal systems and law enforcement and security equipment under Schedule contracts. The GSA Acquisition Manual governs this cooperative purchasing process. *See* http://www.gsa.gov/cooperativepurchasing.

3.9 What are the rules on alternative/variant bids?

If an agency intends to award a contract without first engaging tenderers in discussions regarding their proposals, the agency may elect to allow tenderers to submit proposals that deviate from the agency's stated requirements with an explanation as to why the tenderer believes the deviation would result in an advantage to the government. *See* FAR 15.203(a)(2), 15.209(a)(2). The agency may either accept or reject the alternative proposal or revise the requirements in its solicitation accordingly. In procurements for commercial items, tenderers are encouraged to submit alternate proposals. *See* FAR 52.212-1(e).

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3.10 What are the rules on conflicts of interest?

Generally speaking, organisational and personal conflicts of interest are prohibited and must be avoided or mitigated, unless the government, in rare circumstances, waives the conflict. The rules governing organisational and consultant conflicts of interest are in FAR Subpart 9.5, and the rules governing contractor employee conflicts of interest are in FAR Subpart 3.11.

3.11 What are the rules on market engagement and the involvement of potential bidders in the preparation of a procurement procedure?

Although agencies may seek input generally from the market in developing a solicitation, there are strict rules prohibiting bidders from gaining an unfair competitive advantage by advising an agency on how to prepare solicitations. *See* FAR 9.505.

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions?

Under federal procurement law, certain activities that are deemed "inherently governmental functions" (e.g., conducting criminal investigations, commanding military forces, or conducting foreign relations), which must be performed by government employees and cannot be performed by contractors. *See* FAR Subpart 7.5; OMB Circular A-76, "Performance of Commercial Activities", 76 Fed. Reg. 56,227 (September 12, 2011).

4.2 How does the law apply to "in-house" arrangements, including contracts awarded within a single entity, within groups and between public bodies?

Under FAR Part 8, federal agencies must first use what they have in their own inventories and then must satisfy their requirements for supplies and services through a number of government sources, if possible. Agencies may use Schedule contracts and commercial sources (including educational and non-profit sources) to fulfil their commercial items requirements.

If an agency acquires supplies or services through another agency, such "interagency acquisitions" may be governed by the Economy Act and FAR Subpart 17.5.

Finally, specialised government-wide acquisition contracts ("GWACs") assist federal agencies in procuring information technology requirements through individualised task orders. GWACs are IDIQ contracts awarded to multiple tenderers under which agencies issue task order solicitations subject to competitive bidding among the awardees. *See* FAR 2.101.

5 Remedies

5.1 Does the legislation provide for remedies and if so what is the general outline of this?

Federal procurement law provides for various enforcement procedures and remedies. Tenderers that submit proposals or that plan to submit proposals in response to a federal agency's solicitation may "protest" the procuring agency's decision with respect to the procurement, and the vast majority of disappointed tenderers file such protests with the Government Accountability Office ("GAO"), which has authority under 31 U.S.C. § 3552 to resolve such protests. The regulations at 21 C.F.R. Part 4 govern the GAO's protest procedures, and only actual or prospective tenderers whose direct economic interest would be affected by the award of a contract may file or participate in a GAO protest. The protesting party additionally must show that, but for the procuring agency's action, the protestor would have had a substantial chance of receiving the contract. The GAO's regulations were most recently revised effective May 1, 2018, to establish a new Electronic Protest Docketing System and a protest filing fee of US$350. *See* 83 Fed. Reg. 13,817 (April 2, 2018).

5.2 Can remedies be sought in other types of proceedings or applications outside the legislation?

In addition to protests before the GAO, disappointed tenderers may file a protest with the procuring agency seeking an independent review at a level above the contracting officer. *See* FAR Subpart 33.103. Disappointed tenderers also may file an action seeking injunctive relief in the United States Court of Federal Claims. *See* 28 U.S.C. § 1491.

5.3 Before which body or bodies can remedies be sought?

Parties aggrieved in the procurement process may seek relief by filing a protest with the GAO or the procuring agency or by filing an action in the Court of Federal Claims. The available fora may be restricted depending on the type of contract, the dollar value, and agency involved. *See* 10 U.S.C. § 2304c(e)(1); 41 U.S.C. § 4106(f)(1); and FAR 16.505(a)(10).

5.4 What are the limitation periods for applying for remedies?

For protests brought to the GAO, pre-award protests must be filed prior to the due date for the submission of proposals; post-award protests must be filed within 10 days of the date that the protester knew or should have known of the grounds for protest, or within 10 days of a requested and required debriefing. If a party protests within 10 days of award, or within five days after a requested and required debriefing, the procuring agency must automatically suspend performance of the awarded contract, pending the outcome of the protest. *See* FAR 33.104. Substantially similar timing rules apply to agency-level protests. *See generally* FAR 33.103.

The Court of Federal Claims follows rules similar to those of the GAO with respect to the limitation period applicable to pre-award protests; but for post-award protests, the court applies the equitable doctrine of laches and considers the timeliness of such protests in connection with the decision of whether to order injunctive relief. Parties may seek *de novo* review in the Court of Federal Claims of agency procurement decisions following the disposition of a timely GAO protest.

5.5 What measures can be taken to shorten limitation periods?

The limitation periods set out above are generally not subject to being shortened.

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5.6 What remedies are available after contract signature?

The GAO, the Court of Federal Claims, and procuring agencies have wide latitude in structuring remedies in response to protests of awarded contracts. For instance, if the GAO determines that an award did not comply with applicable statutes or regulations or solicitation terms, it may recommend that the procuring agency terminate the contract, re-compete the contract, amend the solicitation, or award the contract to the protester. See 4 C.F.R. § 21.8. The procuring agency may follow the GAO's recommendation, may implement more robust corrective action, or may cancel the procurement altogether. Rarely do procuring agencies decline to follow the GAO's recommendations.

5.7 What is the likely timescale if an application for remedies is made?

The GAO is required by statute to decide all protests within 100 days of filing. Under FAR 31.103(g), procuring agencies must use their best efforts to resolve agency-level protests within 35 days of filing. Protest actions at the Court of Federal Claims are not subject to any statutory or regulatory timetable and usually take many months to resolve.

5.8 What are the leading examples of cases in which remedies measures have been obtained?

The GAO resolves hundreds of protests each year by written decision. Thus, it is difficult to identify current leading examples of GAO bid protest decisions; nevertheless, GAO decisions have precedential value and are often relied on in resolving future bid protests. A discussion of the most common reasons for the GAO sustaining a protest may be found at http://www.gao.gov/assets/690/688362.pdf.

5.9 What mitigation measures, if any, are available to contracting authorities?

If the procuring agency has been required to suspend performance of an awarded contract because a protest has been filed, the agency may "override" the stay of performance upon a finding of either the best interests of the United States or urgent and compelling circumstances which significantly affect the interests of the United States. *See* FAR 33.104(c)(2).

Procuring agencies are authorised to take voluntary corrective action in response to a protest to address issues identified in the protest. The nature, scope, and timing of any voluntary corrective action are within the broad discretion of the procuring agency.

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) and changes to the membership of bidding consortia pre-contract award? If not, what are the underlying principles governing these issues?

Procuring agencies may change their requirements or the terms and conditions of the procurement prior to award, either before or after receipt of proposals. In negotiated procurements, agencies must amend the solicitation to make such changes. *See* FAR 15.206. Regardless of the type of procurement, however, procuring agencies must provide tenderers with fair notice of their requirements and the criteria that will be used to evaluate tenders.

Pre-award changes to the bidding entity (i.e., through sale or corporate restructuring) may be allowed under certain circumstances. *See Consortium HSG Technischer Service GmbH et al.*, B-292699.6, June 4, 2004, 2004 CPD ¶ 134. Generally, the assignment of proposals "when such transfer is effected by operation of law, or merger, or corporate reorganisation, or sale of an entire business, or sale of an entire portion of a business embraced by a proposal" is permissible. *Numax Elecs., Inc.*, B-181670, January 16, 1975, 75-1 CPD ¶ 21. A mere change in the corporate name should have no effect on a proposal's acceptability. *See Baker Support Servs., Inc. et al.*, B-256192.3, B-256192.4, September 2, 1994, 95–1 CPD ¶ 75. Where changes may affect the resources available for contract performance, tenderers should disclose that information to the agency before contract award. *See, e.g., Lockheed Martin Integrated Sys., Inc.*--Recon., B-410189.7, August 10, 2017, 2017 CPD ¶ 258; *Dual, Inc.*, B-280719, November 12, 1998, 98–2 CPD ¶ 133.

6.2 What is the scope for negotiation with the preferred bidder following the submission of a final tender?

In negotiated procurements, the submission of revised proposals is governed by FAR 15.307. Because agencies may not favour one tenderer over another (*see* FAR 15.306(e)(1)), all tenderers must be allowed an opportunity to submit revised proposals by a common cut-off date.

6.3 To what extent are changes permitted post-contract signature?

Post-contract changes are governed by FAR Part 43 and are made via contract modifications. Depending on the type of change, the modification may be made unilaterally by the contracting officer or may be negotiated by the parties. *See* FAR 43.103.

Disputes concerning contract changes after award are primarily governed by the Contract Disputes Act of 1978, which provides both an administrative and a judicial process for the resolution of all claims (by both contractor and government) relating to an existing contract. *See also* FAR Subpart 33.2. Most contract administration disputes are settled at the procuring agency level by negotiating a request for equitable adjustment of the contract price and schedule. FAR 33.214 also encourages the use of Alternative Dispute Resolution ("ADR"). However, if a dispute is not settled informally at the agency level, the contractor may file an action at the Court of Federal Claims or at a board of contract appeals.

6.4 To what extent does the legislation permit the transfer of a contract to another entity post-contract signature?

The Assignment of Contracts Act, 41 U.S.C. § 6305, prohibits the transfer of a government contract to another entity unless the government consents to the transfer or the transfer occurs "by operation of law" (e.g., through a merger). *See Tuftco Corp. v. U.S.*, 614 F.2d 740, 745 (Ct. Cl. 1980). Formal consent for a transfer of a contract is obtained through the novation process, which is governed by FAR Subpart 42.12. Agencies may not award a

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contract with the intent to transfer the contract to another entity. *See, e.g., Acepex Mgmt. Corp.*, B-283080 *et al.*, October 4, 1999, 99–2 CPD ¶ 77.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

FAR Subpart 7.5 and OMB Circular A-76 set forth policies and procedures to ensure that government contracts are not issued to private parties for the performance of "inherently governmental" functions.

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

In recent years, PPPs have become more common in the United States, particularly as a mechanism to develop and fund infrastructure projects such as highway and transit systems. PPPs often involve the participation of federal, state, and local government entities. Although there are no federal rules specifically governing PPPs, several states have passed legislation authorising and regulating these types of partnerships.

8 The Future

8.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

Federal procurement laws and regulations change constantly. In 2019, the final report of the "Section 809 Panel" is expected to be issued. The report will make multiple recommendations concerning proposed reforms of the defence procurement system. The Trump Administration's international trade policies will remain dynamic in 2019 and may result in strengthened "Buy American" laws and potential U.S. withdrawal from, or renegotiation of, international trade agreements.

8.2 Have there been any regulatory developments which are expected to impact on the law and if so what is the timescale for these and what is their likely impact?

The Department of Defense is becoming increasingly active in its use of "other transaction authority" to enter into agreements with industry and academia for certain research and development or prototyping work. These agreements are exempt from most of the regulatory requirements applicable to federal government contracts.

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