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Selected Legal Tools for Maintaining Government Contractor Accountability

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SUMMARY

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Federal procurement statutes and the Federal Acquisition Regulation (FAR) establish largely uniform policies and procedures applicable to government contracts "to deliver on a timely basis the best value product or service to the [government], while maintaining the public's trust and fulfilling public policy objectives." To meet these ends, federal agencies have a number of legal tools at their disposal to help ensure a contractor adequately performs a contract or, if warranted, to hold a contractor accountable for performance failures or misconduct:

Corrective Actions. In many instances, the FAR requires procurement contracts to include "inspection clauses" that explicitly authorize procuring agencies to require contractors to remove, correct, or replace rejected goods, or reperform services (together, to take "corrective actions") for failing to conform to contract specifications and requirements. Relatedly, inspection clauses often authorize agencies to make equitable cost reductions or seek repayment to account for all of the costs associated with deficient services that cannot be reperformed or goods the agency received and accepted despite the deficiencies.

Incentive Fees. Under certain circumstances, procuring agencies are permitted to incentivize contractors with performance-based payments. These "incentive fees" can be an effective contractor accountability measure because they can be paid to reward contractors for meeting or exceeding goals or standards contemplated in the contract or withheld or reduced when contractors fail to meet or exceed those goals or standards.

Performance and Payment Surety Bonds. Under certain circumstances, government contractors are required to acquire a surety bond, through which a third-party surety promises to assume a contractor's responsibilities in the event that the contractor fails to meet specified contractual obligations. A bond can serve as a contractor accountability measure because it subjects a contractor to potential additional costs, which could include liability expenses under indemnity agreements with the surety and increased costs of acquiring a bond for future contracts.

Liquidated Damages. Liquidated damages are predetermined sums a contractor must pay the procuring agency for specified contract breaches or performance failures. By predetermining the costs associated with a breach or failure to perform, liquidated damages clauses hold contractors accountable for noncompliance, while saving time and litigation costs.

Contract Termination for Default. Termination of a contract because of a contractor's default is arguably the most consequential and dramatic contract-based contractor accountability tool at the government's disposal. A default termination "discharges government duties under the contract while exposing the contractor to potential liability for the consequences of its breach." In addition to other potential repercussions, the cause of the default could serve as grounds for suspending or debarring a contractor from future contracts.

Contractor Performance Evaluations. When selecting contractors, procuring agencies often consider various contractor accountability issues, notably including the contractor's performance under other contracts, through (1) responsibility determinations and (2) source selections under negotiated contracting. To facilitate agency evaluations of a prospective contractor's likelihood of success on future contracts, the FAR generally requires procuring agencies to conduct and document performance evaluations of contractors in federal databases and to review these databases before awarding contracts.

Suspension and Debarment. The FAR requires agencies to have policies and procedures in place to "suspend" and "debar" contractors—i.e., to exclude, except under limited circumstances—from being eligible to receive new federal contracts for some length of time due to various criminal convictions, civil judgments, serious contract performance failures, or other specified grounds. These policies and procedures are designed to ensure that agencies award contracts to responsible contractors that are capable of successful performance.

Civil Fraud Enforcement. Procuring agencies may hold contractors liable for acquiring contracts by fraud pursuant to the False Claims Act, the anti-fraud provision of the Contracts Dispute Act (CDA), and the Program Fraud Civil Remedies Act.

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Introduction

The federal government obligates hundreds of billions of dollars each year to procure goods and services.[1] Federal procurement statutes and regulations[2] establish largely uniform policies and procedures applicable to government contracts "to deliver on a timely basis the best value product or service to the [government], while maintaining the public's trust and fulfilling public policy objectives."[3] To meet these ends, federal agencies[4] have a number of legal tools at their disposal to help ensure a contractor adequately performs a contract or, if warranted, to hold a contractor accountable for performance failures or misconduct.[5] These legal tools are intended to advance the transparency, fairness, and integrity of the procurement system and limit waste, fraud, and abuse. As described in detail below, these tools include contractual remedies, contract bid and source selection criteria, as well as various non-contract-based legal powers, such as civil fraud enforcement and the authority to exclude contractors for a period of time from being eligible for future contracts through suspension or debarment proceedings.[6]

This report analyzes a selection of the legal tools a procuring agency may use to hold contractors accountable. The report first assesses contractual remedies that procuring agencies could utilize to ensure full and satisfactory performance of existing contracts. Next, the report discusses performance-related contract source selection criteria that agencies may, and often must,[7] utilize when evaluating new contract bid proposals. The report ends with a discussion of other legal tools—outside of contract law and the contract selection processes—that the government may employ to hold a contractor accountable.

Contractual Rights and Remedies

Contracting officers generally have wide discretion to draft contracts to protect the government's interest.[8] However, contracting officers are bound by governing procurement statutes, regulations, and executive orders regulating government contracts.[9] In many instances, the Federal

[1] *Fed. Procurement Data Sys.*, https://www.fpds.gov/fpdsng_cms/index.php/en/ (last visited Sept. 17, 2018) (The federal government obligated more than $500 billion in procurement contracts in FY2017).

[2] *See, e.g.*, Competition in Contracting Act of 1984, Pub. L. No. 98-369, Title VII, §§ 2701–53, 98 Stat. 494, 1175–1203 (1984) (codified as amended in scattered sections of U.S.C.); Federal Acquisition Regulation (FAR), 48 C.F.R. §§ 1.000–9905.506-63 (2017)); 10 U.S.C. § 2304 (2017); 41 U.S.C. § 3301 (2017).

[3] 48 C.F.R. § 1.102(a) (2017). Federal agencies also are required to "[e]nsure that contractors receive impartial, fair, and equitable treatment," which, at times, might create friction with their responsibilities of promoting the government's best interests. *Id.* § 1.602-2(b). *See also* Terrence M. O'Connor, UNDERSTANDING GOVERNMENT CONTRACT LAW 1 (Mgmt. Concepts 2007).

[4] For simplicity's sake, this report refers to actions taken by "procuring agencies." In practice, agency personnel—typically contracting officers—make contracting decisions, operating pursuant to appropriately delegated authority from the agency head or the agency head's designees. 41 U.S.C. § 1702(b); 48 C.F.R. §§ 1.602-1, 1.603-1.

[5] *See generally*, Letter from David M. Simms, Chair, Interagency Suspension & Debarment Comm., et al. to Ron Johnson, Chairman, Senate Comm. on Homeland Sec. & Gov't Affairs, et al., Regarding FY2017 Annual Report to Congress, 1–4 (July 31, 2018), https://acquisition.gov/sites/default/files/page_file_uploads/Control%20ISDC%20FY%202017%20Report_Final_07_31_2018%20-2.pdf.

[6] 48 C.F.R. §§ 9.400–9.409 (2017).

[7] *See, e.g.*, *id.* § 15.304(c)(3)(i) ("Past performance, except as set forth in paragraph (c)(3)(iii) of this section, shall be evaluated in all source selections for negotiated competitive acquisitions expected to exceed the simplified acquisition threshold.").

[8] *See id.* § 1.602-1(a).

[9] 41 U.S.C. § 3101(a) (2011); 48 C.F.R. § 1.602-1(b) (2017). *See also* Yosemite Park & Curry Co. v. United States, 582

Acquisition Regulation (FAR)[10]—the government-wide regulation that generally applies to acquisitions by federal executive branch agencies —requires that particular contracts incorporate specific standard contractual terms (or slightly modified versions thereof, as applicable).[11] Part 52 of the FAR, and in some cases individual agencies' supplements to the FAR, provide for dozens of standard terms agencies must include in their contracts.[12] Many of these standard contract clauses are designed to protect the government's interests, such as by ensuring that goods and services are provided in the time, manner, and quality contemplated and in accordance with the procuring agency's programmatic objectives.[13]

Certain "mandatory contract clauses that express a significant or deeply ingrained strand of public procurement policy"—such as the right to terminate contracts for the government's convenience, discussed further below—are available to the federal government "by operation of law" even in the absence of express authorization.[14] Other rights and remedies may be available to the government only if the relevant procurement contract expressly provides or incorporates such terms by reference.[15]

When problems arise in the performance of a contract, the parties can address them through their contract rights.[16] Contract disputes potentially can be reviewed and resolved by a federal court (typically, the U.S. Court of Federal Claims) or a board of contract appeals in accordance with the Contract Disputes Act.[17] The contract dispute process is outside the scope of this report.[18]

F.2d 552, 558 (Ct. Cl. 1978) ("We begin, as did the Government, with 41 U.S.C. § 252(a), which states unequivocally that executive agencies shall make all purchases of goods and services in compliance with the procurement statutes and implementing regulations . . . except where those statutes and regulations are 'made inapplicable pursuant to . . . any other law.'" (second alteration in original)); 41 U.S.C. § 252(a) (recodified at 41 U.S.C. § 3101(a) by Pub. L. No. 111-350, § 3, 124 Stat. 3742).

[10] 48 C.F.R. §§ 1.101–53.303-347 (2017).

[11] *See, e.g.*, *id*. § 16.203-4(a).

[12] *See, e.g.*, *id*. §§ 252.201-7000–252.251-7001.

[13] *See generally*, *id*. § 1.102(b).

[14] Gen. Eng'g & Mach. Works v. O'Keefe, 991 F.2d 775, 779 (Fed. Cir. 1993) ("Thus, under the Christian Doctrine a court may insert a clause into a government contract by operation of law if that clause is required under applicable federal administrative regulations. However, the Christian Doctrine does not permit the automatic incorporation of every required contract clause. . . . Accordingly, the Christian Doctrine applies to mandatory contract clauses which express a significant or deeply ingrained strand of public procurement policy."). (citing G. L. Christian & Assocs. v. United States, 312 F.2d 418 (Ct. Cl. 1963)). The Christian Doctrine is subject to limitations. *See, e.g.,* Muncie Gear Works, Inc., ASBCA No. 16153, 72-1 BCA ¶ 9,429 (1972) ("The Christian case does not require the incorporation of a clause whose applicability is based on the exercise of judgment or discretion.").

[15] *See, e.g.,* Northrop Grumman Info. Tech., Inc. v. United States, 535 F.3d 1339, 1345 (Fed. Cir. 2008) ("[T]he language used in a contract to incorporate extrinsic material by reference must explicitly, or at least precisely, identify the written material being incorporated and must clearly communicate that the purpose of the reference is to incorporate the referenced material into the contract."). *See also* John Cibinic, Jr., James F. Nagle & Ralph C. Nash, Jr., ADMINISTRATION OF GOVERNMENT CONTRACTS 163 (Wolters Kluwer 5th ed. 2016) ("The written contract document is the primary evidence of the parties' agreement in virtually all cases involving government contract interpretation controversies.").

[16] *See generally* 48 C.F.R. §§ 43.101–43.301 (2017). *See also* Nicholas T. Solosky, *Contractor Alert: Beware Bilateral Modification Release Language*, FOX ROTHSCHILD LLP THE FEDERAL GOVERNMENT CONTRACTS & PROCUREMENT BLOG, Jan. 31, 2017, https://governmentcontracts.foxrothschild.com/tag/government-contract-modification/.

[17] 28 U.S.C. § 1491(b)(1) (2018); *see* 41 U.S.C. §§ 7101–09 (2018). *See generally*, Sarah K. Carpenter, *The Contract Disputes Act: What Every Federal Government Contractor Should Know*, SMITH, CURRIE & HANCOCK LLP (Jan. 29, 2018), https://www.smithcurrie.com/publications/common-sense-contract-law/contract-disputes-act-every-federal-government-contractor-know/.

[18] *See generally* John Cibinic, Jr., James F. Nagle, Stephen D. Knight & Ralph C. Nash, Jr., CONTRACT CHANGES,

The terms that a procuring agency incorporates into a particular contract—and, by extension, the rights and remedies at the agency's disposal—can vary considerably according to the type of contract the agency solicits.[19] The type of contract an agency chooses may depend on, among other factors, the types of goods or services sought; the timeline by which the agency needs delivery or performance; the objective and complexity of the acquisition; the depth and breadth of the qualified contractor pool; and the certainty with which costs can be predicted.[20] This report focuses on the two most common categories of government contracts: fixed-price and cost-reimbursement.[21]

Fixed-price contract. Through a fixed-price contract, a procuring agency acquires a good or service for a specified price that is either firm, or, under certain circumstances, adjustable in accordance with conditions spelled out in the contract.[22] The contractor under a fixed-price contract generally[23] assumes the risk of cost overruns. As a result, the government typically prefers using fixed-price contracts to the extent that they are appropriate for the given circumstances.[24] When administering a fixed-price contract, the government's focus is generally on whether the acquired good or service comports with the contract's specifications and meets the agency's needs.[25]

Cost-reimbursement contract. In contrast, through a cost-reimbursement contract, a procuring agency agrees to reimburse a contractor for specified allowed costs the contractor incurs, subject to a cap.[26] The payment structure of cost-reimbursement contracts subjects the government to a greater risk of wasteful spending than in fixed-price contracts.[27] An agency will typically use a cost-reimbursement contract when there are too many uncertainties regarding the cost, performance, or specifications for the procuring agency to utilize a fixed-price contract.[28] When overseeing the administration of a cost-reimbursement contract, the government generally focuses on "ensuring that the contractor expends funds to most effectively accomplish the government's objectives."[29]

DISPUTES AND TERMINATIONS: MASTERING THE FUNDAMENTALS 223–86 (Walters Kluwer L. & Bus. 2015) (discussing government contract dispute).

[19] Cibinic, Administration, *supra* note 15, at 2 (comparing governmental rights, risks, and flexibilities associated with various contract types, acquisition goals, and other factors).

[20] 48 C.F.R. § 16.104 (2017).

[21] Other types of contracts, such as time-material, and labor hour contracts, also may be used under certain circumstances. *See, e.g.*, *id*. §§ 16.500–16.603-4.

[22] *Id*. § 16.201.

[23] The government still assumes some risk of cost overruns under firm-fixed-price contracts, for instance because of costs resulting from "acts of God" or certain other intervening acts. *See, e.g.*, *Id*. § 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").

[24] 48 C.F.R. § 16.202-1 (2017).

[25] Cibinic, Contract Changes, *supra* note 18, at 287.

[26] 48 C.F.R. § 16.301-1 (2017).

[27] *See generally* Memorandum from Peter R. Orszag, Director, Office of Mgmt. & Budget, Exec. Office of the President, to Heads of Departments and Agencies, M-09-25, 2 (Jul. 29, 2009), https://www.whitehouse.gov/wp-content/uploads/2017/11/m-09-25.pdf ("Cost-reimbursement contracts . . . pose a risk because they provide no direct incentive to the contractor for cost control.").

[28] 48 C.F.R. § 16-301-2(a)(2) (2017).

[29] Cibinic, Contract Changes, *supra* note 18, at 287.

Table 1 details selected common contract types for each category; the situations in which they are typically utilized; and a selection of regulatory conditions imposed on their use.

Table 1. Selected Contract Types

Type	General Description	Typical Use	Limits & Conditions on Use
Firm-fixed-price contracts	Good or service acquired for specified price. 48 C.F.R. § 16.202-1 (2017).	For acquiring goods and services where reasonable prices can be predetermined. 48 C.F.R. § 16.202-2 (2017).	None.
Fixed-price contracts with economic price adjustments.	Good or service acquired for a specified price that, under certain circumstances, could be adjusted based on a predefined economic index or indicator. 48 C.F.R. § 16.203-1 (2017).	For acquiring goods or services whose costs can fluctuate as a result of economic factors. 48 C.F.R. § 16.203-2 (2017).	May be used only when "the contracting officer determines that it is necessary either to protect the contractor and the Government against significant fluctuations in labor or material costs or to provide for contract price adjustment in the event of changes in the contractor's established prices." 48 C.F.R. § 16.203-3 (2017).
Fixed-price contract with prospective price redetermination	Firm-fixed price contract for a performance or delivery period, with predetermined adjustments of price for subsequent performance or delivery periods. 48 C.F.R. § 16.205-1 (2017).	For acquisitions in which "fair and reasonable firm fixed price" can be determined for an initial period but not for future periods. 48 C.F.R. § 16.205-2 (2017).	May be used only when a firm-fixed-price contract and fixed-price incentive contract would not be suitable for the circumstances and prices could be determined "promptly at the specified times." 48 C.F.R. § 16.205-3 (2017).
Fixed-price incentive contracts with firm targets	Fixed-price contract with profits or fees paid (or reduced) for reaching (or failing to reach) specified targets. 48 C.F.R. § 16.403-1(a) (2017).	For circumstances in which targets and profits/fees can be established "that will provide a fair and reasonable incentive and a ceiling that provides for the contractor to assume an appropriate share of the risk." 48 C.F.R. § 16.403-1(b) (2017).	May be used only when firm targets can be reasonably established at the beginning of contract negotiation. 48 C.F.R. § 16.403-1(c) (2017).

Type	General Description	Typical Use	Limits & Conditions on Use
Cost contract	"[C]ost-reimbursement contract in which the contractor receives no fee." 48 C.F.R. § 16.302(a) (2017).	Typically used for research and development services with nonprofits, such as institutions of higher education. 48 C.F.R. § 16.302(b) (2017).	May be used only when a fixed-price contract would not be suitable for the circumstances, the procuring agency has sufficient "resources [] available to award and manage a contract other than firm-fixed priced," and the acquisition is not for commercial items. 48 C.F.R. § 16.301-2–16.301-3 (2017).
Cost-sharing contract	Cost-reimbursement contract through which contractor may be reimbursed exclusively for specified "allowable costs" 48 C.F.R. § 16.303(a) (2017).	"[U]sed when the contractor agrees to absorb a portion of the costs, in the expectation of substantial compensating benefits." 48 C.F.R. § 16.303(b) (2017).	May be used only when a fixed-price contract would not be suitable for the circumstances, the procuring agency has sufficient "resources [] available to award and manage a contract other than firm-fixed priced," and the acquisition is not for commercial items. 48 C.F.R. § 16.301-2–16.301-3 (2017).
Cost-plus-incentive-fee contract	"[C]ost-reimbursement contract that provides for the initially negotiated fee to be adjusted later by a formula based on the relationship of total allowable costs to total target costs." 48 C.F.R. § 16.405-1(a) (2017).	Typically used when technical performance targets and cost incentives are "desirable and administratively practical," such as with contracts for major systems development. 48 C.F.R. § 16.405-1(b) (2017).	May be used only when a fixed-price contract would not be suitable for the circumstances, the procuring agency has sufficient "resources [] available to award and manage a contract other than firm-fixed priced," and the acquisition is not for commercial items. 48 C.F.R. § 16.301-2–16.301-3 (2017).

Source: 48 C.F.R. pt. 16 (2017).

What follows is an analysis of selected contractual rights and remedies that federal agencies may employ to obtain products and services that meet the quality, cost, and other specifications for which they contracted.

Corrective Actions for Nonconforming Goods & Services

As one court found, "the government generally has the right to insist on performance in strict compliance with the contract specifications."[30] To further this end, the FAR generally requires

[30] Granite Constr. Co. v. United States, 962 F.2d 998, 1006–07 (Fed. Cir. 1992).

procurement contracts to include clauses that explicitly authorize the government to inspect and test goods and services to ensure contractors have fully complied with contract specifications.[31] These standard "inspection clauses" authorize procuring agencies to require contractors to remove, correct, replace rejected goods, or reperform services, (together, to take "corrective actions") for failing to conform to contract specifications and requirements.[32]

The type of contract involved typically determines which party assumes the costs associated with taking corrective action. Under many fixed-price contracts, contractors assume all of the costs associated with valid corrective actions.[33] In contrast, under many cost-reimbursement contracts, procuring agencies pay contractors for certain specified allowable costs the contractor incurs to perform corrective actions, subject to a defined ceiling.[34] The standard inspection clauses applicable to cost-reimbursement contracts generally authorize contractors to charge the government for the actual cost—not including profits—of correcting or replacing nonconforming goods, unless the lack of conformity resulted from (1) the contractor's "fraud, lack of good faith, or willful misconduct;" or (2) a "habitually careless or unqualified" employee of the contractor.[35] When contractors fail or refuse to take corrective actions, inspection clauses under both fixed-price and cost-reimbursement contracts authorize the government, under certain circumstances, to hire new contractors or initiate other measures to correct the deficiencies and then to charge the original contractor for the reperformed work.[36]

The procuring agency's general right to require contractors to perform corrective actions to ensure strict compliance with contract specifications is subject to some limitations.[37] For example, procuring agencies generally cannot insist on reperformance when "the cost of correction is economically wasteful and the work is otherwise adequate for its intended purpose."[38]

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[31] 48 C.F.R. § 52.246-2(c) (2017) (Inspection of Supplies—Fixed Price); Id. § 52.246-3(c) (Inspection of Supplies—Cost-Reimbursement); *Id.* §52.246-4(c) (Inspection of Services—Fixed Price); *Id.* §52.246-5(c) (Inspection of Services—Cost-Reimbursement); *Id.* §52.246-6(c) (Inspection—Time-and-Material and Labor Hour); *Id.* §52.246-7(b) (Inspection of Research and Development—Fixed-Price); *Id.* §52.246-8(c) (Inspection of Research and Development—Cost-Reimbursement).

[32] 48 C.F.R. §§ 52.246-2(f)–(g), 52.246-3(f), 52.246-4(e), 52.246-5(d), 52.246-6(e)–(f), 52.246-7(d)–(e), 52.246-8(f) (2017). For example, the standard inspection clause for fixed price supply contracts states, in relevant part: "The Government has the right either to reject or to require correction of nonconforming supplies. . . . The Contractor shall remove supplies rejected or required to be corrected. However, the Contracting Officer may require or permit correction in place, promptly after notice, by and at the expense of the Contractor." *Id.* §52.246-2(f)–(g).

[33] *Id.* §§ 52.246-2(g), 52.246-4(e), 52.246-5(d), 52.246-7(d)–(e).

[34] *Id.* §§ 52.246-3(f), 52.246-6(e)–(f), 52.246-8(f) (2017). Procuring agencies generally are permitted to use cost-reimbursement contracts only when the agency is unable to estimate costs or define contract requirements adequately enough to utilize a fixed-price contract. *Id.* § 16.301-2.

[35] *Id.* § 52.246-3(f)–(h). The standard Inspection Clauses for Time-and-Material and Labor-Hour contracts include similar protections. *Id.* § 52.246-6(f)–(h).

[36] *Id.* §§ 52.246-2(h), 52.246-3(g), 52.246-4(e), 52.246-5(d)–(e), 52.246-6(g), 52.246-7(d)–(e), 52.246-8(f). For example, the standard inspection clause for fixed price supply contracts states, in relevant part: "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." *Id.* § 52.246-2(h). *See, e.g.*, Armour of Am. v. United States, 96 Fed. Cl. 726, 759–69 (2011) (awarding the procuring agency excess costs for the reprocurement of similar goods, as well administrative costs that "were 'foreseeable, direct, natural and proximate' costs resulting from plaintiff's failure to fulfill its contract" (quotations omitted)).

[37] Granite Constr. Co. v. United States, 962 F.2d 998, 1006–07 (Fed. Cir. 1992).

[38] *Id*. at 1007.

Relatedly, inspection clauses often provide agencies with the authority to make equitable cost reductions or seek repayment to account for all of the costs associated with deficient services that cannot be reperformed or goods the agency receives and accepts despite the deficiencies.[39] The cost adjustment is typically calculated by how much the contractor saved as a result of the defective work[40] or the reduced value of the defective work,[41] and, thus, can vary considerably.[42] For instance, an equitable reduction might be modest when the government will still substantially benefit from the good or service in spite of the deficiencies.[43] In contrast, the contract price might be significantly reduced when deficiencies largely eliminate the usefulness of the good or service.[44]

Incentive Fees

Under certain circumstances, procuring agencies are permitted to incentivize contractors with performance-based payments "to . . . motivate contractor efforts that might not otherwise be emphasized and . . . discourage contractor inefficiency and waste."[45] Incentive fees can be an effective contractor accountability measure because they can be paid to reward contractors for meeting or exceeding goals or standards contemplated in the contract or withheld or reduced when contractors fail to meet or exceed those goals or standards.

The FAR provides that incentive fees may be used in situations in which an agency's needs cannot be met with a firm-fixed-price contract and in which performance-based payments can reduce costs or enhance the technical quality or timely delivery of goods and services.[46] Incentive fees[47] can be utilized in both fixed-price (other than firm-fixed price) and cost-reimbursement contracts.[48] Contracts generally provide for an incentive fee to be paid to a contractor if the contractor meets certain cost targets; however, a contract may also provide for incentive fees if the contractor meets other performance targets, such as those related to delivery schedule or the technical standards of the procured good or service.[49] The FAR provides that performance targets should be "reasonable and attainable . . . and clearly communicated" to the contractor.[50] To

[39] 48 C.F.R. §§ 52.246-2(h), (*l*), 52.246-3(g), 52.246-4(f), 52.246-5(e), 52.246-7(e)–(f), 52.246-8(g) (2017). The standard inspection clause for time-and-material and labor-hour contracts generally allows for the contractor to be compensated for the labor involved in replacing and correcting deficiencies, but compensation should be reduced by the portion allocated for profit. *Id.* § 52.246-6(f) ("the hourly rate for labor hours incurred in the replacement or correction shall be reduced to exclude that portion of the rate attributable to profit").

[40] *See, e.g.*, Cameo Bronze, Inc., GSBCA No. 3646, 73-2 BCA ¶ 10,135. *See also* Cibinic, Administration, *supra* note 15, at 759.

[41] Munson Hammerhead Boats, ASBCA No. 51377, 00-2 BCA ¶ 31,143. *See also* Cibinic, Administration, *supra* note 15, at 760–61.

[42] Cibinic, Administration, *supra* note 15, at 760.

[43] *Id.*

[44] *Id.*

[45] 48 C.F.R. § 16.401(a)(2) (2017).

[46] *Id.* § 16.401(a). The lead contracting officer must justify, in writing, why the utilization of an incentive fee was appropriate in each particular procurement. *Id.* § 16.401(d).

[47] An award fee is a type of incentive fee that is used when "predetermined objective incentive targets applicable to cost, schedule, and technical performance" cannot be predetermined due to the nature of the work to be performed. *Id.* § 16.401(e)(1). Award fees are subject to addition conditions and limitations. *Id.* § 16.401(e)–(g).

[48] *Id.* § 16.401(c).

[49] *Id.* § 16.402-1(a).

[50] *Id.* § 16.401(a)(1).

establish an incentive fee as a reward for a contractor meeting certain technical performance targets, for example, contracts generally must specify compliance and quality testing standards applicable to those targets.[51]

The FAR provides that the determination of an incentive fee is a "unilateral decision[] made solely at the discretion of the Government."[52] Nevertheless, an agency may not exercise its discretion arbitrarily or capriciously,[53] and this discretion can be constrained by other terms of the contract.[54]

The FAR also establishes the general conditions under which a procuring agency can reduce or withhold an incentive fee.[55] The degree of discretion that a contracting officer has to reduce or withhold incentive fees varies according to the terms of the contract.[56] Generally speaking, contract officers have less discretion to reduce or withhold incentive fees that are tied to quantitative metrics such as cost or delivery times.[57] In contrast, contract officers have more discretion to reduce or withhold incentive fees that are based on more qualitative performance standards.[58]

Performance & Payment Bonds

Another potential contract mechanism that federal agencies can use to promote contractor accountability is to require a security bond.[59] In the government contract context, a bond is a security instrument in which a third-party surety promises to assume a contractor's responsibilities in the event that the contractor fails to meet specified contractual obligations.[60] The surety might either fulfill the responsibilities under the contract itself or cover the cost—up to the maximum bond amount—for the government to hire a different contractor to complete the procurement.[61] The surety bond must be backed by cash, U.S. Treasury securities, or other

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[51] *Id.* § 16.402-2(e).

[52] *Id.* § 16.401(e)(2).

[53] George Sollitt Constr. Co. v. United States, 64 Fed. Cl. 229, 247 (2005) ("So, if the contract language supports a finding that unilateral discretion has been granted to the government to determine the amount of a performance award, this court is limited to reviewing whether the government's award decision was arbitrary or capricious.").

[54] *See, e.g.,* Kellogg Brown & Root Servs. v. United States, 109 Fed. Cl. 288, 298-99 (2013) (denying a motion to dismiss because it was ambiguous as to whether a separate clause of the contract constrained the government's "unilateral determination" to set the incentive fee; "Clause H.36 does not clearly resolve whether the AFDO's discretion extended to his calculation of the award fee or was limited to amending the AFEB's evaluations and numerical ratings. Because Clause H.36 is ambiguous, the Court must deny defendant's motion to dismiss plaintiff's claim that the Army breached Clause H.36.").

[55] *See* 48 C.F.R. § 52.216-7 (2017) (Allowable Cost and Payment); *Id.* § 52.216-10 (2017) (Incentive Fee); *Id.* § 52.216-16 (Incentive Price Revision - Firm Target); *Id.* § 52.216-17 (Incentive Price Revision - Successive Targets).

[56] *E.g., compare id.* § 52.216-7 (Allowable Cost and Payment) *with id.* § 52.216-16 (Incentive Price Revision - Firm Target).

[57] *See generally* OFF. OF THE UNDERSEC'Y OF DEF., GUIDANCE ON USING INCENTIVE AND OTHER CONTRACT TYPES 20–21 (Apr. 1, 2016), https://www.acq.osd.mil/dpap/policy/policyvault/USA001270-16-DPAP.pdf.

[58] *Id*.

[59] 48 C.F.R. §§ 28.001–28.204-4 (2017).

[60] *Id.* § 28.001. Under certain circumstances, contractors may secure a bond through means other than a surety, such as through irrevocable letters of credit or certified check. *See Id.* §§ 28.204–204-3.

[61] Morrison Assurance Co. v. United States, 3 Cl. Ct. 626, 632–33 (1983) ("Essentially, the payment bond and the performance bond are distinguished by the different obligations a surety has under the respective bonds. Under the performance bond, the surety must assume primary responsibility for the completion of the contract. Under the Federal Procurement Regulations, the surety has the option of completing the project itself or allowing the government to find a

"acceptable assets," as defined in the FAR.[62] While the primary purpose of a surety bond is to protect the government, a bond also arguably serves as a contractor accountability measure because it subjects a contractor to potential additional costs. These could include, for example, liability expenses under indemnity agreements with the surety. Moreover, it is possible that the contractor would find it more expensive and more difficult—perhaps even impossible—to qualify for a bond for future contracts.[63]

The FAR authorizes several different types of bonds, but the two most relevant to contractor accountability are performance and payment bonds, which are described in turn.[64]

Performance bonds. An agency may request a performance bond to ensure that contractors perform in accordance with their contractual obligations.[65] The FAR generally requires performance bonds in construction contracts valued over the simplified acquisition threshold (i.e., $250,000),[66] but a procuring agency may also request such a bond when it is "necessary to protect the Government's interest."[67] The FAR provides that performance bonds might be necessary in nonconstruction contracts when, for instance, the agency is contracting for demolition projects.[68] The maximum amount (i.e., penal amount) of a performance bond generally must be the full contract price, including coverage for any potential increase in the contract price,[69] unless the procuring agency determines that it will be adequately protected by a lower penal amount.[70]

Payment bonds. A payment bond is used to ensure that all subcontractors, laborers, and suppliers that play a role in performing a contract are paid in accordance with the law.[71] The FAR generally requires that a contract also include a payment bond when a performance bond is required.[72] An agency can also request a payment bond when it "is in the Government's interest."[73] The penal amount of payment bonds must not be less than that of the contract's performance bond, and,

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new contractor and pay the government the expense of completion. Under either method, however, the surety is responsible for the expense of completion up to the applicable bond limit. Under the payment bond, the surety is responsible for certain unsatisfied debts of its bonded contractor and has no responsibility for the completion of the project. Although the actual expenses paid under each bond may often be similar, the surety has primary responsibility for the project itself only under its performance bond." (citations omitted)).

[62] 48 CF.R. § 28.203-2(b) (2017).

[63] *See* SURETY INFO. OFFICE, HOW TO OBTAIN SURETY BONDS 3–5 (2015), https://suretyinfo.org/?wpfb_dl=57 (noting that surety bond eligibility and cost can be affected by past performance and that sureties "usually require a demonstration of commitment from the construction company's owners through personal and/or corporate indemnity.").

[64] Other bonds include bid bonds, advance payment bonds, and patent infringement bonds. *See* 48 C.F.R. § 28.001 (2017) (defining "Bond").

[65] *Id.* § 28.001. *See also* Morrison Assurance Co. v. United States, 3 Cl. Ct. 626, 632 (1983).

[66] 41 U.S.C. § 134 (2018).

[67] 48 C.F.R. §§ 28.102-1, 102-2, 103-2(a). (2017).

[68] *Id.* § 28.103-2(a). Performance bonds also might be warranted when the relevant contract provides "[s]ubstantial progress payments" prior to the delivery of finished products, or the contractor will be using government property to perform the contract. *Id*.

[69] *Id.*

[70] *Id.* § 28.102-2(b)–(d).

[71] *Id.* § 28.001. *See also* Morrison Assurance Co. v. United States, 3 Cl. Ct. 626, 632–33 (1983).

[72] 48 C.F.R. § 28.103-3(a) (2017) ("A payment bond is required only when a performance bond is required, and if the use of payment bond is in the Government's interest.").

[73] *Id.* § 28.103-3(a).

thus, is generally the full contract price, including potential increases, unless the contracting officer determines in writing that such amount would be "impractical."[74]

Liquidated Damages

Liquidated damages are predetermined sums a contractor must pay the procuring agency for specified contract breaches or performance failures.[75] By predetermining the costs associated with a breach or failure to perform, liquidated damages clauses hold contractors accountable for noncompliance, while "sav[ing] the time and expense of litigating the issue of damages."[76] The FAR authorizes (and in some cases, requires)[77] the use of liquidated damages clauses in contracts when an agency reasonably expects that a contractor's failure to meet timelines for the delivery of goods or the performance of services will harm the government, but "[t]he extent or amount of such damage would be difficult or impossible to estimate accurately or prove."[78]

Liquidated damages are intended to represent "just compensation for the harm that is caused by late delivery or untimely performance of the particular contract."[79] Courts will generally enforce a liquidated damages clause if it is reasonable and not punitive in nature.[80] Liquidated damages must bear some reasonable relation to the potential damage that the government would suffer as a result of performance or delivery delays.[81] For example, a liquidated damages clause in a construction contract should encompass "the estimated daily cost of Government inspection and superintendence [and] . . . other expected expenses associated with delayed completion."[82] A contractor challenging a liquidated damages clause as an unenforceable penalty has a "heavy" burden of proof because, by their very nature, liquidated damages are intended to cover harms that "are uncertain or hard to measure."[83]

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[74] *Id.* § 28.102-2(b)(2). Slightly different payment bond standards are applicable to relatively low value contracts. *Id.* § 28.102-2(c).

[75] Ralph C. Nash, Jr., Steve L. Schooner, Karen R. O'Brien-DeBakey & Vernon J. Edwards, THE GOVERNMENT CONTRACTS REFERENCE BOOK 318 (Wolters Kluwer L. & Bus. 4th ed. 2013).

[76] DJ Mfg. Corp. v. United States, 86 F.3d 1130, 1133 (Fed. Cir. 1996).

[77] *See, e.g.,* 48 C.F.R. § 19.708(b) (2017) (certain contracts incorporating small business subcontracting plans); *id.* § 22.305 (certain contracts that involve hiring laborers or mechanics); *id.* § 22.2110 (certain construction and service contracts).

[78] *Id.* § 11.501(a). The FAR generally requires contracting officers to "take all reasonable steps to mitigate liquidated damages . . . [to] prevent excessive loss to defaulting contractors and protect the interests of the Government." *Id.* § 11.501(c).

[79] *Id.* § 11.501(b).

[80] *See id.*; *see also DJ Mfg. Corp.*, 86 F.3d at 1137 ("[R]egardless of how the liquidated damage figure was arrived at, the liquidated damages clause will be enforced 'if the amount stipulated is reasonable for the particular agreement at the time it is made.'" (citations omitted)); Kothe v. R.C. Taylor Trust, 280 U.S. 224, 226 (1930). *See also* K-Con Bldg. Sys., Inc. v. United States, 107 Fed. Cl. 571, 594 (2012) ("[C]ourts will not enforce a liquidated damages clause when the amount of liquidated damages is 'plainly without reasonable relation to any probable damage which may follow a breach' or is 'so extravagant, or so disproportionate to the amount of property loss, as to show that compensation was not the object aimed at or as to imply fraud, mistake, circumvention, or oppression.'" (citations omitted)).

[81] 48 C.F.R. § 11.501(b) (2017) ("Liquidated damages are used to compensate the Government for probable damages. Therefore, the liquidated damages rate must be a reasonable forecast of just compensation for the harm that is caused by late delivery or untimely performance of the particular contract.").

[82] *Id.* § 11.502(b).

[83] *K-Con Bldg. Sys.*, 107 Fed. Cl. at 595.

Contract Termination for Default

Termination of a contract because of a contractor's default is arguably the most consequential and dramatic contract-based contractor accountability tool at the government's disposal.[84] By terminating a contract, in whole or in part, for default, a procuring agency is informing a contractor that its failure to meet contract requirements "discharges government duties under the contract while exposing the contractor to potential liability for the consequences of its breach."[85] Courts have long held that the federal government has the authority to terminate contracts even in the absence of express contract termination rights.[86] Nevertheless, the FAR generally requires agencies to incorporate termination clauses in procurement contracts.[87]

The FAR authorizes an agency to terminate a contract for default due to a "contractor's actual or anticipated failure to perform its contractual obligations."[88] Courts review an agency's decision to terminate a contract for default on an "ad hoc, factual" basis, "examin[ing] and weighing [] all relevant circumstances."[89] These facts and circumstances can include the extent of performance and the time left to complete the contract; whether the contractor has met performance goals; the contractor's history of performance; the contractor's finances; and issues with suppliers or subcontractors.[90]

In order to terminate a contract for default, the FAR requires a procuring agency to comply with various procedural requirements,[91] such as providing the contractor with notice of the default and 10 days to cure the breach.[92] If the contractor fails to rectify (i.e., cure) the problems that served as the basis for the notice of the default (e.g., correcting defective supplies) within 10 days, the procuring agency may issue a written notice of termination, at which point the contractor

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[84] Cibinic, Administration, *supra* note 15, at 791.

[85] *Id*.

[86] *See, e.g.,* Russell Motor Car Co. v. United States, 261 U.S. 514, 521 (1923) ("With the termination of the war[,] the continued production of war supplies would become, not only unnecessary, but wasteful. Not to provide, therefore, for the cessation of this production, when the need for it had passed, would have been a distinct neglect of the public interest."); United States v. Corliss Steam-Engine Co., 91 U.S. 321, 322 (1875) ("[T]he power to suspend work contracted for, whether in the construction, armament, or equipment of vessels of war, when from any cause the public interest requires such suspension, must necessarily rest with [the Secretary of the Navy]."); Torncello v. United States, 681 F.2d 756, 764 (Ct. Cl. 1982) ("The concept that the government may, under certain circumstances, terminate a contract and settle with the contractor for the part performed dates from the winding down of military procurement after the Civil War. . . . The case that first articulated this idea, and which generally is credited as providing the basic legal theory to support the modern termination for convenience clause, is *United States v. Corliss Steam-Engine Co.*").

[87] *See, e.g.,* 48 C.F.R. §§ 12.403, 49.501–505 (2017).

[88] *Id.* § 49.401(a).

[89] McDonnell Douglas Corp. v. United States, 567 F.3d 1340, 1350 (Fed. Cir. 2009) (designated by the Federal Circuit as *McDonnell-Douglas XIV*), *vacated and remanded*, 563 U.S. 478 (2011). *See also* McDonnell Douglas Corp. v. United States, 323 F.3d 1006, 1016–17 (Fed. Cir. 2003) (designated by the Federal Circuit as *McDonnell-Douglas XII*).

[90] *Id*. at 1351 ("Of course, in some cases, it is possible that a conclusion drawn from a comparison of the entire contract effort and the time remaining for contract performance is so clear that it becomes dispositive. However, in cases such as the present one, where such a comparison is inapplicable, the court must examine other factors, including the contractor's failure to meet progress milestones, its problems with subcontractors and suppliers, its financial situation, and its performance history." (citations omitted)).

[91] 48 C.F.R. §§ 49.402-3, 49.403 (2017).

[92] *Id.* § 49.402-3(c), (d). *See also id.* §§ 52.249-8(a)(2), 52.249-9(a). 52.249-10(a). Agencies do not have to provide a cure notice under certain circumstances, such as when the default is for failure to meet delivery or performance deadlines. *Id.* § 49.402-3(c).

generally must immediately halt work on the terminated portion of the contract and inform subcontractors and vendors to do the same.[93]

The financial impact that a contractor suffers when a procuring agency exercises its right to terminate a contract for default varies according to the contract type.[94] Typically, the financial impact of a default termination is most dramatic with fixed-price supply contracts because the procuring agency must provide compensation only for supplies that it accepts and that meet the contract specifications.[95] Consequently, a contractor under a fixed-price supply contract generally will be responsible for all of the costs associated with manufacturing/assembling goods that the procuring agency rejected for failure to meet contract specifications.[96] In contrast, under construction and service contracts, the procuring agency generally must compensate contractors for all performance that takes place prior to the default and termination.[97] Regardless of contract type, contractors generally will be liable for the extra cost to the government of reprocuring the contract.[98] Additionally, contractors might be required to return certain compensation (e.g., progress payments) they had received prior to the termination for default,[99] and they might be liable for liquidated damages, actual damages, and the repercussions of triggering a surety bond.[100]

On top of these contractual liabilities, contractors that have had contracts terminated for default might have difficulty receiving future contracts because, as is discussed in the next section of this report, procuring agencies generally consider prior contract performance during the contract solicitation and selection processes.[101] Furthermore, the cause of a termination for default potentially could serve as grounds for suspending or debarring a contractor from government contracting, as discussed in the final section of this report.[102]

[93] *Id.* § 49.402-3(g).

[94] Cibinic, Administration, *supra* note 15, at 792.

[95] 48 C.F.R. § 49.402-2(a) (2017). The procuring agency might also exercise its right to equitable price adjustment. *See infra* "Corrective Actions for Nonconforming Goods & Services."

[96] 48 C.F.R. § 52.248-8(f) (2017). *See also* Cibinic, Administration, *supra* note 15, at 792.

[97] 48 C.F.R. §§ 52.249-9(f), 52.249-10(a) (2017). *See also* Cibinic, Administration, *supra* note 15, at 791–92.

[98] 48 C.F.R. § 49.402-6 (2017). The excess procurement costs must be reasonable. Cascade Pac. Int'l v. United States, 773 F.2d 287, 293–94 (Fed. Cir. 1985) ("[E]xcess reprocurement costs may be imposed only when the Government meets its burden of persuasion that the following conditions (factual determinations) are met: (1) the reprocured supplied are the same as or similar to those involved in the termination; (2) the Government actually incurred excess costs; and (3) the Government acted reasonably to minimize the excess costs resulting from the default.").

[99] 48 C.F.R. § 49.402-2(a) (2017).

[100] *Id.* § 49.402-7(a)–(b). *See also id.* §§ 52.249-8(h), 52.249-9(h), 52.249-10(d) (each stating: "The rights and remedies of the Government in this clause are in addition to any other rights and remedies provided by law or under this contract."). *See, e.g.*, Armour of Am. v. United States, 96 Fed. Cl. 726, 771 (2010) ("Defendant has demonstrated that the termination for default of plaintiff's contract was reasonable and not in bad faith or an abuse of discretion . . . and defendant is awarded reprocurement costs in the amount of $1,507,438.00 and $45,630.00 in administrative costs, for a total sum of $1,553,068.00.").

[101] *See infra* "Evaluation of Prospective Contractors During the Selection Process."

[102] *See infra* "Exclusion Through Suspension & Debarment."

A contractor may challenge[103] a default termination by arguing, for example, that the default was caused by "excusable" forces outside of the contractor's control (e.g., natural disaster),[104] or that the procuring agency failed to follow the FAR's default termination procedures.[105] Nevertheless, even if the contractor's challenge proved successful,[106] the contract generally would not be reinstated, but, rather, likely would be converted from a default termination to a termination for the government's convenience if it is in the government's interest to do so.[107]

The FAR defines "[t]ermination for convenience" to "mean[] the exercise of the Government's right to completely or partially terminate performance of work under a contract when it is in the Government's interest."[108] Courts have construed the term "Government's interest" broadly[109] to include situations in which the agency no longer needs the products or services;[110] the acquisition has become too expensive;[111] or there has been a corrosion in the relationship between the agency and contractor. The conversion of a default termination to a termination for the government's convenience "is a very common practice and has been extended to practically any reason for wrongful default termination."[112]

When the government terminates a contract for convenience it is generally liable for the "recovery [of] costs incurred, profit on work done, and costs of preparing the termination

[103] As previously mentioned, procuring agencies and contractors can voluntarily resolve disagreements over the performance of a contract, or when agreement cannot be reached, a federal court (typically, the U.S. Court of Federal Claims) or a board of contract appeals can review the dispute and enforce any remedies in accordance with the Contract Disputes Act. *See supra* notes 17-18.

[104] 48 C.F.R. § 52.249-14(a) (2017) ("[T]he Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are (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. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor.").

[105] *See, e.g.*, Electro-Magnetic Refinishers, Inc., GSBCA No. 5035, 79-1 BCA ¶13,697.

[106] "Success" could be achieved through the voluntary agreement of the procuring agency or pursuant to an opinion of a contract board of appeals or federal court. *See supra* notes 17-18 & 103 and surrounding text.

[107] 48 C.F.R. § 49.402-3(j) (2017) ("If the contracting officer determines before issuing the termination notice that the failure to perform is excusable, the contract shall not be terminated for default. If termination is in the Government's interest, the contracting officer may terminate the contract for the convenience of the Government."). *See also id.* §§ 52.249-6(b), 52.249-8(g), 52.249-9(g). 52.249-10(c). *See also supra* note 86 and surrounding text.

[108] 48 C.F.R. § 2.101 (2017).

[109] Agencies cannot exercise this authority through an "abuse of discretion" or in "bad faith." Krygoski Constr. Co. v. United States, 94 F.3d 1537, 1544–45 (Fed. Cir. 1996). ("A contracting officer may not terminate for convenience in bad faith, for example, simply to acquire a better bargain from another source. When tainted by bad faith or an abuse of contracting discretion, a termination for convenience causes a contract breach." (citing Torncello v. United States, 681 F.2d 756, 772 (Ct. Cl. 1982)); Allied Materials & Equip. Co. v. United States, 215 Ct. Cl. 902, 905–06 (1977); Nat'l Factors, Inc. v. United States, 492 F.2d 1383, 1385 (Ct. Cl. 1974); Keco Indus., Inc. v. United States, 492 F.2d 1200, 1203–04 (Ct. Cl. 1974); John Reiner & Co. v. United States, 325 F.2d 438, 442 (Ct. Cl. 1963).

[110] *See, e.g.*, Russell Motor Car Co. v. United States, 261 U.S. 514, 521 (1923); United States v. Corliss Steam-Engine Co., 91 U.S. 321, 322–23 (1875).

[111] *See, e.g.*, *Krygoski Constr. Co.*, 94 F.3d at 1541.

[112] Cibinic, Administration, *supra* note 15, at 964 ("The conversion of default to convenience terminations by boards [of contract appeals] and courts is a very common practice and has been extended to practically any reason for wrongful default termination."). *See also* Salsbury Indus. v. United States, 905 F.2d 1518, 1521 (Fed. Cir. 1990) ("It is not the province of the courts to decide de novo whether termination was the best course. In the absence of bad faith or clear abuse of discretion the contracting officer's election to terminate is conclusive." (citations omitted)).

settlement proposal."[113] However, the contractor is not able to recover "anticipatory profits," which would generally be recoverable, when the government has breached the contract.[114]

Contractor Performance Evaluations

When selecting contractors, procuring agencies often must consider various contractor accountability issues, notably including the contractor's performance under other contracts, through (1) "responsibility determinations" to assess whether the contractor is capable of performing on the contract; and (2) source selections under negotiated contracting.[115] (Similarly, as is discussed in the next section of this report, procuring agencies also must ensure that a contractor is legally eligible to be awarded a federal contract.) Procuring agencies generally have considerable discretion in *how* they evaluate prospective contractors when conducting a selection process,[116] as long as selection decisions are rationally based and comply with the law.[117]

The FAR generally requires procuring agencies to compile and review information about potential contractors in the federal government's Contractor Performance Assessment Reporting

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[113] Cibinic, Contract Changes, *supra* note 18, at 175. *See, e.g.,* 48 C.F.R. § 52.249-6(h) (2017) (Termination (Cost-Reimbursement)) ("If the Contractor and the Contracting Officer fail to agree in whole or in part on the amount of costs and/or fee to be paid because of the termination of work, the Contracting Officer shall determine . . . the amount, if any, due the Contractor . . . which shall include the following: (1) All costs reimbursable under this contract, not previously paid, for the performance of this contract before the effective date of the termination . . . ; (2) The cost of settling and paying termination settlement proposals under terminated subcontracts . . . ; (3) The reasonable costs of settlement of the work terminated . . . ;" and (4) potentially portions of incentive fees.). *See also id.* §§ 52.249-8(f) (Default (Fixed-Price Supply and Service)), 52.249-9(f) (Default (Fixed-Price Research and Development)), 52.249-10(c) (Default (Fixed-Price Construction).

[114] Torncello v. United States, 681 F.2d 756, 759 (Ct. Cl. 1982) ("The [termination for convenience] clause is intended to enable the contracting officer to stop or curtail a contractor's performance without involving the government in a breach that would render it liable for the contractor's anticipatory profits.").

[115] *See, e.g.,* 48 C.F.R. §§ 9.104-1, 15.304(c) (2017).

[116] *See, e.g., id.* §§ 9.104-3(b), 9.104-6(b)(3) ("Contracting officers shall use sound judgment in determining the weight and relevance of the information contained in [the Federal Awardee Performance and Integrity Information System] and how it relates to the present acquisition.").

[117] This discretion is subject to Administrative Procedure Act review. 5 U.S.C. § 706 ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . without observance of procedure required by law . . . ."). *See, e.g.,* Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1333 (Fed. Cir. 2001) ("The traditional APA standard adopted by the *Scanwell* [*Laboratories, Inc. v. Shaffer*] line of cases allows for review of an agency's responsibility determination if there has been a violation of a statute or regulation, or alternatively, if the agency determination lacked a rational basis."); Todd Constr., LP v. United States, 88 Fed. Cl. 235, 247 (2009) ("In the bid protest context, the assignment of a past performance rating is reviewed only to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations, since determining the relative merits of the offerors' past performance is primarily a matter within the contracting agency's discretion." (internal quotations and citation omitted)).

Under certain circumstances, contractors have due process rights to at least receive notification of an agency's nonresponsibility determination "and some opportunity to respond to the charges before adverse action is taken." Old Dominion Dairy Prods., Inc. v. Sec'y of Def., 631 F.2d 953, 956–57 (D.C. Cir. 1980) ("We are mindful of the fact that Government agencies require sufficient latitude to ensure the efficient functioning of agency operations, and that the imposition of stringent due process requirements on every governmental decision could have devastating effects on the conduct of Government business. Nevertheless, we hold that when the Government effectively bars a contractor from virtually all Government work due to charges that the contractor lacks honesty or integrity, due process requires that the contractor be given notice of those charges as soon as possible and some opportunity to respond to the charges before adverse action is taken.").

System (CPARS).[118] These databases include the Past Performance Information Retrieval System (PPIRS), which is available only to authorized government personnel and the contractor in question,[119] and the publicly available Federal Awardee Performance and Integrity Information System (FAPIIS).[120] In addition, agencies are required to compile and review information in a separate but linked government-run database called the System for Award Management (SAM) Exclusions.[121]

This section of the report first analyzes FAR provisions requiring procuring agencies to evaluate *prospective* contractors in connection with[122] (1) responsibility determinations and (2) the source selection process. It then analyzes FAR provisions requiring agencies to document contractor performance-related matters in PPIRS, FAPIIS, and SAM Exclusion while administering *existing* contracts.

Evaluation of Prospective Contractors During the Selection Process

Responsibility Determinations

Prior to entering into most[123] procurement contracts, the FAR requires procuring agencies to "make[] an affirmative determination . . . that the prospective contractor is responsible."[124] According to the FAR, procuring agencies must determine that a contractor is "nonresponsible" unless there is "information clearly indicating that the prospective contractor is responsible."[125] Some of the criteria agencies must consider when making a responsibility determination include contractor accountability measures. These factors include whether a contractor "[has] a satisfactory performance record";[126] "a satisfactory record of integrity and business ethics;"[127] and is legally eligible to be awarded a procurement contract.[128] For example, a contractor may become ineligible for award of a federal procurement contract if the contractor has been convicted of a federal crime in the last two years or is delinquent in paying federal taxes.[129]

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[118] 48 C.F.R. §§ 9.105-2, 9.406-3, 9.407-3, 42.1501, 42.1502, 42.1503 (2017).

[119] *Id.* § 42.1503(d).

[120] *See, e.g., id.* §§ 9.105-1(c), 9.104-6(a)(1) ; 42.1503.

[121] *See, e.g., id.* §§ 9.105-1(c), 9.104-6(a)(1), 42.1503.

[122] Past performance is just one component of the source selection evaluation criteria. *See id.* § 15.305(a)(2)(i) ("Past performance information is one indicator of an offeror's ability to perform the contract successfully. The currency and relevance of the information, source of the information, context of the data, and general trends in contractor's performance shall be considered. This comparative assessment of past performance information is separate from the responsibility determination required under subpart 9.1.").

[123] A responsibility determination is generally required for all contracts other than those with state, local, and foreign governments, federal agencies and instrumentalities, and agencies for the blind and severely disabled, or where it "would be inconsistent with the laws or customs where the contractor is located." *Id.* § 9.102(a)(2).

[124] *Id.* § 9.103(b).

[125] *Id.* § 9.103(b).

[126] *Id.* § 9.104-1(c). Contractors cannot be considered nonresponsible or responsible exclusively because they lack performance history. *Id*.

[127] *Id.* § 9.104-1(d).

[128] *Id.* § 9.104-1(g) ("To be determined responsible, a prospective contractor must . . . [b]e otherwise qualified and eligible to receive an award under applicable laws and regulations.").

[129] *Id.* § 9.104-7(d) ("The contracting officer shall insert the provision 52.209-11, Representation by Corporations Regarding Delinquent Tax Liability or a Felony Conviction under any Federal Law, in all solicitations."). This solicitation clause requires contractors to attest affirmatively that they have not been convicted of federal crimes in the

When assessing a contractor's past performance for a responsibility determination, procuring agencies can examine prior contractor performance failures and deficiencies. Such failures and deficiencies may include "failure to apply sufficient tenacity and perseverance to perform acceptably;" "the extent of deficient performance;" the length of time that has elapsed since deficient performance; and the steps a contractor has taken to rectify the causes of past failures and deficiencies.[130] As part of its responsibility determination, a procuring agency also generally must "consider [the] information available through FAPIIS with regard to the [prospective contractor] and any immediate owner, predecessor, or subsidiary identified for that [prospective contractor] in FAPIIS, including information that is linked to FAPIIS such as from SAM, and PPIRS."[131]

Source Selection in Negotiated Contracting

Separate from, and in addition to, responsibility determinations,[132] procuring agencies generally are required to evaluate prospective contractors under a negotiated contracting process.[133] When contracting through negotiation, as opposed to sealed bidding, the procuring agency's main goal "is to select the proposal that represents the best value" to the government.[134] Price or cost are always going to be part of the best value evaluation, but other factors, such as past performance, may also play a role.[135] Nevertheless, while it imposes some requirements on the process, the FAR generally defers to the procuring agency's judgment regarding "[t]he currency and relevance of the information" it examines on past performance.[136] For instance, the FAR requires agencies to describe their general method for evaluating past performance when soliciting contracts and to provide prospective contractors a chance to submit information about their past performance during the selection process.[137] The FAR also requires procuring agencies to assess a prospective contractor's past work experience with disadvantaged small businesses, if applicable.[138] The FAR further prohibits procuring agencies from viewing a prospective contractor's *lack* of past

last two years and are not delinquent on their federal taxes. *Id.* § 52.209-11(b).

130 *Id.* § 9.104-3(b).

131 *Id.* § 9.105-1(c).

132 *See supra* notes 122-123.

133 Past performance evaluation is generally required for "all source selections for negotiated competitive acquisitions expected to exceed the simplified acquisition threshold," unless the agency determines that such an evaluation is not suitable under the circumstances. 48 C.F.R. § 15.304(c)(3) (2017). However, there are exceptions, including at times, when using a Lowest Price Technically Acceptable contract selection process. *Id.* § 15.101-2(b).

134 *Id.* § 15.302.

135 *Id.* § 15.101 ("[I]n acquisitions where the requirement is clearly definable and the risk of unsuccessful contract performance is minimal, cost or price may play a dominant role in source selection. The less definitive the requirement, the more development work required, or the greater the performance risk, the more technical or past performance considerations may play a dominant role in source selection."). *See also id.* § 15.101-1(a), (c) ("A tradeoff process is appropriate when it may be in the best interest of the Government to consider award to other than the lowest priced offeror or other than the highest technically rated offeror. . . . This process permits tradeoffs among cost or price and non-cost factors and allows the Government to accept other than the lowest priced proposal. The perceived benefits of the higher priced proposal shall merit the additional cost . . .").

136 *Id.* § 15.305(a)(2)(i).

137 *Id.* § 15.305(a)(2)(ii). Prospective contractors generally must be given the opportunity to respond to material adverse past performance information. *Id.* § 15.306(d)(3). *See also* Q Integrated Cos., LLC v. United States, 126 Fed. Cl. 124, 145 (2016) ("The court concludes that during its discussions, the government failed to disclose to Q Integrated that its past performance submission either showed 'significant weaknesses' or constituted 'adverse past performance information,' in contravention of FAR § 15.306(d)(3) and the definitional terms of the solicitation.").

138 48 C.F.R. § 15.305(a)(2)(v) (2017).

performance history either favorably or unfavorably.[139] Other than these general requirements, procuring agencies have a great deal of discretion in determining how to evaluate past performance when selecting bids, and courts generally defer to an agency's reasonable exercise of that discretion.[140]

Evaluating Contractors During Contract Performance

To facilitate agency evaluations of a prospective contractor's likelihood of success on future contracts,[141] the FAR generally requires procuring agencies to conduct and document performance evaluations of contractors shortly after a contract is completed, as well as at least once each year.[142] The FAR requires past performance evaluations to include, at the very least, assessments of the contractor's performance under the following factors:

1. Technical (quality of product or service).
2. Cost control (not applicable for firm-fixed-price or fixed-price with economic price adjustment arrangements).
3. Schedule/timeliness.
4. Management or business relations.
5. Small business subcontracting, including reduced or untimely payments to small business subcontractors . . . (as applicable[]).
6. Other (as applicable) (e.g., trafficking violations, tax delinquency, failure to report in accordance with contract terms and conditions, defective cost or pricing data, terminations, suspension and debarments).[143]

Procuring agencies generally must rate a contractor's performance under each applicable evaluation factor as either exceptional, very good, satisfactory, marginal, or unsatisfactory.[144] These factors are described in **Table 2**.

[139] *Id.* § 15.305(a)(2)(iv).

[140] Todd Constr., L.P. v. United States, 88 Fed. Cl. 235, 247 (2009) ("In the bid protest context, the assignment of a past performance rating is reviewed only to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations, since determining the relative merits of the offerors' past performance is primarily a matter within the contracting agency's discretion." (internal quotations and citation omitted)).

[141] 48 C.F.R. § 42.1501(a) (2017).

[142] *Id.* § 42.1502(a). Past performance evaluations are not required for every contract. *Id.* § 42.1502(b)-(f), (h).

[143] *Id.* § 42.1503(b)(2). Procuring agencies also are generally required to evaluate incentive fee performance, if applicable. *Id.* § 42.1503(c).

[144] *Id.* § 42.1503(b)(4).

Table 2. Evaluation Ratings Definitions As Provided in FAR Table 42-1

Rating	Definition	Note
Exceptional	Performance meets contractual requirements and exceeds many to the Government's benefit. The contractual performance of the element or sub-element being evaluated was accomplished with few minor problems for which corrective actions taken by the contractor were highly effective.	To justify an Exceptional rating, identify multiple significant events and state how they were of benefit to the Government. A singular benefit, however, could be of such magnitude that it alone constitutes an Exceptional rating. Also, there should have been NO significant weaknesses identified.
Very Good	Performance meets contractual requirements and exceeds some to the Government's benefit. The contractual performance of the element or sub-element being evaluated was accomplished with some minor problems for which corrective actions taken by the contractor were effective.	To justify a Very Good rating, identify a significant event and state how it was a benefit to the Government. There should have been no significant weaknesses identified.
Satisfactory	Performance meets contractual requirements. The contractual performance of the element or sub-element contains some minor problems for which corrective actions taken by the contractor appear or were satisfactory.	To justify a Satisfactory rating, there should have been only minor problems, or major problems the contractor recovered from without impact to the contract/order. There should have been NO significant weaknesses identified. A fundamental principle of assigning ratings is that contractors will not be evaluated with a rating lower than Satisfactory solely for not performing beyond the requirements of the contract/order.
Marginal	Performance does not meet some contractual requirements. The contractual performance of the element or sub-element being evaluated reflects a serious problem for which the contractor has not yet identified corrective actions. The contractor's proposed actions appear only marginally effective or were not fully implemented.	To justify Marginal performance, identify a significant event in each category that the contractor had trouble overcoming and state how it impacted the Government. A Marginal rating should be supported by referencing the management tool that notified the contractor of the contractual deficiency (e.g., management, quality, safety, or environmental deficiency report or letter).

Rating	Definition	Note
Unsatisfactory	Performance does not meet most contractual requirements and recovery is not likely in a timely manner. The contractual performance of the element or sub-element contains a serious problem(s) for which the contractor's corrective actions appear or were ineffective.	To justify an Unsatisfactory rating, identify multiple significant events in each category that the contractor had trouble overcoming and state how it impacted the Government. A singular problem, however, could be of such serious magnitude that it alone constitutes an unsatisfactory rating. An Unsatisfactory rating should be supported by referencing the management tools used to notify the contractor of the contractual deficiencies (e.g., management, quality, safety, or environmental deficiency reports, or letters).

Source: 48 C.F.R. § 42.1503, Table 42-1 (2017).

The procuring agency also must provide a narrative explaining why it assessed each rating.[145] Procuring agencies generally must submit past performance evaluations electronically to the PPIRS module of CPARS.[146] After the performance evaluation is filed, the contractor has up to two weeks to submit comments, or rebuttals,[147] which are also filed in PPIRS.[148] The contracting agency reviews any comments received from the contractor and then finalizes the evaluation.[149] Past performance evaluations generally are made available only to authorized government personnel and the contractor in question.[150]

The FAR also requires procuring agencies to maintain information regarding a contractor's past performance beyond that which is included in past performance evaluations.[151] For example, agencies are required to report information related to contractor performance in the publicly available FAPIIS, such as whether the agency has terminated a contract for default; made a nonresponsibility determination; experienced certain problems associated with payments to small business subcontractors; or made administrative determinations regarding "substantiated allegations" of human trafficking.[152] As the next section explains, the FAR also requires agencies to report information to the electronic SAM Exclusions database about actions they have taken to exclude contractors from being eligible to receive procurement contracts. Finally, the FAR requires agencies to "[e]stablish procedures to ensure that [they] do[] not solicit offers from, award contracts to, or consent to subcontracts with contractors whose names are in the SAM Exclusions, except" under limited circumstances.[153]

145 *Id.* § 42.1503(b)(4).

146 *Id.* § 42.1503(d).

147 *Id.*

148 *Id.* § 42.1503(f).

149 *Id.* § 42.1503(d).

150 *Id.*

151 *See, e.g., id.* § 42.1503(h).

152 *Id.* § 42.1503(h)(1).

153 *Id.* § 9.404.

Other Legal Tools to Hold Contractors Accountable

Exclusion Through Suspension & Debarment

The FAR also requires agencies to have policies and procedures in place to "suspend" and "debar" contractors—i.e., to exclude, except under limited circumstances[154]—from being eligible to receive new federal contracts for some length of time because of various criminal convictions, civil judgments, serious contract performance failures, or specified grounds.[155] These policies and procedures are designed to ensure that agencies award contracts to responsible contractors that are capable of successful performance.[156]

Procuring agencies may utilize suspension proceedings to exclude contractors temporarily during the course of investigations of, or legal proceedings associated with, contractor wrongdoing.[157] A suspension generally must end within 18 months, unless the government initiates civil or criminal proceedings against the contractor.[158] A debarment, in contrast, lasts for a specified period of time "commensurate with the seriousness of the cause(s)," but generally no more than three years.[159]

The government can suspend and/or debar a contractor based[160] on, among other grounds, the contractor's:

- "Commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract;"[161]
- "Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating Federal criminal tax laws, or receiving stolen property;"[162]
- "Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor[];"[163] or
- "[A]ny other cause of so serious or compelling a nature that it affects the present responsibility of [a Government] contractor or subcontractor."[164]

[154] *See, e.g.*, *id.* 9.405(a) ("Contractors debarred, suspended, or proposed for debarment are excluded from receiving contracts, and agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the agency head determines that there is a compelling reason for such action.").

[155] *See, e.g.*, 48 C.F.R. §§ 9.402, 9.406-2, 9.407-2 (2017).

[156] *See, e.g.*, *id.* §§ 9.402, 9.406-2, 9.407-2.

[157] *Id.* § 9.407-1(b)(1).

[158] *Id.* § 9.407-4(b).

[159] *Id.* § 9.406-4(a)(1).

[160] A procuring agency generally may suspend a contractor when there is "adequate evidence" that a contractor has committed the specified offenses. *Id.* § 9.407-2(a). An indictment of a specified offense qualifies as adequate evidence. *Id.* § 9.407-2(b). Grounds for debarment generally must be supported by a criminal conviction, a civil judgment, or "a preponderance of the evidence." *Id.* § 9.406-2(a), (b).

[161] *Id.* §§ 9.406-2(a)(1), (debarment), 9.407-2(a)(1) (suspension).

[162] *Id.* §§ 9.406-2(a)(3) (debarment), 9.407-2(a)(3) (suspension).

[163] *Id.* §§ 9.406-2(a)(5) (debarment), 9.407-2(a)(9) (suspension).

[164] *Id.* §§ 9.406-2(c) (debarment), 9.407-2(c) (suspension). A contractor may also be debarred for the "[w]illful failure to perform" and other "serious" violations of procurement contracts. *Id.* § 9.406-2(b)(1).

While outside the scope of this report, the government can also exclude contractors from being eligible to receive government contracts pursuant to legal authorities other than the FAR.[165] For example, federal law generally prohibits federal agencies from entering into contracts with entities that have been convicted of certain violations of the Clean Water Act and Clean Air Act.[166]

In addition to generally being excluded from acquiring new contracts, contractors that are suspended or debarred also are generally prohibited from being hired as subcontractors under government contracts.[167]

The suspension or debarment of a contractor does not immediately result in the termination of existing contracts, however.[168] Instead, a procuring agency may allow the performance of those contracts to continue unless and until it decides terminating the contract for default or convenience is warranted.[169]

Procuring agencies generally must provide contractors with notice of a suspension or proposed debarment and the opportunity for a hearing before a suspending or debarring official within the agency.[170] These procedural requirements are designed to satisfy the constitutional due process rights of contractors.[171] The notice must explain the grounds for the suspension and proposed debarment, the contractor's rights to dispute the suspension or proposed debarment, the process by which the agency will make a final decision, and the legal impact of the suspension or debarment.[172] If the contractor requests a hearing, the affected contractor may submit evidence, present witnesses, and examine the agency's witnesses.[173] After reviewing the administrative record, the suspending official must notify the contractor of her decision to amend, terminate, or keep in place the suspension or debarment.[174] Alternatively, the contractor and procuring agency

[165] *See, e.g.*, 40 U.S.C. § 3144(b) (2018) ("The Comptroller General shall distribute to all departments of the Federal Government a list of the names of persons whom the Comptroller General has found to have disregarded their obligations to employees and subcontractors [consistent with wage rate requirements of the Davis-Bacon Act]. . . . No contract shall be awarded to persons appearing on the list or to any firm, corporation, partnership, or association in which the persons have an interest until three years have elapsed from the date of publication of the list."). *See also* 48 C.F.R. § 2.101 (2017) (defining the term "Ineligible" to mean "excluded from Government contracting (and subcontracting, if appropriate) pursuant to statutory, Executive order, or regulatory authority other than this regulation (48 CFR chapter 1) and its implementing and supplementing regulations; for example, pursuant to—(1) 40 U.S.C. chapter 31, subchapter IV, Wage Rate Requirements (Construction), and its related statutes and implementing regulations; (2) 41 U.S.C. chapter 67, Service Contract Labor Standards; (3) The Equal Employment Opportunity Acts and Executive orders; (4) 41 U.S.C. chapter 65, Contracts for Material, Supplies, Articles, and Equipment Exceeding $15,000; (5) 41 U.S.C. chapter 83, Buy American; or (6) The Environmental Protection Acts and Executive orders.").

[166] Clean Water Act, 33 U.S.C. § 1368 (2018) (amended by John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636 (Aug. 13, 2018)); Clean Air Act, 42 U.S.C. § 7606 (2018).

[167] 48 C.F.R. §§ 9.405(b), 9.405-2 (2017).

[168] *Id.* § 9.405-1(a).

[169] *Id.*

[170] *Id.* §§ 9.406-3 (debarment), 9.407-3 (suspension).

[171] *See, e.g.*, Horne Bros., Inc. v. Laird, 463 F.2d 1268, 1271 (D.C. Cir. 1972) ("While *Gonzalez* related to a five year disqualification, we think an 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. That fairness requires that the bidder be given specific notice as to at least some charges alleged against him, and be given, in the usual case, an opportunity to rebut those charges.").

[172] 48 C.F.R. §§ 9.406-3(c) (debarment), 9.407-3(c) (suspension) (2017).

[173] *Id.* §§ 9.406-3(b) (debarment), 9.407-3(b) (suspension).

[174] *Id.* §§ 9.406-3(d) (debarment), 9.407-3(d) (suspension).

can negotiate an "administrative agreement" that resolves the issues that prompted the initiation of the suspension or debarment proceedings.[175]

As previously mentioned, procuring agencies are required to file information about contractors that they suspend, debar, or otherwise determine to be ineligible to be awarded government contracts in SAM Exclusions.[176] The information must include: the contractor's name and address; the agency that initiated the relevant action; and the grounds for ineligibility.[177] To help ensure that excluded contractors are not awarded contracts, a procuring agency must check SAM Exclusions both when it receives proposals or opens bids, as well as just before awarding a contract.[178]

Civil Liability for Defrauding the Government

Another mechanism by which the federal government can hold contractors accountable is to enforce civil laws that make it unlawful to defraud the government. Three such laws frequently enforced against government contractors are the False Claims Act;[179] the anti-fraud provision[180] of the Contract Dispute Act;[181] and the Program Fraud Civil Remedies Act.[182] While not exclusively applicable to contracting issues, the government can use these laws to hold government contractors accountable for acquiring, or attempting to acquire, government contracts through fraudulent means or submitting a false claim for payment to the government. The remedies available to the government under each statute are not necessarily exclusive;[183] rather, under certain circumstances, contractors can be held liable under multiple laws.[184] These laws are discussed briefly below.

False Claims Act

The False Claims Act (FCA) prohibits seven types of acts.[185] Of these seven, the violations that are of particular relevance to federal contractors are:

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[175] *Id.* §§ 9.406-3(f) (debarment), 9.407-3(e) (suspension). Information about such an administrative agreement must be submitted in FAPIIS. *Id.* §§ 9.406-3(f) (1)(debarment), 9.407-3(e)(1) (suspension).

[176] *Id.* § 9.404(c)(3).

[177] *Id.* § 9.404(b).

[178] *Id.* § 9.405(d).

[179] 31 U.S.C. §§ 3729-33 (2018).

[180] 41 U.S.C. § 7103(c) (2018).

[181] *Id.* §§ 7101-09.

[182] 31 U.S.C. §§ 3801-12 (2018). Although criminal provisions are outside the scope of this report, government contractors also potentially could be held criminally liable under certain circumstances. Potentially relevant provisions of the federal Criminal Code include 18 U.S.C. § 1001 (false statements), 18 U.S.C. § 287 (false claims), and 18 U.S.C. § 371 (conspiracy to defraud the government).

[183] *See, e.g.,* 31 U.S.C. § 3802(a)(1)(D) (2018) (stating the remedies provided under the Program Fraud Civil Remedies Act are "in addition to any other remedy that may be prescribed by law.").

[184] Roberts v. Shinseki, 647 F.3d 1334, 1341 (Fed. Cir. 2011) ("[T]he PFCRA is not an exclusive remedy. The remedies it provides are 'in addition to any other remedy that may be prescribed by law.'" (quoting 31 U.S.C. § 3802(a)(1)(D))).

[185] 31 U.S.C. § 3729(a)(1)(A)–(G) (2018). *See also* CRS Report R40785, *Qui Tam: The False Claims Act and Related Federal Statutes*, by Charles Doyle ("The False Claims Act . . . proscribes (1) presenting a false claim; (2) making or using a false record or statement material to a false claim; (3) possessing property or money of the U.S. and delivering less than all of it; (4) delivering a certified receipt with intent to defraud the U.S.; (5) buying public property from a federal officer or employee, who may not lawfully sell it; (6) using a false record or statement material to an obligation

> "(A) knowingly present[ing], or caus[ing] to be presented, a false or fraudulent claim for payment or approval; [or]
>
> (B) knowingly mak[ing], use[ing] or caus[ing] to be made or used, a false record or statement material to a false or fraudulent claim."[186]

These fraud provisions govern a wide variety of potential government contractor misconduct, such as submitting a claim for payment while falsely claiming to meet (or failing to disclose a lack of compliance with)[187] a material contract or legal requirement in the submission of a claim for payment;[188] and inducing the government to enter into a contract based on "false statements or fraudulent conduct."[189]

Liability under the FCA is limited to "*knowing*" acts, which is defined to mean having "actual knowledge," being "deliberate[ly] ignorant of the truth" or "act[ing] in reckless disregard for the truth"; however, liability does not require proving actual "intent to defraud."[190] The FCA broadly defines the term '*claim*' "to include 'any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded.'"[191] Additionally, the false or fraudulent claims generally must be "*material*,"[192] which the act defines as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[193]

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to pay or transmit money or property to the U.S., or concealing or improperly avoiding or decreasing an obligation to pay or transmit money or property to the U.S.; or (7) conspiring to commit any such offense.").

186 31 U.S.C. § 3729(a)(1)(A)–(B) (2018).

187 Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 2001 (2016) ("The second question presented is whether . . . a defendant should face False Claims Act liability only if it fails to disclose the violation of a contractual, statutory, or regulatory provision that the Government expressly designated a condition of payment. We conclude that the Act does not impose this limit on liability. But we also conclude that not every undisclosed violation of an express condition of payment automatically triggers liability. Whether a provision is labeled a condition of payment is relevant to but not dispositive of the materiality inquiry.").

188 *Id*. at 1998–99 ("By punishing defendants who submit 'false or fraudulent claims,' the False Claims Act encompasses claims that make fraudulent misrepresentations, which include certain misleading omissions. When, as here, a defendant makes representations in submitting a claim but omits its violations of statutory, regulatory, or contractual requirements, those omissions can be a basis for liability if they render the defendant's representations misleading with respect to the goods or services provided.").

189 Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 787 (4th Cir. 1999) ("Another set of cases involves False Claims Act liability for claims that would not be false under the district court's interpretation of the statute—the fraud-in-the-inducement cases. In these cases, courts, including the Supreme Court, found False Claims Act liability for each claim submitted to the government under a contract, when the contract or extension of government benefit was obtained originally through false statements or fraudulent conduct." (footnote omitted)).

190 31 U.S.C. § 3729(b)(1) (2018).

191 United States *ex rel.* Bettis v. Odebrecht Contractors of Cal., Inc., 393 F.3d 1321, 1326 (D.C. Cir. 2005) (quoting 31 U.S.C. § 3729(c), a subsequently amended statutory provision that is substantially similar to the current 31 U.S.C. § 3729(b)(2)).

192 *Harrison*, 176 F.3d at 788 ("The test for False Claims Act liability distilled from the statute and the sources discussed above is (1) whether there was a false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or to forfeit moneys due (i.e., that involved a 'claim.'")).

193 31 U.S.C, § 3729(b)(4) (2018).

Violators of the FCA can be subject to civil penalties of up to $10,000 (adjusted for inflation),[194] treble damages, and reasonable attorney's fees and other legal costs.[195] The Attorney General can bring claims under the FCA.[196] In addition, "relators"—private individuals acting in the government's name and on the government's behalf—can bring claims under the act through so-called *qui tam* claims.[197] The FCA does not provide for an administrative process; violations of Section 3729 of the FCA are enforced exclusively through the courts.[198]

Anti-Fraud Provision of the Contracts Dispute Act

The Contracts Disputes Act (CDA) establishes judicial and administrative processes for the resolution of certain disputes that arise in the course of awarding and administering applicable government contracts.[199] The CDA includes an anti-fraud provision intended to prevent contractors from "submi[tting] baseless claims [that] contribute [] to the so-called horsetrading theory where an amount beyond that which can be legitimately claimed is submitted merely as a negotiating tactic" in the course of attempting to resolve a contract dispute.[200]

The CDA provision bars contractors from submitting claims that are unsupportable or that are "attributable to a misrepresentation of fact or fraud" in an attempt to acquire a settlement with the government.[201] A "claim" under the CDA is "(1) a written demand, (2) seeking, as a matter of right, (3) the payment of money in a sum certain."[202] The CDA defines "misrepresentation of fact" as "a false statement of substantive fact, or conduct that leads to a belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead."[203]

In order to bring a successful claim under the CDA's anti-fraud provision, the government must show that the contractor's claim was fraudulent and made with "an intent to deceive or mislead the government" based on the "preponderance of the evidence."[204]

Contractors that are held liable under the CDA's anti-fraud provision are liable for "an amount equal to the unsupported part of the claim plus all of the Federal Government's costs attributable to reviewing the unsupported part of the claim."[205]

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[194] The maximum civil penalties for FY2018 are $21,916 to $22,363. Civil Monetary Penalty Adjustments for Inflation, 83 Fed. Reg. 13,826, 13,827–28 (Apr. 2, 2018).

[195] 31 U.S.C. §§ 3729(a)(1)(G), (a)(2)–(3); 3730(d), (g) (2018).

[196] *Id.* § 3730(a)

[197] *Id.* § 3730(b). The government generally has the right to intervene in claims brought by individual relators. *Id*.

[198] *Id*. § 3730.

[199] *See* 41 U.S.C. §§ 7101–09 (2018). *See generally* Cibinic, Contract Changes, supra note 18, at 223–86.

[200] Daewoo Eng'g & Constr. Co. v. United States, 557 F.3d 1332, 1340 (Fed. Cir. 2009) (quoting S. Rep. No. 95-1118, at 20 (1978)).

[201] 41 U.S.C. § 7103(c)(2) (2018).

[202] *Daewoo Eng'g & Constr. Co.*, 557 F.3d at 1335 (quoting Reflectone, Inc. v. Dalton, 60 F.3d 1572, 1575 (Fed. Cir. 1995)).

[203] 41 U.S.C. § 7101(9) (2018).

[204] Commercial Contractors, Inc. v. United States, 154 F.3d 1357, 1362 (Fed. Cir. 1998).

[205] 41 U.S.C. § 7103(c)(2) (2018). *See Daewoo Eng'g & Constr. Co.*, 557 F.3d at 1339 ("The Court of Federal Claims found Daewoo's entire $ 64 million calculation likely was fraudulent, but concluded that a penalty of only $ 50.6 million should be assessed because the remaining $ 13 million incurred cost claims could have been ultimately supported by alternative methodologies which, while incorrect, would not necessarily have been fraudulent." (footnote omitted)).

Program Fraud Civil Remedies Act

The Program Fraud Civil Remedies Act (PFCRA) is another mechanism by which procuring agencies may hold contractors accountable for knowingly submitting "false, fictitious, or fraudulent" contract claims.[206] The fraudulent activities that PFCRA bars are very similar to those barred by the FCA. The PFCRA does not create any new civil fraud violations beyond those established by the FCA except that contractors can be held liable under the PFCRA for making false statements that are not tied to a claim.[207] Instead, the PFCRA provides an additional avenue to hold contractors accountable for fraud.[208] Unlike the FCA, which is exclusively judicially enforced, the PFCRA provides an administrative process for enforcing fraudulent claims in addition to a judicial process.[209] Also in contrast to the FCA, the PFCRA is limited to small claims of not more than $150,000.[210]

Contractors that violate the PFCRA can be subject to a civil penalty up to $5,000 (adjusted for inflation),[211] as well as an assessment equal to twice the amount of any fraudulent claim that was paid by the government.[212]

Procuring agency personnel may report suspected potential violations of the PFCRA to the relevant agency's inspector general or other "investigating official."[213] The investigating official may investigate allegations and, if warranted, issue a report with conclusions about violations to a separate and independent "reviewing official."[214] The reviewing official, upon reviewing the report, may notify the Attorney General of a potential referral of the matter along with an explanation of, among other things, evidence supporting the allegations and the estimated value of the alleged fraud.[215] Upon the Attorney General's approval,[216] the reviewing official may then file a complaint with the contractor or seek to settle the issue with the procuring agency.[217] The contractor may request an administrative hearing,[218] generally conducted in accordance with the

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206 31 U.S.C. § 3802(a)(1) (2018).

207 COUNCIL OF THE INSPECTORS GENERAL ON INTEGRITY AND EFFICIENCY, PROGRAM FRAUD CIVIL REMEDIES ACT PRACTITIONER'S GUIDE 2 (2013), https://www.nsf.gov/oig/outreach/sbirworkshop/PFCRA%20Practioners%20Guide.pdf ("The PFCRA does not create any new civil fraud violations or change the way agencies receive allegations of false claims or false statements," except one: contractors can be held liable under the PFCRA for making false statements that are not tied to a claim).

208 31 U.S.C. § 3103 (2018).

209 PRACTITIONER'S GUIDE, *supra* note 211, at 2–4. *See also* 31 U.S.C. § 3103 (2018).

210 31 U.S.C. § 3803(c)(1) (2018). *See also* Roberts v. Shinseki, 647 F.3d 1334, 1341 (Fed. Cir. 2011) ("The PFCRA does not apply when more than $150,000 'is requested or demanded in violation of [31 U.S.C. § 3802]' in a fraudulent claim or a group of related fraudulent claims. 31 U.S.C. § 3803(c)(1); 38 C.F.R. § 42.6(a)(2). As indicated above, legislative history expressly refers to this restriction as a 'jurisdictional cap.' H.R. Rep. No. 99-1012, at 259 . . . ." (alteration in original)).

211 The maximum civil penalty for FY2018 is $10,781. Program Fraud Civil Remedies Act of 1986, Civil Monetary Penalties Inflation Adjustment, 82 Fed. Reg. 40,957, 40,957 (Aug. 29, 2017).

212 31 U.S.C. § 3802(a)(1)(D) (2018).

213 *Id*. § 3801(a)(4) (defining the term "investigating official.").

214 *Id.* § 3803(a)(1).

215 *Id.* § 3803(a)(2).

216 *Id.* § 3803(b)(2)-(3).

217 *Id.* § 3803(d), (j).

218 *Id.* § 3803(e).

Administrative Procedure Act,[219] before an Administrative Law Judge or other "presiding officer."[220]

If, upon finding that the government met its burden of proof that the contractor, based on a preponderance of the evidence, violated the PFCRA, then the presiding officer may issue an initial decision recommending the issuance of civil penalties and assessments against the contractor.[221] The contractor may appeal the presiding officer's initial decision to the head of the procuring agency.[222] If the contractor does not appeal the presiding officer's initial decision, that decision becomes final.[223] If the initial decision is appealed, the agency head may "affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment."[224] If the agency head determines that the contractor is liable, then the contractor may appeal her decision to a federal district court, which shall set aside the agency head's decision only if it is "unsupported by substantial evidence."[225]

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[219] 5 U.S.C. § 556 (2018). *But see* 31 U.S.C. 3803(g)(1)(B) (2018).

[220] 31 U.S.C. § 3803(f) (2018); *see id.* § 3801(7) (defining the term "presiding officer."). If the contractor does not request a hearing, the presiding officer may issue a decision on the matter based on the record submitted by the reviewing officer. *See* PRACTITIONER'S GUIDE, *supra* note 211, at 3.

[221] 31 U.S.C. § 3803(h) (2018).

[222] *Id.* § 3803(i).

[223] *Id.* § 3803(h).

[224] PRACTITIONER'S GUIDE, *supra* note 211, at 3.

[225] 31 U.S.C. § 3805 (2018). The act only authorizes appeals by the contractor. *Id*.