

GOVERNMENT CONTRACTING: A BRIEF OVERVIEW OF THE 2020 FIELD

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Executive Summary: The federal government must obtain supplies, technology, and even some services from private companies; almost half of the federal government’s discretionary spending goes towards contracts,¹ and federal spending on contracting is increasing each year by billions of dollars.² Government contracts range from carpet cleaning to billion-dollar sections of the border wall.³ For Fiscal Year 2019, the top federal contractors were also the top defense contractors.⁴ The field of federal government contracting has undergone changes in 2020 that, in combination with COVID-19, will impact large “household name” contractors and small businesses (including those owned by women, minorities, and veterans) alike. Foundational elements for the field remain, however, rooted in separation of powers and administrative law.

I. BACKGROUND

A. Foundations of Government Contracting

A patchwork of laws and administrative rules govern the field of government contracting. Congress has the power to dispose of government property,⁵ which implies a power to obtain property, and also retains the power to pay the debts of the United States⁶ incurred by governmental acquisition of said property. As a sovereign entity, the federal government enters into business contracts, thus incurring debt.⁷ Federal agencies have and use discretion in the day-to-day administration of contracting. Thus, federal agencies acting in official capacities contract directly for goods and services. Once the government has entered into an obligation contract law governs and treats the agency as a party; the agency does not enjoy sovereign immunity.⁸

Only Congress has the power of the purse,⁹ so an agency’s power to contract has limitations pursuant to Congress’s edicts, including a prohibition on contracting without

¹ U.S. GOV’T ACCOUNTABILITY OFF., CONTRACTING DATA ANALYSIS: ASSESSMENT OF GOVERNMENT-WIDE TRENDS 1 (2017).

² WatchBlog, *A Snapshot of Government-wide Contracting for FY 2019*, U.S. GOV’T ACCOUNTABILITY OFFICE (May 26, 2020), <https://blog.gao.gov/2020/05/26/a-snapshot-of-government-wide-contracting-for-fy-2019-infographic/>.

³ James MacPherson, *US Government Awards Largest-Ever Contract for Border Wall*, FEDERALTIMES.COM (May 21, 2020), <https://www.federaltimes.com/govcon/2020/05/21/us-government-awards-largest-ever-contract-for-border-wall/>.

⁴ The top federal contractors included: Lockheed Martin, Boeing, General Dynamics, Northrop Grumman, and Raytheon. *The Top Government Contractors in FY19*, BLOOMBERG (2020), <https://about.bgov.com/bgov200/>.

⁵ U.S. CONST. Art. IV, § 3, cl. 2 (“Congress shall have [p]ower to dispose of and make all needful [r]ules and [r]egulations respecting the [t]erritory or other [p]roperty belonging to the United States.”).

⁶ U.S. CONST. Art I, § 8. (“Congress shall have [p]ower . . . to pay the [d]ebts . . .”).

⁷ *United States v. Tingey*, 30 U.S. 115, 122–23 (1831); *Pacific Far East Line, Inc.* ASBCA No. 7629, 63 BCA ¶ 3835.

⁸ *Cooke v. United States*, 91 U.S. 389, 398 (1875) (explaining the federal government is treated as a party under contract law principles in disputes regarding the terms of a contract).

⁹ U.S. CONST. Art I, § 9, cl. 7 (“No [m]oney shall be drawn from the [t]reasury, but in [c]onsequence of [a]ppropriations made by [l]aw; and a regular [s]tatement and [a]ccount of [r]eceipts and [e]xpensures

prior Congressional authorization under the Appropriations Clause. Congress passes authorization and appropriation acts for each Fiscal Year (“FY”), detailing the specific purpose, time, and monetary limitations to which all contracts must adhere.¹⁰ An agency may only incur obligations that will be performed within a specific appropriations’ period of availability set by Congress.¹¹ The Anti-Deficiency Act¹² further limits agencies, prohibiting contractual obligations in advance of or in preparation for Congressionally-provided appropriations.¹³ Additionally, agencies can only obligate current FY funds to meet current FY needs, absent a statutory exception.¹⁴ The Buy American Act¹⁵ further limits contracts, generally requiring the agency to procure domestic materials and products.¹⁶

B. *The Procurement Process*

The procurement process, which may result in a contested action, can take many forms. To simplify this explanation, this paper focuses on competitive (not sole source) procurements.¹⁷ Once an agency decides to procure goods or services and determines the proposed action does not violate any limitations, the agency must articulate specific needs and criteria in a solicitation.¹⁸ The agency then uniformly evaluates all bids to fulfill the solicitation against the announced criteria.¹⁹ Once an agency selects a prospective contractor and awards the contract, the agency will announce the winning bid.²⁰ The

of all public [m]oney shall be published from time to time.”); *United States v. Nicoll*, 1 Paine 646 (C.C.N.Y. 1826).

¹⁰ 31 U.S.C. §§ 1301, 1341, 1511–17, 1552 (2018); U.S. GOV’T ACCOUNTABILITY OFF., *PRINCIPLES OF FEDERAL APPROPRIATIONS LAW* 3-9 (4th ed. 2017).

¹¹ U.S. GOV’T ACCOUNTABILITY OFF., *PRINCIPLES OF FEDERAL APPROPRIATIONS LAW* 2–9 (4th ed. 2016) (stating that lengths range from definite (either fiscal year or multiple-year) to indefinite (no-year)).

¹² 31 U.S.C. § 1341 (2018).

¹³ *Id.* § 1341(a)(1)(B).

¹⁴ We are unable to cover exceptions to the bona fide needs rule here. For more information, see generally 41 U.S.C. § 253; U.S. GOV’T ACCOUNTABILITY OFF., *PRINCIPLES OF FEDERAL APPROPRIATIONS LAW* (3d ed. 2004); U.S. GOV’T ACCOUNTABILITY OFF., *FUNDING OF MAINTENANCE CONTRACT EXTENDING BEYOND FISCAL YEAR* (1996).

¹⁵ 41 U.S.C. § 8301-8303.

¹⁶ *Id.* § 8303; *Administration of the Buy American Act: Hearing Before the Subcomm. Of the H. Comm. on Gov’t Operations*, 95th Cong. 38–39 (1978) (statement of J. Kenneth Fasick, Director of the Int’l Div. of GAO) (explaining the triggering conditions).

¹⁷ For a full overview of the process, see L. ELAINE HALCHIN, CONG. RSCH. SERV., *OVERVIEW OF THE FEDERAL PROCUREMENT PROCESS AND RESOURCES* (2012), <https://fas.org/sgp/crs/misc/RS22536.pdf>; Office of Management and Budget, *THE OFFICE OF FEDERAL PROCUREMENT POLICY*, <https://www.whitehouse.gov/omb/management/office-federal-procurement-policy/#top> (last visited Sept. 26, 2020).

¹⁸ The pre-solicitation notices, solicitation notices, and later award notices as well as sole-source notices are placed on the centralized website Beta.sam.gov, although advertisements may be placed elsewhere in addition to this posting. See BETA.SAM.GOV, <https://beta.sam.gov> (last visited Sept. 26, 2020) (explaining it is the official location for government contracting opportunities). See generally Halchin, *supra* note 17; U.S. GOV’T ACCOUNTABILITY OFF., *PRINCIPLES OF FEDERAL APPROPRIATIONS LAW* (4th ed. 2016), <https://www.gao.gov/legal/appropriations-law-decisions/red-book>.

¹⁹ Halchin, *supra* note 17, at 2.

²⁰ *Id.*

agency must also debrief unsuccessful bidders, which may then challenge the contract award in a “bid protest.”²¹

C. *The Dispute Process*

Most federal agencies follow processes and authority of the Federal Property and Administrative Service Act,²² the Office of Federal Procurement Policy Act,²³ and the Federal Acquisition Streamlining Act of 1994.²⁴ The Armed Forces and National Aeronautics and Space Administration follow the Federal Acquisition Regulation (FAR),²⁵ which established the Civilian Board of Contract Appeals and the Armed Services Board of Contract Appeals. The Budget and Accounting Act of 1921²⁶ established the Government Accountability Office (GAO),²⁷ an administrative body that authors decisions in bid protests and also provides advisory opinions. Ultimately, the Federal Circuit can hear disputes brought before these bodies.²⁸

Unsuccessful bidders may protest awards under a request for “reconsideration” at GAO.²⁹ A GAO decision, if unfavorable, allows a disappointed bidder to request reconsideration at GAO or to directly file suit in the U.S. Court of Federal Claims (COFC).³⁰ The COFC will take a *de novo* look at the procurement if it is on appeal from a GAO finding.³¹ The bidder may also file protests directly in Federal District Court.³² Appealing bidders from either venue may file with the United States Court of Appeals for the Federal Circuit.³³ Awardees with claims under an awarded contract may bring said claims. The contractor must initially exhaust administrative procedures by submitting a claim to the agency’s contracting officer for a written decision.³⁴ The contractor may then file the claim in District Court and appeal to the Federal Circuit.

²¹ 10 U.S.C. § 2305.

²² 40 U.S.C. §112.

²³ 41 U.S.C. §1101.

²⁴ Pub. L. No. 103-355, 108 Stat. 3243.

²⁵ 48 C.F.R. § 1.301 (2019).

²⁶ Pub. L. No. 67-13, 42 Stat. 20.

²⁷ *Id.* § 301, 42 Stat. at 23. When it was created, the agency was known as the General Accounting Office. The name changed (but initials remained) in 2004. U.S. Gov’t Accountability Office, About GAO: History <https://www.gao.gov/about/what-gao-is/history/> (last visited Sept. 26, 2020).

²⁸ These arise under the Contract Disputes Act (CDA) and additional appeals may be heard under the Tucker Act. Collin Swan & Victor Pham, *2018 Government Contract Law Decisions of the Federal Circuit*, 68 AM. U. L. REV. 1373, 1374 & no. 1 (2019) (referring to Pub. L. No. 95-563, 92 Stat. 2383 (codified as amended at 41 U.S.C. §§ 7101–09); 28 U.S.C. § 1491(a)(1)).

²⁹ Or through an applicable administrative body such as the Armed Services Board of Contract Appeals, based on jurisdiction of the agency at issue. ARMED SERVICES BOARD OF CONTRACT APPEALS WELCOME, <https://www.asbca.mil/> (last visited Sept. 26, 2020).

³⁰ 41 U.S.C. §§ 7104, 7107; *see also* 28 U.S.C. § 1491.

³¹ 41 U.S.C. § 7104(b)(4).

³² U.S. GEN. ACCT. OFF., BID PROTESTS: CHARACTERISTICS OF CASES FILED IN FEDERAL COURTS 5 (2000), <https://www.gao.gov/products/GGD/OGC-00-72>.

³³ 41 U.S.C. §7107(a)(1)(B); 28 U.S.C. §§ 1295(a)(3), (10).

³⁴ 41 U.S.C. § 7103(a)(1).

II. CURRENT ISSUE: COVID-19

Given the unprecedented nature of the COVID-19 pandemic, the federal government has quickly gathered resources to ensure the health and stability of the nation. This reaction has opened the door for anti-competitive practices in the field of government contracts. On March 13, 2020, President Trump declared a national emergency in response to the threat of COVID-19,³⁵ which allowed the government to use more simplistic acquisition procedures for purchases.³⁶ Then, the President issued an Executive Order that delegated powers under the Defense Production Act of 1950³⁷ (“DPA”) to agency heads.³⁸ These orders allowed agency heads to enter into agreements with private companies that antitrust laws would normally prohibit.³⁹

While these policies have served as tools to provide much needed goods and services during the COVID-19 pandemic, their implementation has proved to be a detriment to the integrity of government contracts. More than half of all COVID-19 government contracts were not awarded competitively.⁴⁰ Further, millions of dollars in non-competitive awards went to vendors that the government previously accused of defrauding taxpayers.⁴¹ Although not every accuser under False Claims Act⁴² has a substantiated claim, there is no federal policy that prohibits firms accused by the government of defrauding taxpayers from procuring another government contract, unless a judgment suspended or debarred them from conducting business with the government.

For example, In January 2020, a manufacturer of durable medical equipment agreed to pay more than \$37 million to settle a dispute.⁴³ The federal government accused the manufacturer of paying kickbacks to medical equipment suppliers and other

³⁵ See Proclamation No. 9994, 85 Fed. Reg. 15337 (2020).

³⁶ See Federal Acquisition Regulation (FAR), 48 C.F.R. § 18.000–18.204.

³⁷ Pub. L. No. 81-774, 64 Stat. 798.

³⁸ Exec. Order No. 13,922, 85 Fed. Reg. 30,583 (2020).

³⁹ *Applying the Defense Production Act*, FEMA (Apr. 13, 2020) <https://www.fema.gov/news-release/20200726/applying-defense-production-act>. See generally, Mike Andrews, *DOD Announces \$135 Million in Defense Production Act Title 3 COVID-19 Actions*, Dep’t of Def. (June 10, 2020) <https://www.defense.gov/Newsroom/Releases/Release/Article/2214497/dod-announces-135-million-in-defense-production-act-title-3-covid-19-actions/#:~:text=DoD%20announces%20%2420%20million%20Defense%20Productio%20Act%20Title%20III%20Contract&text=The%20purpose%20of%20this%20investment,producing%20large%20advanced%20combat%20engines> (noting that the Department of Health and Human Services, the Federal Emergency Management Agency, and the Department of Defense are among the top agencies that have utilized the broad authorization provided by the DPA).

⁴⁰ Aaron Boyd, *GAO: More Than Half of COVID-19 Government Contracts Not Competitively Awarded*, NEXTGOV (July 29, 2020), <https://www.nextgov.com/cio-briefing/2020/07/gao-more-half-covid-19-government-contracts-not-competitively-awarded/167313/>.

⁴¹ Josh Salman & Nick Penzenstadler, *Hundreds of Millions of Dollars Goes to COVID-19 Contractors Accused of Prior Fraud*, USA TODAY (July 7, 2020) <https://www.usatoday.com/in-depth/news/investigations/2020/07/07/covid-19-contracts-overlook-fraud-claims-masks-sanitizer-and-ppe/5352886002/>.

⁴² 31 U.S.C. § 3729 (2018).

⁴³ Salman & Penzenstadler, *supra* note 41.

healthcare providers in violation of the False Claims Act.⁴⁴ Just two months after the settlement, the government awarded the same company a \$32 million-dollar contract for ventilators developed to fight COVID-19.⁴⁵ The contract was awarded through sole-source, not competition.⁴⁶

III. ADDITIONAL CASES OF NOTE

A. *Amazon Web Services Inc. v United States*⁴⁷

In 2019, the federal government awarded Microsoft the Joint Enterprise Defense Infrastructure contract (“JEDI”), worth an estimated \$10 billion: one of the largest government contracts ever awarded.⁴⁸ The Department of Defense will house 80% of its data with Microsoft commensurate with the contract—if the company can overcome a legal challenge from Amazon.⁴⁹ Amazon challenged the government’s decision, claiming improper pressure from President Trump.⁵⁰ In a suit between Amazon and the United States, Amazon alleged that the Department of Defense made errors at the evaluation stage of the JEDI system protest, and that the claims were not judged solely on the evaluation criteria.⁵¹ The Department of Defense reaffirmed its award to Microsoft⁵², but the case is still pending in the Court of Federal Claims.⁵³

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ 147 Fed. Cl. 146 (2020).

⁴⁸ Kate Conger et al., *Microsoft Wins Pentagon’s \$10 Billion JEDI Contract, Thwarting Amazon*, N.Y. TIMES (Oct. 25, 2019), <https://www.nytimes.com/2019/10/25/technology/dod-jedi-contract.html>.

⁴⁹ Andrew Eversden, *Amazon or Microsoft? DoD Picks a Winner for Its Controversial JEDI Contract*, FEDERAL TIMES (Oct. 25, 2019), <https://www.federaltimes.com/home/2019/10/26/amazon-or-microsoft-dod-picks-a-winner-for-its-controversial-jedi-contract/>.

⁵⁰ MEETING OF PRESIDENT TRUMP AND PRIME MINISTER OF THE NETHERLANDS, C-SPAN, in D.C. (Jul. 18, 2019) (documenting President Trump’s statement that he was “. . . getting tremendous complaints about the contract with the Pentagon and with Amazon . . .” See Donald J. Trump (@realDonaldTrump), Twitter (Mar. 29, 2018, 7:57 AM), https://twitter.com/realDonaldTrump/status/979326715272065024?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E979326715272065024%7Ctwgr%5Eshare_3&ref_url=https%3A%2F%2Fwww.theastreet.com%2Fworld%2Ftrump-vs-bezos-a-history-of-their-twitter-clashes-14859977; Donald J. Trump (@realDonaldTrump), Twitter (Dec. 7, 2015, 10:08 AM), https://twitter.com/realDonaldTrump/status/673881733415178240?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E673881733415178240%7Ctwgr%5Eshare_3&ref_url=https%3A%2F%2Fwww.theastreet.com%2Fworld%2Ftrump-vs-bezos-a-history-of-their-twitter-clashes-14859977 (demonstrating President Trump and Amazon have an openly contentious relationship, and the President’s criticisms of the company and its leadership).

⁵¹ 147 Fed. Cl. At 150.

⁵² Dep’t of Def., *DOD Reaffirms Original JEDI Cloud Award to Microsoft* (Sept. 4, 2020)

<https://www.defense.gov/Newsroom/Releases/Release/Article/2337557/dod-reaffirms-original-jedi-cloud-award-to-microsoft/>; Rachel Sandler, *Pentagon Awards JEDI Contract to Microsoft – Again – in Blow to Amazon*, FORBES (Sep. 4, 2020), <https://www.forbes.com/sites/rachelsandler/2020/09/04/pentagon-awards-jedi-contract-to-microsoft-again-in-blow-to-amazon/#2c70f9fc505f>.

<https://www.forbes.com/sites/rachelsandler/2020/09/04/pentagon-awards-jedi-contract-to-microsoft-again-in-blow-to-amazon/#588336b6505f>.

⁵³ 147 Fed. Cl. at 160.

*B. Space Explorations Technology Corp. v. United States*⁵⁴

Space Exploration Technologies Corp. (“SpaceX”), which provides launching services to a variety of entities and the United States Air Force, was tasked with procuring launch services for the federal government’s space needs. On May 17, 2019, SpaceX commenced a post-award bid protest action challenging the Air Force’s evaluation and award decisions to provide space launch services.⁵⁵ The Department of Defense issues the portfolio award decisions pursuant to the Department of Defense’s authority to enter into Other Transaction Agreements (“OTAs”). SpaceX challenged the Air Force’s claim of Other Transaction Authority at the COFC, which ruled it lacked jurisdiction, dismissed the case, and transferred it to the United States District Court for the Central District of California.⁵⁶ Agencies generally use OTAs for prototype contracts, which are not considered a pure procurement contract. This makes challenging them difficult, as GAO does not have jurisdiction. This case is important because the use of OTAs is currently on the rise, and protestors that want to challenge the award of an OTA now have very limited options.⁵⁷

*C. Raytheon Co.*⁵⁸

The United States Army awarded a contract to Raytheon on December 27, 2010, for the purchase of military equipment.⁵⁹ While fulfilling the contract, Raytheon requested several scheduled extensions, for which they offered consideration in several forms.⁶⁰ Finally, in 2018, the government contracting officer issued a decision demanding more than \$6,000,000 as damages for breach of contract.⁶¹ Raytheon appealed to the Armed Services Board of Contract Appeals. The Board held that the government can revoke acceptance of contracted goods if there are latent defects, but it must do so within a reasonable amount of time after the latent defect is or should have been discovered.⁶² The Board also held that a claim for partial breach may proceed despite the government’s acceptance of late delivery and the government can waive the right to require strict performance if a contract requirement is treated as “dead.”⁶³

⁵⁴ 144 Fed. Cl. 433 (2019).

⁵⁵ *Id.* at 438.

⁵⁶ Jones Day, *Government Contracts: Court of Federal Claims Finds No Jurisdiction Over SpaceX’s OTA Protest* (Sept. 2019), <https://www.jonesday.com/en/insights/2019/09/government-contracts-spacex-ota-protest>.

⁵⁷ *Id.*

⁵⁸ ASBCA No. 61859, 20-1 BCA ¶ 37,630.

⁵⁹ *Id.* at 2.

⁶⁰ *Id.* at 2–3.

⁶¹ *Id.* at 3.

⁶² *Id.* at 5.

⁶³ *Id.* at 8-9.