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# **Selected Legal Mechanisms Whereby the Government Can Hold Contractors Accountable for Failure to Perform or Other Misconduct**

**name redacted**

Legislative Attorney

**name redacted**

Legislative Attorney

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## Summary

Reports of “waste, fraud, and abuse” in federal contracting often prompt questions about what the government can do to hold its vendors accountable for failure to perform as required under their contracts, or for legal violations or other misconduct unrelated to contract performance. Broadly speaking, the government can be seen as having two types of legal recourse available to it in such situations. The first type involves rights provided to the government as terms of its contracts, which the government may exercise without resort to judicial proceedings. The second type involves other actions, not necessarily provided for by contract. In some cases, the government may take these actions on its own behalf, without resort to judicial proceedings. In other cases, the government must seek sanctions or damages through the courts.

Not all of these mechanisms involve “penalties” as that term is generally understood. In some cases, the controlling legal authority expressly provides that the government may take certain actions only to protect the government’s interest, and “not for purposes of punishment.” However, in all cases, the government’s action represents a consequence of and response to the contractor’s delinquencies, and could be perceived as punitive by the contractor or other parties. The government generally has discretion as to whether to employ any of these mechanisms in particular circumstances, and could employ multiple mechanisms in a given case. In some cases, though, the government must choose between particular mechanisms.

### **Rights Granted to the Government as Terms of Its Contracts**

Government contracts include standard terms granting the government certain rights that could be exercised if the contractor fails to perform as required under the contract, such as the right to assess liquidated damages and the right to terminate the contract for default. A specific right must generally be expressly provided for in the contract for the government to exercise it, although the government’s right to terminate contracts for default may be read into contracts that do not expressly provide for it. The government’s exercise of the right must also generally be in conformity with the terms of the contract. In addition, depending upon the facts and circumstances of the case, a contractor could challenge the government’s exercise of a contractual right by bringing suit before a court or board of contract appeals, alleging that the contractor’s deficient or delinquent performance must be excused because it was caused by an event that is beyond the contractor’s control and without its fault or negligence. Alternatively, a contractor could assert that the government has waived particular contractual rights in specific cases. A waiver is an intentional or voluntary relinquishment of a legal right, or conduct that warrants an inference that the right has been relinquished.

### **Other Agency Actions Not Necessarily Provided for as Terms of a Contract**

The government could also take certain actions in response to contractors’ failure to perform or other misconduct that are not expressly provided for as terms of a federal contract, but are authorized under federal statutes or regulations. In some cases, the government may take these actions on its own behalf, without resort to judicial proceedings, as is the case with debarment and suspension and consideration of agency evaluations of past performance in source-selection decisions. In other cases, the government must seek sanctions through the courts, as is the case with suits under the civil provisions of the False Claims Act. In either case, the government’s recourse is generally limited by the controlling legal authority (e.g., suspension must be on a ground specified in statute or regulation). Agency actions could also be challenged on the grounds that the action deprives the contractor of certain contractual or other rights, or is arbitrary and capricious. In addition, in some cases, contractors are entitled to due process in the form of notice and an opportunity for a hearing before being subjected to agency action or sanctions.

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Reports of “waste, fraud, and abuse”<sup>1</sup> in federal contracting often prompt questions about what the government can do to hold its vendors accountable for failure to perform as required under their contracts, or for legal violations or other misconduct unrelated to contract performance. Because agencies rely extensively on contractors in their operations,<sup>2</sup> it is important that contractors perform on time and in conformity with the contract’s requirements. Failure to do so can negatively affect the services that the agency provides to taxpayers, as well as the conditions under which federal personnel work.<sup>3</sup> Relatedly, there is a widespread (although not universal) view that contracting with the government is a “privilege,” and contractors should be exemplary in all aspects of their operations, including in performing legal responsibilities and duties unrelated to their obligations under a federal contract.<sup>4</sup> When a contractor is implicated in wrongdoing, its suitability for doing business with the government may be publicly questioned.

This report provides an overview of selected legal mechanisms that the federal government could rely upon in holding contractors accountable for deficiencies in their performance under the contract, or for other misconduct. Not all of these mechanisms involve “penalties” as that term is generally understood.<sup>5</sup> In some cases, the controlling legal authority expressly provides that the government may take certain actions only to protect the government’s interest, and “not for purposes of punishment.”<sup>6</sup> However, in all cases, the government’s action represents a consequence of and response to the contractor’s delinquencies, and could be perceived as punitive by the contractor or other parties. The government generally has discretion as to whether to employ any of these mechanisms in particular circumstances,<sup>7</sup> and could employ multiple mechanisms in a given case. In some cases, though, the government must choose between particular mechanisms.<sup>8</sup>

For ease of discussion, the various mechanisms discussed in this report are broadly divided into two categories. The first category includes rights provided to the government as terms of its

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<sup>1</sup> The terms “waste,” “fraud,” and “abuse” are often used as a unit. *See, e.g., How Good Is Our System for Curbing Contract Waste, Fraud, and Abuse?: Hearing Before the Joint Commission on Wartime Contracting in Iraq and Afghanistan*, May 24, 2010. However, such usage can obscure important distinctions between the three terms. “Fraud” is a term of art, connoting a false representation of a present or past fact that another person relies upon to his or her detriment, and is subject to legal penalties. *See, e.g., BLACK’S LAW DICTIONARY* 685-97 (8<sup>th</sup> ed. 2004). “Waste” and “abuse,” in contrast, do not have standard legal definitions and are more subjective in their application. Also, depending upon the circumstances, alleged waste or abuse may not be subject to legal penalties.

<sup>2</sup> *See, e.g., Paul C. Light, The True Size of Government* (Brookings Institution Press, 2001) (placing the number of persons who provide supplies and services to the federal government at 17 million, including 1.9 million civil servants).

<sup>3</sup> *See, e.g., Jimmie E. Gates, FEMA Trailers Brought Shelter, Problems to Katrina Victims*, USA TODAY, August 28, 2015, available at <http://www.usatoday.com/story/news/nation/2015/08/28/fema-trailers-brought-shelter-problems-katrina-victims/71342988/>; “Multiple” Failures Led to Iraq Electrocution, Pentagon Says, CNN News, July 27, 2009, available at <http://www.cnn.com/2009/US/07/27/military.electrocutions/>.

<sup>4</sup> *See, e.g., U.S. Dep’t of Labor, News Release, Department of Labor and Federal Acquisition Regulatory Council Propose Guidance, Rule to Implement Fair Pay and Safe Workplaces Executive Order*, May 27, 2015, available at <http://www.dol.gov/opa/media/press/asp/oasp20151046.htm> (“The opportunity to contract with the federal government is a privilege, not an entitlement. Taxpayer dollars should not reward corporations that break the law....”).

<sup>5</sup> *See, e.g., Merriam-Webster Online, “Penalty,” available at http://www.merriam-webster.com/dictionary/penalty* (September 8, 2015) (defining “penalty” as a “punishment for breaking a rule or law”).

<sup>6</sup> 48 C.F.R. §9.402(b) (discussing debarment and suspension). *See also* 48 C.F.R. §11.501(b) (“Liquidated damages are not punitive and are not negative performance incentives.”).

<sup>7</sup> However, exclusion, in particular, is required by statute in certain cases. *See infra* “Debarment and Suspension.”

<sup>8</sup> *See, e.g., 48 C.F.R. §52.246-2(h) (Inspection of Supplies—Fixed-Price)* (“If the Contractor fails to promptly remove, replace, or correct rejected supplies that are required to be removed or to be replaced or corrected, the Government may either (1) by contract or otherwise, remove, replace, or correct the supplies and charge the cost to the Contractor or (2) terminate the contract for default.”).

contracts, which the government may exercise without resort to judicial proceedings. The second category includes other actions, not necessarily provided for by contract. In some cases, the government may take these actions on its own behalf, without resort to judicial proceedings. In other cases, the government must seek sanctions or damages through the courts. Individual mechanisms are listed alphabetically within the first of these sections, and grouped by topic in the second. Within each of these sections, the discussion of individual mechanisms explains the underlying legal authority, the mechanism's basic operation, and key issues the government may encounter when exercising contractual rights or taking other actions. Recent developments regarding particular mechanisms are highlighted in accompanying text boxes, where relevant.

The report does not address prosecution of government contractors, although it is important to note that contractors could be subject to criminal penalties for misconduct related to contract performance or otherwise.<sup>9</sup> Also, the discussion of the government's potential mechanisms for holding contractors accountable in this report should not be taken to mean that contractors and contractor employees are more likely to fail to perform or engage in misconduct than government employees. That is a separate debate, outside the scope of this report.

## **Rights Under Government Contracts**

The standard terms of government contracts grant the government certain rights that the government could exercise on its own, without the permission of a court or board of contract appeals, in response to a contractor's failure to perform as required under the contract.<sup>10</sup> Examples include the assessment of liquidated damages, termination for default, and withholding of award or incentive fees. A specific right must generally be expressly provided for in the contract for the government to exercise it, although the government's right to terminate contracts for default may be "read into" (or treated as a constructive term of) certain federal procurement contracts that do not expressly provide for it.<sup>11</sup> The government's exercise of the right must also generally be in conformity with the contract (e.g., providing any required notice of the government's intent to exercise the right).<sup>12</sup> In addition, depending upon the facts and circumstances of the case, a contractor could challenge the government's exercise of a contractual right by bringing suit before a court or board of contract appeals, alleging that the contractor's deficient or delinquent performance must be excused because it was caused by an event that is beyond the contractor's control and without its fault or negligence.<sup>13</sup> Alternatively, a contractor

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<sup>9</sup> The False Statements Act (18 U.S.C. ch. 63) is notable among the statutes under which contractors could face prosecution, as it prohibits any person, in any matter under the government's jurisdiction, from "knowingly and willfully" falsifying, concealing, or covering up a material fact, or making a false, fictitious, or fraudulent statement. However, depending upon the acts or omissions involved, federal contractors could face prosecution under other statutes. *See, e.g.,* Chris DiMarco, *Judge Caps BP's Clean Water Act Fines at \$13.7 Billion*, Inside Counsel, January 16, 2015, available at <http://www.insidecounsel.com/2015/01/16/judge-caps-bps-clean-water-act-fines-at-137-billio>.

<sup>10</sup> An agency's exercise of its contractual rights could, however, be litigated in specific cases if the contractor challenges the permissibility of the agency action. Other misconduct, not involving failures to perform under the contract, is less commonly addressed as terms of the contract, although provisions could potentially be added to a contract to cover such misconduct in individual cases.

<sup>11</sup> *See, e.g.,* Appeal of Sabre Eng'g Corp., 81-2 B.C.A. ¶15,310 (1981).

<sup>12</sup> For example, the standard "Default (Fixed-Price Supply and Service)" clause requires that the government give the contractor 10-day written notice of its intention to terminate the contract for the contractor's failure to make progress or perform. *See* 48 C.F.R. §52.249-8(a)(2). Failure to provide the requisite notice could result in a termination for default being treated as if it were a termination for convenience, as discussed below. *See* "Termination for Default."

<sup>13</sup> The common law of contracts has long excused certain failures to perform due to circumstances seen to be outside the contractor's control. *See, e.g.,* Taylor v. Caldwell, 122 Eng. Rep. 309 (K.B. 1863) (defendant excused from (continued...))

could assert that the government has waived particular contractual rights in specific cases.<sup>14</sup> A waiver is an intentional or voluntary relinquishment of a legal right, or conduct that warrants an inference that the right has been relinquished. The government could be bound by a waiver if the contractor relies upon the waiver to its detriment.<sup>15</sup>

## Correction or Re-Work at the Contractor's Expense

The Federal Acquisition Regulation (FAR), which generally governs the acquisition of supplies and services by executive branch agencies,<sup>16</sup> requires that clauses granting the government the right to inspect and test the supplies or services to be provided under the contract be incorporated into many contracts.<sup>17</sup> These inspection clauses also provide the government with the right to require the contractor to correct or re-do some or all deficient work at its own expense, as discussed below. The inspection clauses may also provide that the contractor must furnish (or have furnished by subcontractors) “all reasonable facilities and assistance for the safe and convenient performance” of inspection and testing at no cost to the government.<sup>18</sup> In addition, the inspection clauses may provide that, if the contractor fails to correct or re-do the deficient work, the government may procure the supplies or services in question at the contractor's expense.<sup>19</sup>

The extent to which the government may require contractors to correct or re-do deficient work at the contractor's expense depends, in part, upon whether the contract is fixed-price or cost-reimbursement.<sup>20</sup> With fixed-price contracts, the contractor is generally liable for the costs of correction,<sup>21</sup> and sometimes also for any additional costs of inspection or testing if the supplies are not ready at the time specified, or if prior rejection makes re-inspection or retesting necessary.<sup>22</sup> The situation is somewhat different as to cost-reimbursement contracts because the

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(...continued)

performance when the music hall that the defendant had promised to let the plaintiff use for concerts was destroyed in a fire). Some standard terms of government contracts also recognize the possibility of failures to perform being excused. *See, e.g.*, 48 C.F.R. §52.249-8(c) (noting, as examples of the causes of failure to perform for which the contractor shall not be liable, “(1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather”).

<sup>14</sup> *See, e.g.*, *Am. Nat'l Bank & Trust Co. v. United States*, 23 Cl. Ct. 542 (1991).

<sup>15</sup> *See, e.g.*, *Miller Elevator Co. v. United States*, 30 Fed. Cl. 662, 687 (1994); *Freeway Ford Truck Sales, Inc. v. Gen. Servs. Admin.*, 93-3 B.C.A. ¶26,019 (1993).

<sup>16</sup> For more on the FAR, see generally CRS Report R42826, *The Federal Acquisition Regulation (FAR): Answers to Frequently Asked Questions*, by (name redacted) et al.

<sup>17</sup> *See* 48 C.F.R. §52.246-2(c) (Inspection of Supplies—Fixed Price); 48 C.F.R. §52.246-3(c) (Inspection of Supplies—Cost-Reimbursement); 48 C.F.R. §52.246-4(c) (Inspection of Services—Fixed Price); 48 C.F.R. §52.246-5(c) (Inspection of Services—Cost-Reimbursement); 48 C.F.R. §52.246-6(c) (Inspection—Time-and-Material and Labor-Hour); 48 C.F.R. §52.246-7(b) (Inspection of Research and Development—Fixed-Price); 48 C.F.R. §52.246-8(c) (Inspection of Research and Development—Cost-Reimbursement).

<sup>18</sup> *See* 48 C.F.R. §52.246-2(d); 48 C.F.R. §52.246-4(d); 48 C.F.R. §52.246-7(c).

<sup>19</sup> *See* 48 C.F.R. §52.246-2(h); 48 C.F.R. §52.246-3(g); 48 C.F.R. §52.246-4(f); 48 C.F.R. §52.246-5(e); 48 C.F.R. §52.246-6(g); 48 C.F.R. §52.246-7(f); 48 C.F.R. §52.246-8(g).

<sup>20</sup> With a fixed-price contract, the contractor assumes the risk of increases in the expenses of performing by agreeing to provide supplies or services to the government at a specified price established at the time of contracting. In contrast, with a cost-reimbursement contract, the government assumes the risk of increases in the expenses of performing by agreeing to pay the contractor for all allowable, reasonable, and allocable costs of performing specified work, up to a total cost provided for in the contract. *See* CRS Report R41168, *Contract Types: Legal Overview*, by (name redacted).

<sup>21</sup> *See* 48 C.F.R. §52.246-2(k); 48 C.F.R. §52.246-4(e); 48 C.F.R. §52.246-5(d); 48 C.F.R. §52.246-7(f).

<sup>22</sup> *See* 48 C.F.R. §52.246-2(e).

government, and not the contractor, may be liable for the costs of “ordinary” correction of work, or of furnishing facilities and assistance for testing and correction.<sup>23</sup> However, even under cost-reimbursement contracts where they are not otherwise liable for the costs of correction, contractors may be liable for these costs when the deficiency is due to fraud, lack of good faith, or willful misconduct on the part of the contractor’s “managerial personnel;” or the conduct of one or more contractor employees who were selected or retained by the contractor after its managerial personnel had “reasonable grounds” to believe that the employee is “habitually careless or unqualified.”<sup>24</sup> Correction is not limited to the repair or replacement of defective supplies; it can encompass other work necessary to make the defective supplies operable.<sup>25</sup>

The fact that the contract places the responsibility for inspection on the government generally does not relieve the contractor of its responsibility to furnish conforming supplies and services and, thus, to correct or re-do deficient work.<sup>26</sup> However, other factors could potentially constrain the government’s ability to insist that the contractor perform corrective actions. Depending upon the facts and circumstances of the case, such factors could include (1) the government’s furnishing defective specifications or materials to the contractor;<sup>27</sup> (2) the government’s acceptance of the deficient performance before requesting corrective action;<sup>28</sup> and (3) the government’s failure to inform the contractor of the need for corrective work before obtaining it from another contractor, whose costs the government then seeks to recoup.<sup>29</sup> Also, while the government generally has the right to insist on “strict compliance” with the contract’s specifications,<sup>30</sup> it may not be able to insist on work being redone to specifications when doing so would be “economically wasteful and the work is otherwise adequate for its intended purpose.”<sup>31</sup> Instead, in such situations, the government may be limited to an equitable reduction in contract price.<sup>32</sup> *See* “Equitable Reduction in Price or Other Compensation.”

## **Equitable Reduction in Price or Other Compensation**

The FAR requires or authorizes the use of several standard contract clauses that give the government the right to an equitable reduction in price or other compensation if it accepts supplies or services that do not fully conform to the contract’s requirements. These clauses differ in the circumstances in which they are used, as well as in the supplies and services to which they apply, as discussed below. However, any exercise of the government’s rights under such a clause

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<sup>23</sup> *See* 48 C.F.R. §52.246-3(d) & (f); 48 C.F.R. §52.246-5(c); 48 C.F.R. §52.246-6(d) & (f); 48 C.F.R. §52.246-8(d) & (f). The contractor may, however, be denied any additional fee on the work to be corrected or re-done. *See, e.g.*, 48 C.F.R. §52.246-8(f) (“[T]he cost of replacement or correction shall be determined as specified in the Allowable Cost and Payment clause, but no additional fee shall be paid.”).

<sup>24</sup> *See* 48 C.F.R. §52.246-3(h); 48 C.F.R. §52.246-6(h); 48 C.F.R. §52.246-8(h). “Managerial personnel” is defined broadly for purposes of these provisions. *See* 48 C.F.R. §52.246-3(a); 48 C.F.R. §52.246-6(a); 48 C.F.R. §52.246-8(a).

<sup>25</sup> *See* Appeal of Cooper-Bessemer Corp., 69-1 B.C.A. ¶7,623 (1969).

<sup>26</sup> *See, e.g.*, 48 C.F.R. §52.246-7(d) (“Government failure to inspect and accept or reject the work shall not relieve the Contractor from responsibility, nor impose liability on the Government, for nonconforming work.”).

<sup>27</sup> *See* Appeal of Aeronca Mfg. Corp., 69-2 B.C.A. ¶7,811 (1969).

<sup>28</sup> *See* Appeal of G.M. Co. Mfg., Inc., 60-1 B.C.A. ¶2,576 (1960); Appeal of Douglas Corp., 60-1 B.C.A. ¶2,531 (1960).

<sup>29</sup> *See, e.g.*, Appeal of Reynolds Metals Co., 66-1 B.C.A. ¶5,566 (1966).

<sup>30</sup> *See, e.g.*, *S.S. Silberblatt, Inc. v. United States*, 433 F.2d 1314, 1323 (1970).

<sup>31</sup> *See, e.g.*, *Granite Constr. Co. v. United States*, 962 F.2d 998, 1007 (Fed. Cir. 1992).

<sup>32</sup> *Id.* *See also* *Farwell Co. v. United States*, 148 F. Supp. 947, 950 (1957); *Toombs & Co., Inc.*, 91-1 B.C.A. ¶23,403 (1990).

can be seen as holding the contractor accountable for failure to perform as required by the contract because the contractor would receive less compensation than the parties had initially contemplated as a result of deficiencies in its performance.

Provisions for reductions in price or other compensation appear in a number of standard contract clauses, perhaps most notably those that grant the government the right to inspect and test the supplies or services provided under the contract and, in some cases, require the contractor to correct or re-do defective work at the contractor's expense. *See* "Correction or Re-Work at the Contractor's Expense." For example, the standard "Inspection of Supplies—Fixed-Price" clause provides that "[u]nless the Contractor corrects or replaces the [deficient] supplies within the delivery schedule, the Contracting Officer may require that delivery and make an equitable reduction in price."<sup>33</sup> However, other contract clauses, not involving inspection, also make express provision for reductions in price or other consideration for specified issues in contractors' performance, including (1) violations of the prohibitions upon disclosing or obtaining procurement information set forth in 41 U.S.C. §§2102-2103;<sup>34</sup> (2) furnishing certified cost or pricing data that were not complete, accurate, or current;<sup>35</sup> (3) incurring "excessive pass-through charges" under certain contracts that involve subcontracting;<sup>36</sup> and (4) breach of certain express warranties made by the contractor.<sup>37</sup> Yet other clauses make provision for the reduction of payments to the contractor if the contractor fails to comply with any material requirement of the contract; endangers performance of the contract by failure to make progress or by its unsatisfactory financial condition; or is delinquent in paying subcontractors or suppliers under the contract in the ordinary course of business.<sup>38</sup>

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<sup>33</sup> 48 C.F.R. §52.246-2(h). There are similar provisions for equitable price reductions in other inspections clauses, including those used in certain cost-reimbursement contracts and contracts for commercial items. *See* 48 C.F.R. §52.212-4(a) (Contract Terms and Conditions—Commercial Items); 48 C.F.R. §52.246-3(g)(1) (Inspection of Supplies—Cost-Reimbursement); 48 C.F.R. §52.246-7(e) (Inspection of Research and Development—Fixed-Price); 48 C.F.R. §52.246-8(g)(1)(i) (Inspection of Research and Development—Cost-Reimbursement). For more on the difference between fixed-price and cost-reimbursement contracts, *see supra* note 20.

<sup>34</sup> *See* 48 C.F.R. §52.203-10 (Price or Fee Adjustment for Illegal or Improper Activity).

<sup>35</sup> *See* 48 C.F.R. §52.214-17(b) (Price Reduction for Defective Certified Cost or Pricing Data—Modification—Sealed Bidding); 48 C.F.R. §52.215-10(a)-(b) (Price Reduction for Defective Certified Cost or Pricing Data); 48 C.F.R. §52.215-11(b) (Price Reduction for Defective Certified Cost or Pricing Data—Modifications).

<sup>36</sup> *See* 48 C.F.R. §52.215-23(d)(2) (entitling the government to a price reduction "for the amount of the excessive pass-through charges included in the contract price" in the case of certain Department of Defense fixed-price contracts). An "excessive pass-through charge" is defined as "a charge to the Government ... that is for indirect costs or profit on work performed by a subcontractor" in cases where the charging party (i.e., the contractor or a higher-tier subcontractor) "adds no or negligible value." 48 C.F.R. §52.215-23(a).

<sup>37</sup> *See* 48 C.F.R. §52.216-18(c)(2) (Warranty of Supplies of a Complex Nature); 48 C.F.R. §52.216-19 (Warranty of Systems and Equipment under Performance Specifications or Design Criteria).

<sup>38</sup> *See* 48 C.F.R. §52.232-32(g)(1)-(3) (Performance-Based Payments). *See also* 48 C.F.R. §52.232-16 (Progress Payments).



Any reduction in price is generally effectuated by modifying the contract.<sup>39</sup> However, the contractor could potentially bring a suit challenging the government's right to the reduction, or the amount of the reduction, under the Contract Disputes Act (CDA) of 1978, as amended.<sup>40</sup> In particular, the contractor could assert that its performance was not defective,<sup>41</sup> or that there is a cognizable excuse for any failure to perform.<sup>42</sup> The contractor could also assert that the government is barred from exercising its right to a price reduction because the government had "accepted" the supplies or services in question before seeking a price reduction (although certain defects or contract terms may permit a price reduction even after acceptance).<sup>43</sup> Alternatively, the contractor could assert that the government has not acted in conformity with the contract's terms regarding the exercise of its right to a price reduction.<sup>44</sup>

### Recent Developments as to the CDA

The CDA establishes a framework whereby a board of contract appeals or the U.S. Court of Federal Claims may hear "claims" made by the parties to a government contract. (A claim is a written demand or assertion by one of the parties to a government contract seeking, as a matter or right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract.)

In its recent decision in *Sikorsky Aircraft Corporation v. United States*, 773 F.3d 1315 (Fed. Cir. 2014), the U.S. Court of Appeals for the Federal Circuit found that a provision of the CDA which states that claims "shall be submitted within 6 years after the accrual of the claim" is not jurisdictional, but rather a "claim processing rule." In so finding, the court noted the absence of anything in the language or context of the CDA suggesting this 6-year period was jurisdictional, something which the court viewed as significant in light of Supreme Court precedent stating that "absent a clear statement [that the rule is jurisdictional] ... courts should treat the restriction as nonjurisdictional in character." See *Sebelius v. Auburn Regional Med. Ctr.*, 133 S. Ct. 817, 825 (2013). It also noted the absence of Supreme Court or other long-standing interpretations to the contrary.

<sup>39</sup> The amount of the reduction could be any amount up to the contract price, in the case of supplies or services that are unusable and of no value to the government. *See, e.g.*, 48 C.F.R. 52.246-2(h) ("Failure to agree to a price reduction shall be a dispute."); Appeal of McGrath & Co. Assoc., 58-1 B.C.A. 1599 (1958) (noting the extent of the price adjustment as an appealable issue). However, although the terms of the contract may limit the reduction in certain ways. *See, e.g.*, Appeal of Mercury Chemical Co., 69-1 B.C.A. 7566 (1969). In cases where the supplies or services are completely unusable, some allowance would generally need to be made for the residual value of the supplies or services. *Cf.* 2-27A GOV'T CONTRACTS: LAW, ADMIN. & PROC. §27A.40[d] (2015).

<sup>40</sup> *See generally* 41 U.S.C. §§7101-7109.

<sup>41</sup> *See, e.g.*, Appeal of Keystone Coat & Apron Mfg. Corp., 58-2 B.C.A. ¶1912 (1958).

<sup>42</sup> *See, e.g.*, 48 C.F.R. §52.246-19(b)(8) (providing that the contractor is generally not responsible, under one of the standard warranty clauses, for the correction of defects in government-furnished property).

<sup>43</sup> *See, e.g.*, 48 C.F.R. §52.246-7(f) ("Acceptance shall be conclusive, except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise specified in the contract."); *Am. Lithographic Co. v. United States*, 57 Ct. Cl. 340, 355-56 (1922) (finding that the government could not require that the work be corrected after acceptance, because acceptance binds the government to pay); Appeal of Asubeco, Inc., 63 B.C.A. 3941 (1963) (noting that the government could not seek a reduction in price for supplies it had previously accepted, although it could potentially recover under the guaranty or other clauses). *See also* 48 C.F.R. §52.212-4(a) providing for exercise of the right to an equitable reduction in price after acceptance under certain circumstances in contracts for commercial items. "Acceptance" is a term of art, connoting an act by an authorized representative of the government by which the government assumes ownership of existing and identified supplies, or approves specific services rendered, as partial or complete performance of the contract. Acceptance does not necessarily occur at the time when supplies are delivered or services are rendered. *See, e.g.*, 48 C.F.R. §52.246-18(a).

<sup>44</sup> *See, e.g.*, 48 C.F.R. §52.212-4(a) (prescribing that exercise of the post-acceptance right to an equitable reduction in price as to commercial items must be "within a reasonable time" after the defect was discovered (or should have been discovered), and before any "substantial change" in the condition of the item occurs due to causes unrelated to the defect); 48 C.F.R. §52.246-2(h) ("If the Contractor fails to promptly remove, replace, or correct rejected supplies that are required to be removed or to be replaced or corrected, the Government may either (1) by contract or otherwise, remove, replace, or correct the supplies and charge the cost to the Contractor or (2) terminate the contract for default.").

## Liquidated Damages

The FAR requires or authorizes executive agencies to incorporate provisions that call for the assessment of liquidated damages into their contracts in certain circumstances. “Liquidated damages” are “amounts fixed, settled, and agreed upon [by the parties to a contract] in advance to avoid litigation as to the damages actually sustained” in the event of specified breaches of the contract.<sup>45</sup> The amount may “exceed or fall short of the actual damages sustained, but the sum thus determined in advance binds both parties to such agreement.”<sup>46</sup> Liquidated damages are not “penalties” as that term is generally understood.<sup>47</sup> However, the assessment of liquidated damages can hold contractors accountable for certain deficiencies in their performance by making them pay an amount which represents a reasonable estimate of the damages the government incurred as a result of such deficiencies.<sup>48</sup>

Specifically, the FAR requires the incorporation of certain liquidated damages provisions in (1) contracts for public construction projects subject to the Davis-Bacon Act;<sup>49</sup> and (2) any contracts that include “subcontracting plans,” or goals for the percentage and dollar value of work under the contract to be subcontracted to small businesses.<sup>50</sup> Individual agencies may also require the use of liquidated damages provisions in other contracts as a matter of law or policy.<sup>51</sup> In yet other cases, the FAR authorizes (but does not require) the use of liquidated damages provisions when the contracting officer determines that the time of delivery or timely performance is “so important” that the government may “reasonably expect to suffer damage if the delivery or performance is delinquent,” and the extent or amount of such damage would be “difficult or impossible to estimate accurately or prove.”<sup>52</sup> In such cases, the contracting officer also has discretion in determining the amount of liquidated damages specified in the contract.<sup>53</sup>

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<sup>45</sup> *Pacific Hardware Steel Co. v. United States*, 48 Ct. Cl. 399, 406 (1913).

<sup>46</sup> *Id.*

<sup>47</sup> *See supra* note 56 and accompanying text.

<sup>48</sup> *See also* *Robinson v. United States*, 261 U.S. 486, 488 (1923) (“[A] provision giving liquidated damages for each day’s delay is an appropriate means of inducing due performance ...”).

<sup>49</sup> *See* 48 C.F.R. §52.222-4(b) (“The Contracting Officer will assess liquidated damages at the rate of \$10 per affected employee for each calendar day on which the employer required or permitted the employee to work in excess of the standard workweek of 40 hours without paying overtime wages required by the [Act].”).

<sup>50</sup> *See* 48 C.F.R. §52.219-16(b) (“If ... the Contractor has failed to meet its subcontracting goals and the Contracting Officer decides ... that the Contractor failed to make a good faith effort to comply with its subcontracting plan, ... the Contractor shall pay the Government liquidated damages in an amount stated.”). Subcontracting plans are generally required in contracts valued at over \$650,000 (\$1.5 million for construction contracts) that have “subcontracting possibilities.” *See* 48 C.F.R. §19.702(a)(1).

<sup>51</sup> *See, e.g.*, 48 C.F.R. §52.211-12 (requiring liquidated damages provisions in certain Department of Defense construction contracts); *DJ Mfg. Corp. v. United States*, 86 F.3d 1130, 1132 (Fed. Cir. 1996) (“[A]ll contracts for items to be used in Operation Desert Shield/Desert Storm contained liquidated damages clauses for late delivery because of the need to get war items to the soldiers quickly.”).

<sup>52</sup> 48 C.F.R. §11.501(a)(1)-(2).

<sup>53</sup> 48 C.F.R. §52.211-11(a) (Liquidated Damages—Supplies, Services, or Research and Development) (“[T]he Contractor shall, in place of actual damages, pay to the Government liquidated damages of \$\_\_ per calendar day of delay [Contracting Officer insert amount].”); 48 C.F.R. §52.211-12(a) (Liquidated Damages—Construction) (same).

If the contract has a liquidated damages provision and the requisite conditions are met, damages are generally assessed<sup>54</sup> The government could recover these damages by withholding a corresponding amount from the payments to be made under the contract, or by asserting a claim under the CDA.<sup>55</sup>

Contractors could, however, avoid the assessment of damages by showing that the amount stipulated in the contract is “so disproportionate to any damage reasonably to be anticipated in the circumstances disclosed” that the ostensible liquidated damages provision actually constitutes an “unenforceable penalty.”<sup>56</sup> The contractor has the burden of proof here, and this burden has been described as an “exacting one” by the U.S. Court of Appeals for the Federal Circuit, which has further noted that it is “rare ... for a federal court to refuse to enforce the parties’ bargain on the issue.”<sup>57</sup> Contractors could also assert that the government waived its right to liquidated damages by delaying or hindering the contractor’s performance, or by failing to mitigate the damages (e.g., not providing timely inspections).<sup>58</sup>

## Performance and Other Bonds

In federal procurement, bonds—which are written promises to pay or to act in a certain way upon the occurrence of specified conditions—can be used to ensure that contractors fulfill their obligations to the government (including their promises to the government to pay subcontractors and suppliers).<sup>59</sup> Under the FAR, executive agencies must obtain adequate security for bonds

### Recent Developments as to Liquidated Damages

In its February 12, 2015, decision in *K-Con Building Systems, Inc. v. United States*, 778 F.3d 1000 (Fed. Cir. 2015), the U.S. Court of Appeals for the Federal Circuit highlighted—once again—the “steep climb” that contractors face in trying to show that a liquidated damages provision represents an unenforceable penalty. In upholding the validity of a provision which set a rate of \$589 per day of delay on a \$582,641 contract, the court rejected the contractor’s allegation that the government made certain mathematical errors in arriving at the amount of damages on the grounds that the alleged error was “immaterial.” The court did so because it viewed the ultimate rate as “reasonable” since delay would foreseeably “create a number of costs” for the agency, including travel, inspection, and other work by government personnel, “all continuing beyond the date by which such activities for this contract should have ended.” Given the difficulty of measuring these costs, the rate of \$589 per day was not so “extravagant[] or disproportionate” as to constitute an impermissible penalty, in the court’s view.

The court also rejected the contractor’s argument that the government would have incurred the costs of travel, inspection, etc., regardless of when the work had been performed as “meritless.” In so doing, the court noted that “[i]t is reasonable to expect that delay, if it occurs, will require personnel to devote more time and resources to the project than they would have if the project had been completed on time.”

<sup>54</sup> See 48 C.F.R. §52.219-16(b) (“[T]he Contractor shall pay the Government liquidated damages in an amount stated.”); 48 C.F.R. §52.222-4(b) (“The Contracting Officer will assess liquidated damages ...”); 48 C.F.R. §52.211-11(a) (“[T]he Contractor shall ... pay ... liquidated damages ...”); 48 C.F.R. §52.211-12(a) (same).

<sup>55</sup> See, e.g., *DJ Mfg. Corp.*, 86 F.3d at 1132 (noting that the government withheld payment of \$663,266.92 to cover liquidated damages). Provision could also be made for forfeiture of bid guarantees or “earnest money” deposits. See, e.g., *H.T. Johnson v. All-State Constr., Inc.*, 329 F.3d 848 (Fed. Cir. 2003) (bid guarantee); *Young Assocs., Inc. v. United States*, 471 F.2d 618 (1973) (earnest money). The government also uses withholding of payments for other purposes. See, e.g., 48 C.F.R. §22.406-9(a) (withholding of payments for certain violations of contractual obligations to pay contractor employees prevailing wages and fringe benefits).

<sup>56</sup> *Kothe v. R.C. Taylor Trust*, 280 U.S. 224, 226 (1930). See also *United States v. Bethlehem Steel Co.*, 205 U.S. 105, 121 (1907) (“The amount is not so extraordinarily disproportionate to the damage” as to constitute a penalty).

<sup>57</sup> *DJ Mfg. Corp.*, 86 F.3d at 1134.

<sup>58</sup> See, e.g., *Mergentime Corp. v. Wash. Metro. Area Transp. Auth.*, 400 F. Supp. 2d 145 (D.D.C. 2005); *United States v. Kanter*, 137 F.2d 828 (8<sup>th</sup> Cir. 1943); *Appeal of Southwest Marine, Inc.*, 95-1 B.C.A. ¶27,519 (1995).

<sup>59</sup> See 48 C.F.R. §28.001.

(e.g., via surety, certified check, irrevocable letter of credit).<sup>60</sup> Where the FAR requires the use of bonds, standard contract terms generally reserve the government’s right to increase bond protection in the event of price increases and provide the bond’s amount, permissible forms of security, and when the bond is to be provided to the contracting agency, among other things.<sup>61</sup> The three most common types of federal procurement bonds are (1) bid bonds; (2) performance bonds; and (3) payment bonds. However, only two of these—performance and payment bonds—involve express terms of federal contracts and are discussed here.

**Performance Bonds.** A performance bond secures the “performance and fulfillment” of the contractor’s obligations under the contract.<sup>62</sup> The FAR generally requires construction contractors to provide the government with performance bonds when the value of their contract exceeds \$150,000.<sup>63</sup> For other contracts, the FAR generally restricts agencies from requiring performance bonds unless the agency determines such bonds are “necessary to protect the Government’s interest.”<sup>64</sup>

Standard contract terms provide the performance bond’s amount and reserve the government’s right to increase the bond amount in the event of price increases.<sup>65</sup> Under the FAR, performance bonds of construction contracts must generally be for 100% of the original contract plus any price increases permitted in the contract unless the contracting officer determines that a lesser amount would adequately protect the government’s interest.<sup>66</sup> It is the bond amount that the government can generally recover in the event a contractor fails to meet its performance obligations. More specifically, the bond’s security can be made available to the government to offset the costs of contract completion, which can include delays and finding a new contractor.<sup>67</sup> However, it is important to note that defenses to a contractor’s failure to perform its contractual obligations can preclude the government’s recovery on a performance bond.<sup>68</sup>

**Payment Bonds.** A payment bond generally ensures that a contractor pays subcontractors and other persons supplying labor or materials used in performing the contract.<sup>69</sup> As with performance bonds, the FAR generally requires payment bonds for construction contracts that exceed the simplified acquisition threshold.<sup>70</sup> Outside of the construction contract context, payment bonds are only required when performance bonds are required and when use of a bond is in the

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<sup>60</sup> See 48 C.F.R. §28.201(a).

<sup>61</sup> See 48 C.F.R. §§52.228-15, 52.228-16.

<sup>62</sup> 48 C.F.R. §28.001; see *United States v. Apex Roofing of Tallahassee, Inc.*, 49 F.3d 1509, 1513 n.10 (11<sup>th</sup> Cir. 1995) (observing that performance bonds guarantee that contractors complete projects in accordance with specifications).

<sup>63</sup> 48 C.F.R. §28.102-1(a). This requirement can be waived for work to be performed outside the United States when it is impracticable for the contractor to provide a performance bond, or as otherwise permitted by law. *Id.*

<sup>64</sup> 48 C.F.R. §§28.103-1(a); 48 C.F.R. §28.103-2(a). For example, a performance bond might be appropriate when “[g]overnment property or funds are to be provided to the contractor for use in performing the contract or as partial compensation (as in retention of salvaged material).” *Id.*

<sup>65</sup> 48 C.F.R. §52.228-15; 48 C.F.R. §52.228-16.

<sup>66</sup> 48 C.F.R. §28.102-2(b). In the case of non-construction contracts, the contracting office generally has discretion as to the bond amount. See 48 C.F.R. §52.228-16(b) (“The Contractor shall furnish a performance bond (Standard Form 1418) for the protection of the Government in an amount equal to \_\_\_\_ percent of the original contract price and a payment bond (Standard Form 1416) in an amount equal to \_\_\_\_ percent of the original contract price.”).

<sup>67</sup> See *Egyptian Am. Bank, S.A.E. v. United States*, 13 Cl. Ct. 337, 342 (1987).

<sup>68</sup> See *id.*

<sup>69</sup> 48 C.F.R. §28.001; see *United States v. Stern*, 13 F.3d 489, 491 n.1 (1<sup>st</sup> Cir. 1994) (“[P]ayment bonds’ ensure that those who furnish labor and materials for the [contracted] project will be paid.”).

<sup>70</sup> 48 C.F.R. §28.102-1(a). The waiver provisions applicable to performance bonds also apply to payment bonds.

government's interest.<sup>71</sup> Standard contract terms prescribe the payment bond's amount and reserve the government's right to increase the bond amount if the price paid by the government under the contract increases. Unless a contracting officer makes a written determination that such an amount is impracticable, payment bonds for construction contracts must generally be for 100% of the original contract price plus any price increases, and must be for no less than the performance bond.<sup>72</sup>

## Reduction or Withholding of Award or Incentive Fees

The FAR authorizes agencies to use contracts that provide for the payment of award or incentive fees in certain circumstances.<sup>73</sup> Such fees are paid as an additional allowance for profit in the case of fixed-price contracts; or paid separate from and in addition to the contractor's costs in the case of cost-reimbursement contracts.<sup>74</sup> Fees are intended to "motivate" the contractor to perform better under the contract, because the contractor can receive the fee only if it meets or exceeds certain conditions prescribed in the contract.<sup>75</sup>

Standard contract terms providing for the payment of award and incentive fees expressly grant the government certain discretion in determining whether the contractor receives a fee, and how much that fee is.<sup>76</sup> For example, one standard clause used in certain incentive fee contracts provides that "when the Contracting Officer considers that performance or cost indicates that the Contractor will not achieve [its] target the Government shall pay on the basis of *an appropriate lesser fee*."<sup>77</sup> Similarly, contracts involving award fees are required to include terms which specify that "the award amount and the award-fee determination methodology are *unilateral decisions made solely at the discretion of the Government*."<sup>78</sup> Such language makes reducing or withholding contractor fees one means by which the government could hold contractors accountable for deficiencies in performance under the contract.

The government can resort to reducing a contractor's fees only when the contract expressly provides for the payment of fees and grants the government discretion in determining the amount. (In contrast, the government's discretion to pay a reduced price, or not to pay certain costs, is more limited, and discussed elsewhere in this report. See "Equitable Reduction in Price or Other Compensation.") Also, while broad, the government's discretion is less than it might seem given the standard contract terms quoted above. Notably, although the FAR and the standard contract terms regarding award fees state that the amount of such fees is a "unilateral decision" of the contracting officer, the U.S. Court of Appeals for the Federal Circuit has held that this language does not shield award fee determinations from review under the CDA and potential reversal if "the discretion employed in making the [award fee] decision is abused, for example, if the

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<sup>71</sup> 48 C.F.R. §28.103-3(a).

<sup>72</sup> 48 C.F.R. §28.102-2(b)(2)(i) & (ii). For non-construction contracts, see 48 C.F.R. §52.228-16(b).

<sup>73</sup> See generally 48 C.F.R. Subpart 16.4 (Incentive Contracts).

<sup>74</sup> For more on the difference between fixed-price and cost-reimbursement contracts, see *supra* note 20.

<sup>75</sup> See, e.g., 48 C.F.R. §16.404 ("Award-fee provisions may be used in fixed-price contracts when the Government wishes to motivate a contractor and other incentives cannot be used ...").

<sup>76</sup> There are also provisions for the reduction or denial of fees in other, more specific contexts. See, e.g., National Defense Authorization Act for FY2012, P.L. 111-383, §834, 124 Stat. 4278-79 (January 7, 2011) (authorizing Department of Defense officials to deny or reduce award fees to certain contractors not subject to the jurisdiction of U.S. courts).

<sup>77</sup> 48 C.F.R. §52.216-10(c) (emphasis added). This clause is used with cost-plus-incentive-fee contracts.

<sup>78</sup> 48 C.F.R. §16.406(e)(3) (emphasis added).

decision was arbitrary and capricious.”<sup>79</sup> Similarly, if the contract provides a methodology for determining the award fee amount, that methodology could be found to constrain the discretion of the fee-determining official.<sup>80</sup> Note also that even if the government would be within its rights to reduce or withhold award or incentive fees, it is generally not required to reduce award fees, in particular,<sup>81</sup> and the amount of any reduction in award or incentive fees is generally within the contracting officer’s discretion.<sup>82</sup>

## Rejection of Nonconforming Supplies or Services

Standard contract terms generally give the government the right to inspect and test all supplies or services provided by the contractor “at all places and times,” including “in any event before acceptance.”<sup>83</sup> When the government observes the contractor has provided supplies or services which do not conform to the requirements of its contract with the government—and thus failed to perform as required under the contract—the FAR generally requires the contracting officer to reject the supplies or services.<sup>84</sup> However, standard contract provisions generally give the contractor the opportunity to correct or replace the nonconforming supplies or services within the previously agreed upon delivery or performance period.<sup>85</sup> Further, the federal courts have recognized that if goods are not in “substantial conformity” with contract requirements, contractors must be given a “reasonable time” to cure any defects.<sup>86</sup> In such instances, the contractor bears the burden of showing that it “had reasonable grounds to believe that [its] delivery would conform to contract requirements,” and any defects are minor.<sup>87</sup>

If the contractor provides nonconforming supplies or services on or after the agreed upon delivery or performance date, the FAR provides two exceptions to the general rule that the supplies or services must be rejected. First, if the nonconformance is “critical”<sup>88</sup> or “major,”<sup>89</sup> the contracting

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<sup>79</sup> *Burnside-Ott Aviation Training Center v. Dalton*, 107 F.3d 854, 859-60 (Fed. Cir. 1997). At the time of this decision, the FAR and standard terms in award fee contracts further provided that the contracting officer’s determination as to the fee amount was not subject to dispute under the CDA. *Id.* at 856. However, that language has since been deleted in part because the Federal Circuit found that it was not enforceable. *Id.* at 859 (“[T]he CDA trumps a contract provision inserted by the parties that purports to divest the Board of jurisdiction....”).

<sup>80</sup> *See Kellogg Brown & Root Servs., Inc. v. United States*, 109 Fed. Cl. 288, 292, 298 (2013) (rejecting the government’s motion to dismiss the plaintiff’s claim that the government had breached the contract by denying it any award fees after having previously given the contractor “consistently high ratings for its overall and technical performance” because the contract included both language stating that the amount of the fee was a unilateral decision of the contracting officer and language prescribing how award fees were to be determined, and the relationship between the two provisions was unclear).

<sup>81</sup> *See* 48 C.F.R. §16.406(e)(3). The standard contract clause as to incentive fees, previously quoted, states that the contracting officer “shall pay ... an appropriate lesser fee” if the contractor does not achieve its target. However, the government could potentially waive its right to reduce an incentive fee notwithstanding this language.

<sup>82</sup> *See id.*; 48 C.F.R. §52.216-10(c). *But see supra* note 76.

<sup>83</sup> *See* 48 C.F.R. §§52.246-2 to 48 C.F.R. §52.246-8.

<sup>84</sup> 48 C.F.R. §46.407(a); 48 C.F.R. §46.102(e) (“Agencies shall ensure that ... [n]onconforming supplies or services are rejected, except as otherwise provided in [48 C.F.R. §]46.407.”).

<sup>85</sup> 48 CFR §46.407(b). *See* 48 C.F.R. §§52.246-2 to 48 C.F.R. §52.246-8.

<sup>86</sup> *Radiation Tech., Inc., v. United States*, 366 F.2d 1003, 1003 (Cl. Ct. 1966).

<sup>87</sup> *Id.*; *Universal Shelters of Am., Inc. v. United States*, 87 Fed. Cl. 127, 144 (Fed. Cl. 2009).

<sup>88</sup> A “critical nonconformance” is one likely to result in unsafe or hazardous conditions for the person using, maintaining, or depending on the supplies or services, or one that is likely to “prevent performance of a vital agency mission.” 48 C.F.R. §46.101.

<sup>89</sup> A “major nonconformance” is defined as one likely to end with failure of the supplies or services, or to “materially reduce the usability of the supplies or services for their intended purposes.” *Id.*

officer can accept or conditionally accept<sup>90</sup> the supplies or services if doing so would be in the best interest of the Government.<sup>91</sup> Second, if the nonconformance is minor,<sup>92</sup> the government can choose to accept or reject the supplies or services.<sup>93</sup> When the government accepts nonconforming supplies or services, standard contract terms generally grant the government the right to receive the supplies or services at reduced prices. See “Equitable Reduction in Price or Other Consideration.” For example, when the government accepts supplies or services with critical or major nonconformances, the contracting officer *must* modify the contract to provide the government with a price reduction or other consideration.<sup>94</sup> If the government conditionally accepts the goods or services, then the price reduction or consideration must sufficiently cover the estimated cost of correcting any deficiencies.<sup>95</sup> However, when the government accepts supplies or services with “minor” nonconformances, the contract does not need to be modified unless it seems as though the contractor’s savings in providing the nonconforming goods or services will exceed the cost to the government of accepting such goods or services.<sup>96</sup>

If the government rejects nonconforming goods, standard contract terms generally give it the right to replace or correct any deficiencies in supplies or services “by contract or otherwise” and charge the costs of replacement or correction to the contractor (see “Correction or Re-Work at the Contractor’s Expense”), or to terminate the contract for default.<sup>97</sup>

## Re-procurement at the Contractor’s Expense

In certain contracts, the FAR requires the use of terms that would permit the government to re-procure the supplies or services in question at the contractor’s expense if the contractor fails to perform as required. The most notable of these are the standard termination for default clauses used in fixed-price contracts, which are the focus of discussion in this section.<sup>98</sup> See also “Termination for Default.” However, other standard contract clauses similarly provide for deficient work to be re-done at the contractor’s expense in a manner analogous (although not necessarily identical) to that in the termination clauses.<sup>99</sup> The government could also be entitled to

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<sup>90</sup> If the government conditionally accepts the nonconforming supplies or services, the contractor is required to correct or otherwise complete the nonconforming supplies or services by a specified date. *Id.*

<sup>91</sup> 48 C.F.R. §46.407(c)(1). In determining whether acceptance of supplies or services that majorly or critically fail to conform to contract requirements is in the best interest of the government, contracting officers must consider advice regarding the item’s safety and ability to perform its intended function and information on the nature of the nonconformance, among other factors specified in the FAR. *Id.*

<sup>92</sup> A “minor nonconformance” is defined as one unlikely “to materially reduce the usability of the supplies or services for their intended purpose,” or one that “is a departure from established standards having little bearing on the effective use or operation of the supplies or services.” 48 C.F.R. §46.101.

<sup>93</sup> 48 C.F.R. §46.407(d).

<sup>94</sup> 48 C.F.R. §46.407(f).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> 48 C.F.R. §§52.246-2 to 48 C.F.R. §52.246-8.

<sup>98</sup> See 48 C.F.R. §52.249-7(c) (Termination (Fixed-Price Architect-Engineer)); 48 C.F.R. §52.249-8 (Default (Fixed-Price Supply and Service)); 48 C.F.R. §52.249-9(b) (Default (Fixed-Price Research and Development)); 48 C.F.R. §52.249-10 (Default (Fixed-Price Construction)).

<sup>99</sup> See e.g., 48 C.F.R. §52.246-2(h)(1) (Inspection of Supplies—Fixed Price); 48 C.F.R. §52.246-3(g)(1)(i) (Inspection of Supplies—Cost-Reimbursement); 48 C.F.R. §52.246-4(f)(1) (Inspection of Services—Fixed Price); 48 C.F.R. §52.246-5(e)(1) (Inspection of Services—Cost-Reimbursement); 48 C.F.R. §52.246-6(g)(1)(i) (Inspection—Time-and-Material and Labor-Hour); 48 C.F.R. §52.246-8(g)(1)(i) (Inspection of Research and Development—Cost-Reimbursement). See “Correction or Re-Work at the Contractor’s Expense.”

recover the costs of its administrative expenses in re-procuring the defaulted work, separate and apart from the costs of re-procurement in the case of default.<sup>100</sup>

Agency contracting officers have substantial discretion when awarding re-procurement contracts after terminating a contract for default, and generally need not comply with the FAR's solicitation, competition, and related requirements in doing so. Indeed, Section 49.402-6 of the FAR expressly provides that the contracting officer may use "any terms and acquisition methods deemed appropriate for the repurchase" after a termination for default, provided that competition is obtained "to the maximum extent practicable."<sup>101</sup> In other words, the contracting officer's conduct in selecting re-procurement vendors need only be reasonable; it need not involve the same source-selection methods or contract types as the defaulted contract.<sup>102</sup> Note also that the terminated contractor could potentially be awarded the re-procurement contract, although not at a higher price than that provided for in the defaulted contract.<sup>103</sup> At one time, terminated contractors were seen to be ineligible for re-procurement contracts on the grounds that they could not be considered responsible bidders on these contracts.<sup>104</sup> However, this view began to change in 1976, partly because of concerns that precluding a defaulted contractor from bidding or offering constitutes an improper premature responsibility determination (i.e., one made before determining to whom to award the contract).<sup>105</sup> In practice, though, terminated contractors are generally at a disadvantage when competing for re-procurement contracts because their recent default on a contract for the same or similar supplies or services suggests they are unable or unwilling to perform the proposed contract.<sup>106</sup>

For the contractor to be liable for the costs of re-procurement, the supplies or services obtained must be the "same" or "similar" to those under the defaulted contract.<sup>107</sup> They need not be identical,<sup>108</sup> but there should not be any substantial alterations in their function, use, design, or mechanical characteristics.<sup>109</sup> Also, the government has a duty to mitigate its damages (e.g., by conducting the re-procurement in a timely fashion).<sup>110</sup> Because re-procurement at the contractor's expense represents a claim by the government, the government generally has the initial burden of "demonstrating that it acted reasonably and in accordance with the procedures set out in the

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<sup>100</sup> See, e.g., 48 C.F.R. §49.402-7(b); Appeal of Birken Mfg. Co., 90-2 B.C.A. ¶22,845 (1990); Appeal of Lewis Mgmt. & Serv. Co., 85-3 B.C.A. ¶18,416 (1985).

<sup>101</sup> 48 C.F.R. §49.402-6(b). See also Performance Textiles, Inc., B-256895 (1994) ("Generally, in the case of a reprocurement after default, the statutes and regulations governing ... federal procurements are not strictly applicable.")

<sup>102</sup> See, e.g., DCX, Inc., B-232692 (1989) (noting that the Government Accountability Office (GAO) will review challenged re-procurements for "reasonableness under the circumstances"); Hyspan Precision Prods., 76-2 B.C.A. ¶11,922 (1976) (declining to differentiate between a requirements contract and an indefinite-quantity contract); Appeal of Weinberg, 64 B.C.A. ¶4,383 (1964) (contracting by negotiation permissible, sealed bidding not required).

<sup>103</sup> See, e.g., Las Energy Corp., B-242733 (May 21, 1991); Preston-Brady Co., Inc., B-211749 (October 24, 1983).

<sup>104</sup> See Appeal of Southern Supply Co., ASBCA No. 1413 (1953).

<sup>105</sup> See Appeal of Venice Maid Co., Inc., 76-2 B.C.A. ¶12,045 (1976) (suggesting that the government could have failed to mitigate its damages by refusing to contract with the defaulted contractor); W.M. Grace, Inc., B-197192 (January 10, 1980) (concerns about premature responsibility determinations).

<sup>106</sup> See, e.g., Colonial Press Int'l, Inc., B-403632 (October 18, 2010) (defaulted contractor not entitled to contest a government decision to exclude it from bidding on the grounds of nonresponsibility).

<sup>107</sup> See, e.g., Cascade Pacific Int'l v. United States, 773 F.2d 287, 293-94 (Fed. Cir. 1985); Appeal of Solar Labs., Inc., 76-2 B.C.A. ¶12,115 (1976).

<sup>108</sup> See, e.g., Appeal of Puroflow Corp., 93-3 B.C.A. ¶26,191 (1993).

<sup>109</sup> See, e.g., Appeal of B&M Constr., Inc., 93-1 B.C.A. ¶25,431 (1992); Appeal of Accutherm, Inc., 83-1 B.C.A. ¶16,307 (1983).

<sup>110</sup> See, e.g., Appeal of AAR Allen Aircraft Corp., 88-2 B.C.A. ¶20,581 (1988).



contract for calculating damages.”<sup>111</sup> Once that showing is made, the burden then shifts to the contractor to show, for example, that differences between the supplies or services re-procured and those under the original contract caused unreasonable expense.<sup>112</sup>

## Termination for Default

The FAR generally requires that agencies incorporate terms in their contracts which give the government the right to terminate the contract for default (also known as “cause”) if the contractor fails to (1) perform within the time specified; (2) make progress, so as to endanger performance; or (3) perform other requirements of the contract.<sup>113</sup> Indeed, in some cases, a right to terminate for default will be “read into”—or treated as an implied term of—contracts that do not expressly provide for it, and the common law of contracts generally permits one party to a contract to cease performance if the other party fails to perform or repudiates the contract.<sup>114</sup>

The exact terms can vary depending upon the type of the contract (i.e., fixed-price or cost-reimbursement) and the specific supplies or services being procured.<sup>115</sup> However, in addition to specifying that the government has the right to terminate the contract for default if the contractor fails to perform in specified ways, the contract generally provides that

- the termination may be total (encompassing all the work remaining to be performed on the contract), or partial (encompassing only some of the remaining work);<sup>116</sup>
- the termination may be based on actual or anticipated delinquencies;<sup>117</sup>
- the government’s liability in the event of termination may be limited to the contract price for any completed work the government has accepted;<sup>118</sup>
- any termination for default found to be improper will be treated as a termination for convenience, thereby generally ensuring that the government avoids liability for breach of contract;<sup>119</sup> and

<sup>111</sup> *Seaboard Lumber Co. v. United States*, 48 Fed. Cl. 814, 819 (2001).

<sup>112</sup> *See, e.g., Appeal of Arctic Corner, Inc.*, 94-1 B.C.A. ¶26,317 (1993); *Appeal of Skiatron Elec. & Television Corp.*, 65-2 B.C.A. ¶5,053 (1965).

<sup>113</sup> 48 C.F.R. §52.249-8(a)(1)(i)-(iii). Derelictions on the part of a subcontractor could also result in the termination of the prime contractor if the contractor has assumed an absolute obligation to perform, and the contract makes no provisions for excusability. *See, e.g., Appeal of Kemmel, Inc.*, 59-1 B.C.A. ¶2,235 (1959).

<sup>114</sup> *See Sabre Eng’g Corp.*, 81-2 B.C.A. ¶15,310 (1981) (termination for default provisions read into contract); Joseph M. Perillo, CALAMARI & PERILLO ON CONTRACTS §§12.1-12.10 (5<sup>th</sup> ed. 2003) (termination at common law).

<sup>115</sup> *See* 48 C.F.R. §52.212-4(m) (Contract Terms and Conditions—Commercial Items); 48 C.F.R. §52.249-6 (Termination (Cost-Reimbursement)); 48 C.F.R. §52.249-7 (Termination (Fixed-Price Architect-Engineer)); 48 C.F.R. §249-8 (Default (Fixed-Price Supply and Service)); 48 C.F.R. §52.249-9(a) (Default (Fixed-Price Research and Development)); 48 C.F.R. §52.249-10 (Default (Fixed-Price (Construction))). For more on fixed-price and cost-reimbursement contracts, see *supra* note 20.

<sup>116</sup> *See* 48 C.F.R. §52.212-4(m); 48 C.F.R. §52.249-6(a)(2); 48 C.F.R. §52.249-7(a); 48 C.F.R. §249-8(a)(1); 48 C.F.R. §52.249-9(a)(i)-(iii); 48 C.F.R. §52.249-10(a).

<sup>117</sup> *See* sources cited, *supra* note 116.

<sup>118</sup> *See* 48 C.F.R. §52.212-4(m); 48 C.F.R. §52.249-7(b); 48 C.F.R. §52.249-8(f); 48 C.F.R. §52.249-9(f).

<sup>119</sup> *See* 48 C.F.R. §52.212-4(m); 48 C.F.R. §52.249-7(d); 48 C.F.R. §52.249-8(g); 48 C.F.R. §52.249-9(g); 48 C.F.R. §52.249-10(c). The government’s liability in the event of a termination for convenience is greater than in the event of a termination for default, but less than in the case of breach. *See* CRS Report R43055, *Terminating Contracts for the Government’s Convenience: Answers to Frequently Asked Questions*, by (name redacted), (name redacted), and (name redacted)

- the contractor may be liable to the government for liquidated damages, as well as the excess costs of re-procurement and certain other costs.<sup>120</sup>

Also, although not expressly provided for in the contract, any termination for default could affect the contractor's ability to receive future contracts because the FAR requires that terminations for default be reported in the Federal Awardee Performance and Integrity Information System (FAPIIS),<sup>121</sup> and contracting officers must generally check FAPIIS when making responsibility determinations prior to the award of a contract.<sup>122</sup> See "Responsibility Determinations." In addition, delinquent performance resulting in a termination for default could serve as grounds for exclusion from contracting with the government. See "Debarment and Suspension."

The government has discretion as to whether to terminate a contract in the event of a default. Termination is not automatic. In fact, the FAR requires that any termination be "in the Government's interest."<sup>123</sup> It also requires that contracting officers consider certain factors—such as the "specific failure of the contractor and the excuses for the failure"—when determining whether to terminate,<sup>124</sup> although a termination for default is not necessarily invalid if an agency neglected to consider one or more of these factors.<sup>125</sup> The default must also be substantial, not *de minimis*.<sup>126</sup> In addition, the default must be one that is not excused, and has not been waived by the government (e.g., by permitting the contractor to perform after the due date).<sup>127</sup> Further, the termination must generally be effectuated pursuant to the procedures set forth in the contract, which may require that the contractor receive written notice of the default.<sup>128</sup> The contract could also expressly limit the scope of the government's recovery in certain cases.<sup>129</sup> The government has the burden of proving that termination was proper,<sup>130</sup> but the contractor has the burden of proving excuse or waiver.<sup>131</sup>

## Other Actions Not Provided for as Contract Terms

Federal statutes and regulations also require or authorize the government to take certain actions in response to contractors' failure to perform or other misconduct that are not expressly provided for as terms of a federal contract. In some cases, the government may take these actions on its own behalf, without resort to judicial proceedings, as is the case with debarment and suspension and

<sup>120</sup> See 48 C.F.R. §52.212-4(m); 48 C.F.R. §52.249-7(c); 48 C.F.R. §52.249-8(b); 48 C.F.R. §52.249-9(b); 48 C.F.R. §52.249-10(a).

<sup>121</sup> See 48 C.F.R. §42.1503(f)(1)(iii).

<sup>122</sup> See 48 C.F.R. §9.105-1(c).

<sup>123</sup> See 48 C.F.R. §49.101(b).

<sup>124</sup> See 48 C.F.R. §49.402-3(f)(2). Other factors to be considered are prescribed in the FAR. See 48 C.F.R. §49.402-3(f).

<sup>125</sup> See, e.g., Appeal of Metroplex Indus. Constructors, Inc., 89-3 B.C.A. ¶22,174 (1989); Appeal of Envir. Devices, Inc., 93-3 B.C.A. ¶26,138 (1993); Appeal of William A. Hulett, 93-1 B.C.A. ¶25,389 (1992).

<sup>126</sup> See, e.g., Appeal of Davis Contracting, Inc., 80-1 B.C.A. ¶14,422 (1980).

<sup>127</sup> See, e.g., Logics Inc., 97-2 B.C.A. ¶29,125 (1997) (waiver); Appeal of Western Contracting Corp., 82-1 B.C.A. ¶15,486 (1981) (excuse).

<sup>128</sup> See, e.g., 48 C.F.R. §52.249-8(a)(1).

<sup>129</sup> See, e.g., 48 C.F.R. §52.249-8(d) (limiting liability when failure to perform is caused by a subcontractor's default).

<sup>130</sup> See, e.g., Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 764-65 (Fed. Cir. 1987). However, the contractor's failure to make timely delivery of agreed-upon supplies establishes a prima facie case of default. *Id.*

<sup>131</sup> See, e.g., DCX, Inc. v. Perry, 79 F.3d 132, 134 (Fed. Cir. 1996) (burden of proof on excuse), *cert. denied*, 519 U.S. 992 (1996); Appeal of Phoenix Petroleum Co., 96-2 B.C.A. ¶28,284 (1996) (burden of proof on waiver).

consideration of agency evaluations of past performance in source-selection decisions. In other cases, the government must seek sanctions or damages through the courts, as is the case with suits under the civil provisions of the False Claims Act. In either case, the government's recourse is generally limited by the controlling legal authority (e.g., suspension under the FAR must be on one of the grounds specified in the FAR<sup>132</sup>). Agency actions could also be challenged on the grounds that the action deprives the contractor of certain contractual or other rights, or is arbitrary and capricious.<sup>133</sup> In addition, in some cases, contractors are entitled to due process in the form of notice and an opportunity for a hearing before being subjected to agency action or sanctions.<sup>134</sup>

## Past Performance Evaluations in Source-Selection Decisions

The FAR generally requires agencies to evaluate and document contractors' performance on all contracts or orders whose value exceeds the simplified acquisition threshold (typically \$150,000) "at least annually and at the time the work under a contract or order is completed."<sup>135</sup> The FAR also generally requires agencies to consider contractors' past performance when making source-selection decisions in negotiated procurements whose value exceeds the simplified acquisition threshold.<sup>136</sup> Taken together, these two requirements make negative past performance evaluations one mechanism for holding contractors accountable for poor performance, because deficiencies in performing past or current contracts could put the contractor at a disadvantage in future awards.

The FAR prescribes how agencies are to compile and post evaluations of contractors' performance, including the timing of evaluations, the factors to be evaluated, and the terms to be used in describing performance (e.g., exceptional, satisfactory, marginal).<sup>137</sup> Broadly speaking, the FAR contemplates contracting officers (or other agency personnel who have been delegated this responsibility) evaluating performance as to (1) technical factors/quality; (2) cost control; (3) timeliness; (4) business relations; (5) subcontracting with small businesses; and (6) other applicable factors (e.g., tax delinquency).<sup>138</sup> Once the evaluation is complete, it is furnished to the contractor, who has "up to 14 calendar days ... to submit comments, rebutting statements, or additional information."<sup>139</sup> Disagreements between the contractor and the contracting officer as to the evaluation are reviewed "at a level above the contracting officer."<sup>140</sup> However, the "ultimate conclusion on the performance evaluation is a decision of the contracting agency,"<sup>141</sup> and

<sup>132</sup> See 48 C.F.R. §9.406-2 (grounds for debarment). See also 48 C.F.R. §9.407-2 (grounds for suspension).

<sup>133</sup> See, e.g., *Lion Raisins, Inc. v. United States*, 51 Fed. Cl. 238 (2001) (finding that the U.S. Department of Agriculture's (USDA's) suspension of a contractor for falsifying raisin certifications was arbitrary and capricious, given that the USDA knew of the contractor's conduct when making five prior determinations that the contractor was affirmatively responsible for purposes of the award of a federal contract).

<sup>134</sup> See *infra* notes 186-189.

<sup>135</sup> 48 C.F.R. §42.1502(b).

<sup>136</sup> 48 C.F.R. §15.304(c)(3)(i) & (iii).

<sup>137</sup> See generally 48 C.F.R. Subpart 42.1502.

<sup>138</sup> 48 C.F.R. §42.1503(b)(2)(i)-(vi).

<sup>139</sup> 48 C.F.R. §42.1503(d). Prior to May 2014, contractors had "a minimum of 30 days" to submit such information. However, the FAR was amended in May 2014 to shorten this period, in conformity with P.L. 112-81, §806, 125 Stat. 1487 (December 31, 2011) and P.L. 112-239, §853, 126 Stat. 1856-57 (January 2, 2013).

<sup>140</sup> 48 C.F.R. §42.1503(d).

<sup>141</sup> *Id.* Some contracts contain language to the effect that the final performance rating is "the unilateral determination of the reviewing official" and not subject to dispute or appeal beyond the agency. See, e.g., *Colonna's Shipyard, Inc.*, 2010-2 B.C.A. ¶34,494 (2010). However, similar language has been found to be unenforceable when used in other contexts. See, e.g., *Burnside-Ott Aviation Training Center v. Dalton*, 107 F.3d 854 (Fed. Cir. 1997) (award fees); *Puyallup Tribe of Indians*, 88-2 B.C.A. ¶20,640 (waiver of sovereign immunity), *aff'd* F.2d 1096 (Fed. Cir. 1989).

contractors' ability to challenge allegedly erroneous or biased evaluations outside the agency is limited. The U.S. Court of Federal Claims and the boards of contract appeals now generally exercise jurisdiction over claims under the CDA as to contractors' performance evaluations,<sup>142</sup> but the court, in particular, has taken the view that it lacks the authority to order an agency to rescind a poor evaluation or to revise its evaluation.<sup>143</sup>

The FAR similarly prescribes agencies' consideration of contractors' past performance in "negotiated procurements," or procurements wherein the agency selects the vendor that represents the "best value" for the government after discussions with offerors.<sup>144</sup> In addition to requiring that past performance generally be considered in negotiated procurements whose value exceeds the simplified acquisition threshold,<sup>145</sup> the FAR requires that agencies' evaluation of past performance be in accordance with the terms of the solicitation, and that contractors' performance in subcontracting with "small disadvantaged businesses" be considered.<sup>146</sup> However, beyond these requirements, the FAR gives agencies broad discretion in their use of the past performance evaluation factor. In particular, agencies may determine (1) what constitutes "past performance" for purposes of the procurement;<sup>147</sup> (2) what performances qualify as recent and relevant for purposes of the procurement;<sup>148</sup> (3) whose performances are considered when past performance is evaluated;<sup>149</sup> (4) what role the past-performance factor plays in relation to other evaluation factors;<sup>150</sup> and (5) the sources the agency consults when assessing past performance.<sup>151</sup> While contractors may protest a procuring activity's evaluation of their own past performance or that of the winning offeror in making source-selection decisions, the agency's determination will typically be afforded substantial deference.<sup>152</sup> This generally means that, to succeed, the protester must show that the evaluation was unreasonable, inadequately documented, or not in accordance with the law or the terms of the solicitation.<sup>153</sup>

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<sup>142</sup> This was not the case prior to 2004, as discussed in CRS Report R41562, *Evaluating the "Past Performance" of Federal Contractors: Legal Requirements and Issues*, by (name redacted).

<sup>143</sup> See *Todd Constr., L.P. v. United States*, 88 Fed. Cl. 235 (2009).

<sup>144</sup> See 48 C.F.R. §15.101 (best value in negotiated procurements); 48 C.F.R. §2.101 (defining "best value").

<sup>145</sup> In procurements whose value is at or below the simplified acquisition threshold, agencies must consider *either* past performance *or* some other non-cost evaluation factor. See 48 C.F.R. §15.304(c)(2).

<sup>146</sup> 48 C.F.R. §15.305(a)(2)(v); 48 C.F.R. §15.304(d).

<sup>147</sup> See 48 C.F.R. §15.304(d) (requiring only that the agency describe the "general approach for evaluating past performance information" in the solicitation).

<sup>148</sup> See 48 C.F.R. §15.305(a)(2) (requiring that the "currency" and "relevance" of past performance information be considered, but not prescribing what is meant by either of those terms).

<sup>149</sup> Agencies are encouraged (but not required) to consider past performance information regarding predecessor companies, key personnel who have relevant experience, or subcontractors that will perform "major or critical" aspects of the work. 48 C.F.R. §15.305(a)(2)(iv).

<sup>150</sup> Agencies are required to consider cost/price and the quality of the product or service, along with past performance, in all negotiated procurements. 48 C.F.R. §15.304(c)(1) (price/cost); 48 C.F.R. §15.304(c)(2) (quality of the product or service). However, depending upon its requirements, the agency may also consider a range of other factors.

<sup>151</sup> See, e.g., *Seattle Security Servs., Inc. v. United States*, 45 Fed. Cl. 560, 568 (1999).

<sup>152</sup> See, e.g., *Dorado Servs., B-401930.3* (June 7, 2010).

<sup>153</sup> See, e.g., *JSW Maintenance, Inc., B-400581.5* (September 8, 2009).

## Responsibility Determinations Prior to Award of a Contract

The FAR generally requires agencies to determine that a prospective vendor is “affirmatively responsible” prior to the award of a contract.<sup>154</sup> As used here, “responsible” is a term of art, indicating that the contractor meets certain “general standards” which apply regardless of whether they are expressly incorporated into the solicitation. These standards require that contractors (1) have adequate financial resources; (2) are able to comply with the delivery or performance schedule; (3) have a satisfactory performance record; (4) have a satisfactory record of integrity and business ethics; (5) have the necessary management, experience, and technical skills; (6) have the necessary equipment and facilities; and (7) are “otherwise qualified and eligible” to receive an award under applicable laws and regulations.<sup>155</sup> Several of these standards serve to hold contractors accountable for failure to perform under prior contracts, as well as other misconduct. For example, performance under prior contracts is generally considered in assessing whether vendors have a satisfactory performance record,<sup>156</sup> and criminal violations may be considered when assessing whether they have a satisfactory record of integrity and business ethics.<sup>157</sup>

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<sup>154</sup> See, e.g., 48 C.F.R. §9.103(b) (“No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility.”). The requirements as to responsibility determinations generally apply to “all proposed contracts with any prospective contractor” located in the United States, its outlying areas, or elsewhere, unless application of these requirements would be “inconsistent with the laws or customs where the contractor is located.” 48 C.F.R. §9.102(a)(1)-(2). However, certain contracts are exempted. See 48 C.F.R. §9.102(b)(1)-(3).

<sup>155</sup> 48 C.F.R. §9.104-1(a)-(g). The seventh of these standards—that the vendor is “otherwise qualified and eligible”—encompasses the so-called collateral requirements, or other provisions of law which ensure that federal procurement promotes socioeconomic goals. See CRS Report R40633, *Responsibility Determinations Under the Federal Acquisition Regulation: Legal Standards and Procedures*, by (name redacted).

<sup>156</sup> In fact, under the FAR, a “prospective contractor that is or recently has been seriously deficient in contract performance shall be presumed to be nonresponsible, unless the contracting officer determines that the circumstances were ... beyond the contractor’s control, or that the contractor has taken appropriate corrective action.” 48 C.F.R. §9.104-3(b).

<sup>157</sup> See, e.g., Traffic Moving Sys., Comp. Gen. B-248572 (September 3, 1992) (officers’ criminal convictions); Standard Tank Cleaning Corp., Comp. Gen. B-245364 (January 2, 1992) (repeated violations of state law); Drexel Indus., Inc., Comp. Gen. B-189344 (December 6, 1977) (integrity offenses that are grounds for suspension under the FAR); Greenwood’s Transfer & Storage Co., Inc., Comp. Gen. B-186438 (August 17, 1976) (pending debarment).

Responsibility determinations are made just before a vendor is awarded a contract. In making these determinations, contracting officers are required to consider information in the Federal Awardee Performance and Integrity Information System (FAPIIS), “including information that is linked to FAPIIS such as from the Excluded Parties List System (EPLS) and the Past Performance Information Retrieval System (PPIRS),” and other relevant past performance information.<sup>158</sup> Contracting officers are also encouraged to consider other sources of information, including “verifiable knowledge of personnel within the contracting office, audit offices, contract administration offices, and other contracting offices.”<sup>159</sup> However, contracting officers generally have broad discretion as to the conclusions they draw based on the information they consider.<sup>160</sup> A determination is not unreasonable merely because another contracting officer made a different determination after considering the same information.<sup>161</sup>

Contractors are generally not entitled to notice or an opportunity for a hearing prior to being determined nonresponsible.<sup>162</sup> If challenged, contracting officers’ determinations as to vendors’ responsibility are generally afforded substantial deference on the grounds that these determinations are committed to agency discretion by law,<sup>163</sup> and the procuring agencies “must bear the brunt of any difficulties experienced during performance.”<sup>164</sup> This generally means that the party challenging a responsibility determination must show that the determination lacked “any reasonable basis,” or was arbitrary or made in bad

### Recent Developments as to Responsibility Determinations

One recent decision by the Government Accountability Office (GAO) highlights that, while contracting officers’ determinations regarding vendors’ responsibility are afforded substantial deference, such determinations may be successfully challenged if the record indicates that the contracting officer “lacked the facts necessary to make an informed decision.” This case, *FCI Federal, Inc.*, B-408558.4, B-408558.5, B-408558.6 (Oct. 20, 2014), involved a challenge to a determination that a subsidiary of USIS LLC was affirmatively responsible. This determination was made shortly after the Department of Justice had intervened in a False Claims Act suit (subsequently settled) charging USIS LLC with falsifying background checks it performed for the Office of Personnel Management.

The contracting officer who determined that the subsidiary was responsible was aware of USIS LLC’s alleged fraud from media reports, but failed to seek any further information about the allegations. According to the GAO, given the circumstances of the case, this failure rendered the responsibility determination unreasonable. The GAO further noted that the contracting officer in question was apparently unaware that a nonresponsibility determination could be made even if the contractor had not been excluded, or of the rule that vendors are to be presumed nonresponsible in the absence of information “clearly indicating” they are affirmatively responsible. See 48 C.F.R. §9.103(b).

<sup>158</sup> 48 C.F.R. §9.105-1(c). FAPIIS is required to contain brief descriptions of civil, criminal, and administrative proceedings involving federal contracts that result in a conviction or finding of fault, as well as terminations for default, administrative agreements, and nonresponsibility determinations relating to federal contracts, within the past five years for entities holding a federal contract or grant worth \$500,000 or more. See Duncan Hunter National Defense Authorization Act for FY2009, P.L. 110-417, §872(b)(1) & (c), 122 Stat. 4356 (October 14, 2008).

<sup>159</sup> 48 C.F.R. §9.105-1(c)(1)-(5) (internal citations omitted).

<sup>160</sup> See, e.g., *Carl Weissman & Sons, Inc.*, Comp. Gen. B-190304 (February 17, 1978).

<sup>161</sup> See, e.g., *MCI Constructors*, Comp. Gen. B-240655 (November 27, 1990); *S.A.F.E. Exp. Corp.*, Comp. Gen. B-151834 (April 22, 1983).

<sup>162</sup> Contractors may be entitled to written notice of nonresponsibility determinations when dealing with specific agencies. See, e.g., 48 C.F.R. §509.105-2(a) (General Services Administration). See also CRS Report R40633, *Responsibility Determinations Under the Federal Acquisition Regulation: Legal Standards and Procedures*, by (name redacted) (discussing due process issues related to nonresponsibility determinations based on concerns about contractors’ integrity).

<sup>163</sup> See, e.g., *FN Mfg., Inc.*, B-297172, B-297172.2 (December 1, 2005); *Bernstein & Kleinfeld*, 39 Comp. Gen. 705, B-142055 (April 12, 1960).

<sup>164</sup> See, e.g., *Herbert Bauer HmbH & Co.*, B-225500.3 (August 10, 1987).

faith.<sup>165</sup> However, a contractor could have more success in its challenge if the contractor can show that the agency has used the responsibility determination process to effectively exclude the vendor without the procedural protections associated with suspension and debarment. This could result if an agency based a nonresponsibility determination solely upon an earlier nonresponsibility determination;<sup>166</sup> made repeated determinations of nonresponsibility based on the same grounds;<sup>167</sup> or made statements or engaged in other conduct evidencing a refusal to do business with the vendor.<sup>168</sup>

## Debarment and Suspension

Multiple provisions of federal law provide for the debarment or suspension (collectively known as exclusion) of federal contractors.<sup>169</sup> *Debarment* lasts for a prescribed period of time (often three years),<sup>170</sup> while *suspension* is temporary, pending an investigation of the vendor's conduct or legal proceedings.<sup>171</sup> Contractors that are excluded are generally barred from receiving new contracts—or new orders or other work under existing contracts—from an executive agency for the duration of the exclusion.<sup>172</sup> They are also barred from serving as individual sureties, or as subcontractors on subcontracts to which the government must consent.<sup>173</sup> Exclusions may encompass “affiliates” of the principal contractor,<sup>174</sup> and exclusion-worthy conduct may be imputed from a contractor's employees or other associates to the contractor, and vice versa.<sup>175</sup>

Various statutes require or authorize debarment for specified violations of the statute (depending on the statute involved, covered violations may pertain to contract performance or other matters). Examples include (1) convictions for certain violations of the Clean Air Act or Clean Water Act;<sup>176</sup> (2) failures to pay locally prevailing wages under the Davis-Bacon Act, Service Contract Act, or Walsh-Healy Act;<sup>177</sup> (3) misrepresentations of size or status for purposes of small business

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<sup>165</sup> See, e.g., *Data Integrators, Inc.*, B-410517 (December 29, 2014) (“Our Office generally will not disturb a nonresponsibility determination unless a protester can show either that the procuring agency had no reasonable basis for the determination or that it acted in bad faith.”); *Blocacor, LDA*, B-282122.3 (August 2, 1999) (similar).

<sup>166</sup> See, e.g., *Old Dominion Dairy Prods., Inc. v. Sec’y of Def.*, 631 F.2d 953, 955 (D.C. Cir. 1980). *Administrator, Gen. Servs. Admin.*, 43 Comp. Gen. 140, B-151269 (August 8, 1963).

<sup>167</sup> See, e.g., *Shermco Indus., Inc. v. Sec’y of the Air Force*, 584 F. Supp. 76 (N.D. Tex. 1984); *Becker & Schwindenhammer, GmbH*, 87-1 CPD 235, B-225396 (March 2, 1987).

<sup>168</sup> See, e.g., *Phillips v. Mabus*, 894 F. Supp. 2d 71 (D.D.C. 2012); *Trifax Corp. v. Dist. of Columbia*, 314 F.3d 641, 644 (D.C. Cir. 2003); *Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594 (D.C. 1993); *Leslie & Elliott Co. v. Garrett*, 732 F. Supp. 191 (D.D.C. 1990); *Art-Metal USA, Inc. v. Solomon*, 473 F. Supp. 1 (D.D.C. 1978); *TLT Constr. Co. v. United States*, 50 Fed. Cl. 212, 215 (Fed. Cl. 2012).

<sup>169</sup> For more on the various grounds of debarment and suspension in federal statute and the FAR, see CRS Report RL34753, *Procurement Debarment and Suspension of Government Contractors: Legal Overview*, by (name redacted).

<sup>170</sup> 48 C.F.R. §9.406-4.

<sup>171</sup> 48 C.F.R. §9.407-4. The FAR generally provides that suspensions may not exceed 12-18 months unless legal proceedings are initiated within that period. However, an affiliate of a suspended contractor could potentially be suspended for the duration of the investigation of the principal contractor, or of the litigation involving the principal, without being the subject of an independent investigation or litigation. See *Agility Defense & Gov’t Servs., Inc. v. U.S. Dep’t of Defense*, 739 F.3d 586 (11<sup>th</sup> Cir. 2013), *rev’g*, 2012 U.S. Dist. LEXIS 91236 (June 26, 2012).

<sup>172</sup> 48 C.F.R. §§9.405(a), 9.405-1(b)(1)-(3).

<sup>173</sup> 48 C.F.R. §9.405(c) (individual sureties); 48 C.F.R. §9.405-2(a) (consent to subcontract).

<sup>174</sup> 48 C.F.R. §9.406-1(b) (debarment); 48 C.F.R. §9.407-1(c) (suspension).

<sup>175</sup> 48 C.F.R. §9.406-5(a)-(b) (debarment); 48 C.F.R. §9.407-5 (suspension).

<sup>176</sup> 33 U.S.C. §1368 (Clean Water Act); 42 U.S.C. §7606 (Clean Air Act).

<sup>177</sup> 40 U.S.C. §3144 (Davis-Bacon); 41 U.S.C. §6706 (Service Contract); 41 U.S.C. §6504 (Walsh-Healey).

contracting preferences;<sup>178</sup> and (4) convictions or other findings of fault for intentionally affixing a “Made in America” designation to an ineligible product.<sup>179</sup> Such statutory exclusions are generally punitive in nature.

The FAR similarly provides for exclusion on specified grounds, which can encompass both failure to perform as required under a contract and other misconduct. Examples include (1) the commission of fraud or a criminal offense in obtaining or performing under a government contract;<sup>180</sup> (2) delinquent federal taxes in an amount that exceeds \$3,000;<sup>181</sup> (3) willful failure to perform in accordance with the terms of a contract;<sup>182</sup> and (4) “any other cause of so serious or compelling a nature that it affects the present responsibility” of a vendor.<sup>183</sup> Exclusion under the FAR differs from exclusion under the statutes previously noted in that it may be imposed only “for the Government’s protection,” and not “for purposes of punishment.”<sup>184</sup>

The FAR also requires that agency suspending and debarment officials (who are not the contracting officers) consider mitigating factors or remedial measures undertaken by the contractor in debarment determinations, in particular.<sup>185</sup> However, while not punitive in the usual sense of the term, exclusion under the FAR serves to hold contractors accountable for delinquencies, and may be perceived as penal in nature by those excluded.

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<sup>178</sup> 15 U.S.C. §645; 38 U.S.C. §8127.

<sup>179</sup> 10 U.S.C. §2410f; 15 U.S.C. §1536; 22 U.S.C. §2679b; 33 U.S.C. §569f; 41 U.S.C. §8303(c); 42 U.S.C. §5206.

<sup>180</sup> 48 C.F.R. §9.406-2(a)(1) (debarment); 48 C.F.R. §9.407-2(a)(1) (suspension). Debarment on this ground requires a conviction or civil judgment, while suspension requires “adequate evidence.”

<sup>181</sup> 48 C.F.R. §9.406-2(b)(1)(v) (debarment based on a “preponderance of the evidence”); 48 C.F.R. §9.407-2(a)(8) (suspension based on “adequate evidence”). The FAR further defines when taxes are seen to be delinquent for purposes of this provision. *See* 48 C.F.R. §9.406-2(b)(1)(v).

<sup>182</sup> 48 C.F.R. §9.406-2(b)(1)(i)(A) (debarment based on a “preponderance of the evidence”).

<sup>183</sup> 48 C.F.R. §9.406-2(c) (debarment); 48 C.F.R. §9.407-2(c) (suspension).

<sup>184</sup> 48 C.F.R. §9.402(b).

<sup>185</sup> 48 C.F.R. §9.406-1(a)(1)-(10) (debarment). *See also* 48 C.F.R. §9.407-1(b)(1) (considerations as to suspension).



The determination to exclude a contractor is made after an administrative proceeding, not a judicial one. Contractors are generally entitled to due process in the form of notice and an opportunity for a hearing when excluded,<sup>186</sup> although the nature of that process can vary depending upon the type and grounds of exclusion. For example, notice and an opportunity for a hearing must generally be provided *prior to* debarment,<sup>187</sup> although it could potentially be provided *after* suspension.<sup>188</sup> Particularly under the FAR, exclusion is always discretionary; it is not automatically imposed given the existence of potential grounds for exclusion.<sup>189</sup> Also, a vendor's current contracts are not automatically terminated when the vendor is excluded.<sup>190</sup> Instead, the agency would have to take action to terminate those contracts, as previously discussed (see "Termination for Default"). In addition, the vendor's exclusion could be waived to permit the government to do business with a contractor in particular cases. The FAR permits the waiver of FAR-based exclusions when there is a "compelling reason,"<sup>191</sup> and certain statutes similarly permit waivers of statutory exclusions in the "paramount interest of the United States."<sup>192</sup>

## Civil Provisions of the False Claims Act

The civil provisions of the False Claims Act (FCA)<sup>193</sup> are one of the primary tools available to the federal government to address and deter contractor fraud, and, in recent years, have enabled the

### Recent Developments as to Exclusion

Two recent decisions by trial-level federal courts suggest that how agencies structure their debarment and suspension functions, and how quickly they move to exclude contractors, could affect the permissibility of their exclusion determinations.

In the more recent of these two cases, ***International Relief and Development, Inc. v. USAID***, Civil No. 15,854 (order issued Aug. 3, 2015), the U.S. District Court for the District of Columbia issued a preliminary order requiring that the agency declare its suspension of the vendor void *ab initio* and refrain from making contracting decisions based on the vendor's now-voided suspension. In so doing, the court specifically noted that it viewed the contractor as likely to succeed on the merits of its claim that the suspension was in violation of Section 861 of the National Defense Authorization Act for FY2013, which prohibits the suspending and debarring officials of certain agencies from reporting or being subject to the supervision of the agency's acquisition office or of the inspector general.

Previously, in ***Inchcape Shipping Services Holdings Ltd. v. United States***, 2014 U.S. Claims LEXIS 1570 (Jan. 2, 2014), the U.S. Court of Federal Claims found that a contractor was likely to succeed on the merits of its challenge to its suspension because more than one year passed between the time when the audit report that formed the basis for the suspension became available and the exclusion decision. According to the court, this "delay casts serious doubt on the government's claim that immediate action [in the form of suspension] was necessary" to protect the government's interest. The court further questioned whether the suspension was based on "adequate evidence" because the suspending official failed to examine a number of documents in the agency's possession related to the alleged overbilling.

<sup>186</sup> See, e.g., *Horne Brothers, Inc. v. Laird*, 463 F.2d 1268, 1271 (D.C. Cir. 1972) ("[A]n action that 'suspends' a contractor and contemplates that he may dangle in suspension for a period of one year or more, is such as to require the Government to insure fundamental fairness to the contractor whose economic life may depend on his ability to bid on government contracts."); *Gonzalez v. Freeman*, 334 F.2d 570, 574 (D.C. Cir. 1964) (similar).

<sup>187</sup> 48 C.F.R. §9.406-3(b)-(c). In cases where the debarment is based upon convictions or civil judgments, the process that the contractors received in their criminal or civil trial is deemed to provide due process for purposes of debarment.

<sup>188</sup> 48 C.F.R. §9.407-3(b)-(c).

<sup>189</sup> 48 C.F.R. §9.402(a) ("Debarment and suspension are discretionary actions....").

<sup>190</sup> 48 C.F.R. §9.405-1(a).

<sup>191</sup> 48 C.F.R. §9.405(a). Some agencies have regulations defining what constitutes a "compelling reason" for purposes of waiving exclusion. See, e.g., 48 C.F.R. §209.405(a)(i)-(iv) (Department of Defense).

<sup>192</sup> 42 U.S.C. §7606 (Clean Air Act); 33 U.S.C. §1368 (Clean Water Act).

<sup>193</sup> The FCA also contains criminal penalties, pursuant to which "whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof" a claim that the person knows to be false or fraudulent is subject to up to five years imprisonment and a fine. 18 U.S.C. §287.

government to recover billions of dollars per year for procurement and other fraud.<sup>194</sup> There are seven types of conduct that can lead to civil liability under the FCA.<sup>195</sup> Of these, the two that are arguably most relevant in the procurement context include “knowingly<sup>196</sup> present[ing], or caus[ing] to be presented, a false or fraudulent claim<sup>197</sup> for payment or approval” and “knowingly mak[ing], us[ing], or cau[sing] to be made or used, a false record or statement material to a false or fraudulent claim.”<sup>198</sup> In short, these provisions penalize contractors who knowingly and fraudulently try to get the government to pay money on federal contracts, among other things.<sup>199</sup> However, the government must show that the contractor’s false or fraudulent claim, statement, or record was material in order for a contractor to be held liable under the FCA.<sup>200</sup> This generally means that the government must establish that the false statement or claim has a “natural tendency to influence” or be “capable of influencing” the contracting agency’s decision as to whether or not to pay the claim.<sup>201</sup>

Federal contractors can face liability under the FCA for a range of misconduct. This includes (1) submitting a claim for payment when the contractor has not provided the government with the supplies or services in question, or has provided supplies or services that were not as described in the contract;<sup>202</sup> (2) falsely certifying compliance with a required contract provision or law;<sup>203</sup> or (3) making false representations to the government during the contract formation process that cause the government to enter a contract that it would not have but for the false representations.<sup>204</sup>

Civil actions can be brought against contractors who are alleged to have violated the FCA by the Attorney General, or by private persons—called relators—on behalf of the federal government in what are known as *qui tam* actions.<sup>205</sup> Such actions must be brought within the later of six years

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<sup>194</sup> See, e.g., Press Release, Department of Justice, Justice Department Recovers Nearly \$6 Billion from False Claims Act Cases in Fiscal Year 2014 (November 20, 2014), available at <http://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014>.

<sup>195</sup> See 31 U.S.C. §3729(a)(1)(A)-(G). For more on the civil provisions of the False Claims Act and government contractors, see generally CRS Report R43460, *Contractor Fraud Against the Federal Government: Selected Federal Civil Remedies*, by (name redacted) .

<sup>196</sup> In the context of the FCA, an individual or entity acts knowingly when it acts (1) with actual knowledge of the information; (2) in deliberate ignorance of the information’s truth or falsity; or (3) in reckless disregard of the information’s truth or falsity. See 31 U.S.C. §3729(b)(1).

<sup>197</sup> The FCA defines a claim as a request or demand for money or property that is (1) “presented to an officer, employee, or agent of the United States” or (2) made to a recipient of federal funds if the money or property is to be used on the government’s behalf, and the government either “provides or has provided any portion of the money or property requested or demanded” or will reimburse the recipient for any portion of money or property requested. See 31 U.S.C. §3729(b)(2)(A).

<sup>198</sup> 31 U.S.C. §3729(a)(1)(A)-(B).

<sup>199</sup> See *id.*

<sup>200</sup> 31 U.S.C. §§3729(a)(1)(B), (G).

<sup>201</sup> 31 U.S.C. §§3729(b)(4).

<sup>202</sup> *United States ex rel. Conner v. Salina Reg’l Health Ctr., Inc.*, 543 F.3d 1211, 1217 (10<sup>th</sup> Cir. 2008) (observing that in these so-called “factually false” cases, a relator “must generally show that the [contractor] has submitted ‘an incorrect description of goods or services provided or a request for reimbursement for goods or services never provided’”) (citing *Mikes v. Straus*, 724 F.3d 687, 697 (2d Cir. 2001)).

<sup>203</sup> *Mikes v. Straus*, 274 F.3d 687, 697-98 (2d Cir. 2001).

<sup>204</sup> *In re Baycol Prods. Litig.*, 732 F.3d 869, 876 (8<sup>th</sup> Cir. 2013). In such cases, the claims for payment under a contract need not be false or fraudulent themselves, but rather, liability stems from the fact that the contract was initially induced by fraud. See *id.*; see also *United States ex rel. Bettis v. Odebrecht Contractors of Cal., Inc.*, 393 F.3d 1321, 1326 (D.C. Cir. 2005); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 787 (4<sup>th</sup> Cir. 1999).

<sup>205</sup> 31 U.S.C. §3730(a), (b).

from the date of the misconduct or three years from when the misconduct was known or should have been known to the government.<sup>206</sup> No FCA action can be brought more than ten years after the occurrence of the misconduct.<sup>207</sup> Additionally, qui tam lawsuits cannot be brought by relators when: (1) the relator was convicted of criminal conduct stemming from their role in the FCA action;<sup>208</sup> (2) another qui tam action is pending concerning the same conduct (“first-to-file bar”),<sup>209</sup> (3) the same allegations are the subject of a civil suit or penalty in a proceeding wherein the government is a party;<sup>210</sup> or (4) the qui tam action results from misconduct that has already been disclosed to the public (“public disclosure bar”).<sup>211</sup>

If a relator brings a qui tam action under the FCA, the government must receive a copy of the complaint, and the complaint remains sealed and unserved upon the defendant for 60 days.<sup>212</sup> Within this 60-day period, the government has the right to “intervene and proceed with the action,”<sup>213</sup> although it can (and frequently does) request an extension of this period.<sup>214</sup> If the government intervenes in the action, the relator has the right to continue as a party to the action, but generally cedes control over the action to the government (e.g., the government can settle or dismiss the action notwithstanding the private party’s objections).<sup>215</sup> If the government declines to intervene, the relator can proceed with the qui tam lawsuit.<sup>216</sup> If a contractor is found to have violated the FCA, it can face a civil penalty of \$5,500 to \$11,000,<sup>217</sup> plus treble the amount of damages that the FCA violation caused the government.<sup>218</sup> In qui tam lawsuits, if the government intervenes in the action, the relator is generally entitled to receive between 15 and 25 percent of

#### Recent Developments as to the FCA

In a recent case, *KBR v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015), the Supreme Court unanimously held that the Wartime Suspension of Limitations Act, which generally suspends statutes of limitations for fraud offenses against the government during “hostilities” and for five years thereafter, applies only to criminal offenses and not to offenses under the civil provisions of the FCA. Notably, the Court also clarified the proper scope of the FCA’s first-to-file bar, which precludes relators from bringing a qui tam action when a similar qui tam action based on the same underlying facts is pending. The defendant contractor argued that, once a qui tam FCA claim has been brought, the first-to-file bar prohibits any subsequent qui tam lawsuits stemming from the same underlying facts, even if that initial claim has been dismissed. The Court disagreed, observing that the use of the word “pending” makes clear that the bar precludes filing of an FCA claim when a similar claim stemming from the same underlying facts is undecided, not when it has been dismissed.

<sup>206</sup> 31 U.S.C. §3731(b).

<sup>207</sup> 31 U.S.C. §3731(b)(2).

<sup>208</sup> 31 U.S.C. §3730(d)(3).

<sup>209</sup> 31 U.S.C. §3730(b)(5).

<sup>210</sup> 31 U.S.C. §3730(e)(3).

<sup>211</sup> 31 U.S.C. §3730(e)(4)(A). Such public disclosure can result from news media reports, federal investigations, or federal audits. *See id.* Once misconduct potentially giving rise to FCA liability is disclosed to the public, FCA action can only be brought by the Attorney General or the private party that was the original source of the information. *See Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907, 913 (7<sup>th</sup> Cir. 2009).

<sup>212</sup> 31 U.S.C. §3730(b)(2).

<sup>213</sup> *Id.*

<sup>214</sup> 31 U.S.C. §3739(b)(3).

<sup>215</sup> *See* 31 U.S.C. §3730(c)(1)-(2).

<sup>216</sup> 31 U.S.C. §3730(c)(3).

<sup>217</sup> 28 C.F.R. §85.3(a)(9).

<sup>218</sup> 31 U.S.C. §3729(a)(1).

the amount recovered by the government.<sup>219</sup> If the government declines to intervene, the relator is generally entitled to receive between 25 and 30 percent of the amount recovered.<sup>220</sup>

## Program Fraud Civil Remedies Act

The Program Fraud Civil Remedies Act (PFCRA) provides a mechanism through which contracting agencies can seek civil penalties against contractors that submit false or fraudulent claims for payment under a federal contract. Unlike the civil provisions of the FCA, discussed above (see “Civil Provisions of the False Claims Act”), which provide contracting agencies with a judicial remedy for dealing with false or fraudulent payment submissions, the PFCRA offers contracting agencies an administrative one. More specifically, the PFCRA outlines processes for agency investigations and administrative hearings through which contractors can be found civilly liable for defrauding the government. Additionally, unlike the FCA, the PFCRA applies only to false or fraudulent claims for payment that do not exceed \$150,000 in value. Thus, the PFCRA could seemingly only be used to address false or fraudulent contractor claims in connection with relatively small procurements, or fraud involving small claims on larger contracts. The FCA, in contrast, contains no such dollar cap, and can be used by the government to hold contractors accountable for false or fraudulent payment submissions in connection with larger contracts or claims.

Under the PFCRA, a contractor cannot, among other things, submit or cause to be submitted to an agency a claim that the contractor knows to be false or fraudulent.<sup>221</sup> When a contractor is suspected of violating PFCRA, the matter is referred to the agency’s investigating official, who investigates the allegations and reports all findings to the agency’s designated reviewing official.<sup>222</sup> If, after considering the investigating official’s findings, the reviewing official determines that there is adequate evidence that a contractor violated the PFCRA, the matter is referred to the Attorney General.<sup>223</sup> The Attorney General, or designated Assistant Attorney General, then informs the reviewing official of whether the referral is approved.<sup>224</sup> If the referral is approved, the matter then goes to the contractor, who can attempt to settle or can request a hearing before an administrative law judge (ALJ) within the contracting agency.<sup>225</sup> Upon finding that a contractor violated PFCRA, an ALJ can issue a civil penalty against the contractor of up to \$5,500,<sup>226</sup> and can require that the contractor pay up to twice the amount of the false or fraudulent claim if the government paid the claim.<sup>227</sup> If an ALJ finds a contractor liable under the PFCRA, the contractor can appeal the determination to the agency head or his or her designee.<sup>228</sup> If the agency head affirms the ALJ’s decision, the contractor can then appeal to the appropriate federal district court.<sup>229</sup>

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<sup>219</sup> 31 U.S.C. §3730(d)(1).

<sup>220</sup> 31 U.S.C. §3730(d)(2).

<sup>221</sup> 31 U.S.C. §3802(a)(1). For more on the PFCRA, see generally CRS Report R43460, *Contractor Fraud Against the Federal Government: Selected Federal Civil Remedies*, by (name redacted) .

<sup>222</sup> 31 U.S.C. § 3803(a).

<sup>223</sup> 31 U.S.C. § 3803(a)(2).

<sup>224</sup> 31 U.S.C. §3803(b)(1).

<sup>225</sup> See 31 U.S.C. §3803(i)(2) & (j).

<sup>226</sup> 31 U.S.C. §3802(a)(1)(D); 28 C.F.R. §85.3(a)(11).

<sup>227</sup> 31 U.S.C. §3802(a)(1)(D); 31 U.S.C. §3802(a)(3).

<sup>228</sup> 31 U.S.C. §3803(i)(2).

<sup>229</sup> 31 U.S.C. §3805.

Significantly, the PFCRA provides that any civil penalties issued under it are “in addition to any other remedy that may be prescribed by law.”<sup>230</sup> Thus, as has been observed by the U.S. Court of Appeals for the Federal Circuit, the PFCRA is not an exclusive remedy.<sup>231</sup> A contractor that submits false or fraudulent claims for payment to the government can therefore face PFCRA penalties in addition to those otherwise permitted by law.

## **Author Contact Information**

(name redacted)  
Legislative Attorney  
[redacted]@crs.loc.gov7-....

(name redacted)  
Legislative Attorney  
[redacted]@crs.loc.gov7-....

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<sup>230</sup> 31 U.S.C. §3802(a)(1)(D).

<sup>231</sup> *See* Roberts v. Shinseki, 647 F.3d 1334, 1341 (Fed. Cir. 2011).

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