

Government contractor quarterly review

Providing quarterly regulatory updates to government contractor executives and compliance professionals.

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In this edition, we cover recent guidance for contractors on potential ways to obtain inflation relief (pgs 1, 3), developments in the ESG compliance environment (pg 2), recent legal cases involving document retention and CAS compliance (pg 4), and two new Congressional bills that would make significant changes to the federal IT procurement landscape (pg 5).



Inflation Impact: DoD and GSA Seek to Offer Contractors Relief

Both the Department of Defense (DoD) and General Services Administration (GSA) recently issued guidance on how their respective suppliers can obtain monetary relief from the impacts of inflation.

DoD Guidance

In early September, DoD issued a [memo](#) that stated the DoD will consider contractor requests for "Extraordinary Contractual Relief" (as defined in FAR Part 50) specifically due to inflation for firm-fixed-price contracts. DoD has yet to publish more definitive guidance on the format and timing of the claims or how claim amounts should be determined, but key initial considerations include:

- Funding is limited to amounts already appropriated
- Funding is limited to \$35 million unless certain conditions are met
- Requirement that a "loss" has been suffered, not just a decrease in profit
- Request must be submitted before all contract obligations have been discharged

The September memo followed a DoD memo issued earlier in the year that reiterated the government's stance that inflation alone was not suitable grounds for a request for equitable adjustment (REA).

GSA guidance continued on pg 3

Actions to take now to potentially obtain monetary relief on contracts impacted by inflation:

1. Identify Available Relief Mechanisms

Analyze contracts for relief-granting clauses (e.g., EPA) and eligibility for other mechanisms, such as Extraordinary Contract Relief

2. Communicate with Contracting Officer / Customer

Establish lines of communication with contracting officers/customers and determine their attitudes towards different relief mechanisms

3. Develop 'Entitlement' Fact Base and Narrative

Compile facts and evidence that support 'entitlement' to relief (e.g., customer actions, force majeure events, inflation)

4. Compile Claim Costs

Demonstrate that a loss was experienced, not a profit decline; compile inflation related costs that are allowable and allocable, confirming costs are adequately supported, and organize into a claim package

→ **Supply Chain / Forced Labor Updates**

Congress Advances Bill to Bar Human Trafficking Violators from Federal Contracts

Both houses of Congress unanimously passed the [End Human Trafficking in Government Contracts Act of 2022](#), which when signed into law (as is expected) will require federal contractors be referred for suspension and debarment if they are found to have engaged in human trafficking. In addition, the bill requires the Office of Management and Budget to report to Congress on enforcement actions to end human trafficking throughout the federal supply chain.

Forced Labor Enforcement Expected to Ramp-up

In a recent interview, the Department of Homeland Security (DHS) undersecretary who chairs the interagency Forced Labor Enforcement Task Force, Robert Silvers, stated forced labor is now a “top-tier compliance issue.” Furthermore, forced labor should now be treated as a pillar of corporate compliance programs on par with anti-corruption and sanctions compliance, according to Silvers, who also stated DHS and other agencies are increasing their investments in their oversight and enforcement capabilities in this area.

Key Takeaways

Forced labor in the supply chain is becoming a top compliance issue across sectors, but for government contractors the stakes are even higher, with the risk of suspension and debarment, and therefore loss of current and future contracts, increased significantly thanks to new legislation.

Contractors should note all government contracts contain FAR 52.222-50, *Combating Trafficking in Persons*, and may also include FAR 52.222-56, *Certification Regarding Trafficking in Persons Compliance Plan*. These requirements have long existed, but are often overlooked or do not receive regular scrutiny or pressure-testing the same way that other areas of compliance like anti-corruption may receive.

These statements and the increase in resources for oversight and enforcement should give cause to government contractors to examine their supply chains and compliance programs for effective anti-human trafficking policies and measures. These measures include effective due diligence of third parties, and not just first-tier suppliers and subcontractors but those further down the supply chain, as well as regular training and policy updates to keep abreast of the latest requirements and trends.

→ **Labor Updates**

DOL Seeks to Cancel Company's Contracts for Failure to Cooperate in EEO Audit

In another sign that workplace diversity and pay equity are growing arenas of compliance enforcement, the Department of Labor recently issued a statement indicating it has asked an administrative court to compel a federal contractor to provide requested documentation to permit the Office of Federal Contract Compliance Programs (OFCCP) to complete a scheduled compliance review of the company's Equal Employment Opportunity (EEO) practices. If the contractor fails to comply, the Department stated that it will seek to cancel the contractor's current and future government contracts due to its failure to cooperate.

Key Takeaways

To mitigate the risk of potentially losing current and future government contracts due to OFCCP audits, federal contractors should:

- Assess company documentation such as policies and procedures related to compensation, hiring, and similar areas
- Perform an in-depth analysis of their employment practices, inclusive of compensation, assignment, promotion practices, and similar areas
- Monitor subcontractors' adherence to these requirements/audits

GSA OIG Report Recommends Cancellation of TDR, More Pricing Scrutiny

In September, the GSA OIG issued an audit [report](#) that concluded current pricing mechanisms on Multiple Award Schedule (MAS) contracts (i.e., GSA and Department of Veterans Affairs (VA) schedule contracts) -- including both Commercial Sales Practices (CSP) and Transactional Data Reporting (TDR) -- and price analysis performed by Federal Acquisition Service (FAS) staff do not necessarily provide the “lowest overall cost alternative” to ordering agencies.

This audit therefore calls into question whether government agencies are benefitting from the government’s buying power to gain truly competitive pricing, whether based on CSP or TDR. Furthermore, the audit found that in the majority of cases reviewed, FAS staff relied on contractor pricing information that was “unsupported, outdated, or that identified no comparable commercial sales.”

This is not the first time GSA OIG has provided this type of feedback to FAS, and follows last year’s report where the recommendation was made to end the TDR pilot program for failure to achieve intended pricing reductions.

Based on these findings, the GSA OIG made four recommendations to the FAS:

1. Cancel the TDR pilot program
2. Inform customer agencies that they should perform separate and independent price determinations rather than rely on MAS contract pricing
3. Establish requirements and controls to confirm that FAS adequately analyzes CSP information
4. Explore new pricing methodologies to leverage aggregate government buying power to negotiate and award MAS contracts

At this time, it remains to be seen if FAS will ultimately follow through with the OIG recommendations.

Key Takeaways for GSA Contractors

First, contractors that have opted into the TDR pilot may need to prepare to revert to CSPs and Price Reduction Clause (PRC) tracking, which also includes identification and negotiation of a tracking customer.

Second, contractors should prepare for more price scrutiny on MAS contracts and prepare their sales, pricing, and contracts teams with updated market and competitive information.

Finally, contractors should remain vigilant of the False Claims Act (FCA) risks that are abundant when doing business with the GSA, particularly if subject to CSP and PRC requirements. Given the renewed emphasis on obtaining more advantageous pricing to the government, there is likely to be a renewed focus on identifying large-scale CSP and PRC violations, which often result in significant monetary settlements and fines under the FCA.



GSA Inflation Relief

continued from pg 1:

Similar to DoD, GSA followed up on guidance issued earlier this year with a new [Acquisition Alert](#) focused on avenues of relief for GSA Schedule contract holders. Earlier in the year GSA had introduced a temporary moratorium on the enforcement of certain limitations contained in GSA EPA contract clauses. The new guidance extends this through March 2023.

The new guidance also instructs contracting officers to adjust the EPA indices if they are no longer representative of market conditions, and also suggests contracts with shorter periods of performance to allow for more frequent pricing resets.

Key Takeaways for GSA Contractors

First, GSA Schedule holders should determine whether their contracts contain the GSA EPA clauses: GSAR 552.216-70, GSAR 552.216-71, or I-FSS-969. If they do, determine whether the referenced indices have been triggered and therefore a price adjustment is due. If the index has not been triggered, consider whether an alternative index should be negotiated, as per the memo’s guidance.

Second, GSA contractors should determine if any government actions have directly caused inflated costs, in which case a claim or REA may be in order. For example, if the government delayed work, thus shifting the performance to a later period during which costs had increased beyond originally planned, the inflation-related costs may be recoverable.

1. Final Rule: *Small Business Regulations*

Summary: The U.S. Small Business Administration (SBA) amended small business size regulations as a result of the U.S. Office of Management and Budget (OMB) updating the North American Industry Classification System in 2022 (NAICS 2022). There are now 111 new industries in place of the previous 156 which has resulted in changes to SBA size standards, affecting contractors that have to adhere to certain clauses in FAR part 19 and FAR part 52. Through rule 13 CFR 125.3, the SBA is extending the ability for small business government contractors seeking prime contracts with the Government to provide past performance ratings as allowable under FAR 15.305. These small businesses may ask previous contractors with whom they used to work with as a joint-venture, or under as a first-tier subcontractor, to provide past performance which will then have to be provided within 15 days.

Key Takeaways:

1. Contractors should review their small business subcontracting plans (SBSPs) to confirm they are updating processes with current size regulations and are documenting and storing performance ratings.
2. Because of the size standard changes, some current small businesses may expect to lose their small business status, which generally shields them from more complex requirements such as CAS. However, the SBA estimates less than 2% of small businesses will experience loss of status, and of those, very few are actively engaged in federal markets.



Notable Recent Cases

1. Time Card Record Retention Dispute

Summary: An engineering services company was granted a favorable summary judgment related to costs questioned by the government on the basis of missing and unsigned time cards. The company failed to produce employee time cards supporting direct and indirect costs claimed. Despite a record retention period extended by more than four years due to the company's failure to submit timely indirect cost rate proposals (FAR 4.703(b)(3)), the Armed Services Board of Contract Appeals (ASBCA) determined the government's audit did not begin until after the company's obligation to retain the timecards had expired.

Key Takeaways: FAR clauses with record retention requirements, such as FAR 52.215-2, are generally included within government contracts. This case demonstrates the importance of understanding record retention obligations and knowing when an auditor's requests may not technically merit a response if such documents fall beyond the required record retention period. However, as a general leading practice, contractors should implement effective document retention processes and systems to avoid instances where legitimate audit requests cannot be met.

2. CAS 418: Definition of Actual Cost

Summary: The ASBCA recently denied the government's challenge of a contractors' method for costing components of an aircraft engine on the grounds of CAS 418. The contractor sourced engine parts from certain suppliers that participated in a complex cost-sharing mechanism. In an audit, the government deemed this a CAS 418 violation because the claimed supplier costs were not actual cost, according to the government, but an estimate of actual cost. However, ASBCA sided with the contractor, deeming the cost basis a legitimate method of actual costing.

Key Takeaways: CAS 418-50(a)(2) requires companies to account for direct costs at actual cost unless the use of standard costs is established. The central debate in this case was whether the company's payment of the suppliers' share less expenses represented an appropriate measure of cost, which was ultimately determined to be appropriate. Contractors that utilize unorthodox costing practices should confirm they have established legitimate rationale on how the costing qualifies as actual, or standard, in accordance with disclosed practices.

AGILE Act would bolster government IT procurement, raise CAS threshold

As the US Government budgets for IT continue to increase, Congress is seeking to reform and bolster the government's ability to effectively and efficiently procure leading technology products and services.

The Advancing Government Innovation with Leading Edge (AGILE) Procurement Act of 2022 cleared a Senate committee vote in August, bringing the proposed legislation to full debate and eventual vote likely at some point later in the year.

The AGILE Act is seeks to invest in the federal workforce to upskill and recruit a workforce able to effectively and efficiently procure leading technologies. In addition, the Act would:

- Raise the Cost Accounting Standards (CAS) threshold to \$15 million, from its current \$2 million level
- Create a pilot program to use noncompetitive procedures to certain follow-on contracts for companies wholly owned by employee stock ownership plans (ESOPs)

New Congressional bill would require agencies to adopt software cost saving measures

The same Senate committee that approved the AGILE Act, which seeks to bolster government IT procurement, is also reportedly mulling another bill, the Strengthening Agency Management and Oversight of Software Assets (SAMOSA) Act. The bill would require agencies to adopt a number of software cost savings measures, including:

- Reporting to inspector generals in more detail on software assets, spending, and utilization rates
- Increasing the interoperability of software and providing more shared services capabilities to support enterprise license adoption
- Requiring each agency inspector general to complete an independent review of software license management within their respective agency

Industry reports indicate that the bill would seek to minimize licensing restrictions that impact an agency's ability to operate software across operating systems, servers, and cloud environments.

As government IT budgets continue to grow, technology companies should keep abreast of changes at the agency and contractor level that may necessitate changes in how they do business with the government, ranging from business development, contract terms and pricing, strategic partnerships, and audit or oversight. Companies with established federal market operations or with nascent, but growing, sales should continue to reevaluate their go-to-market and contracting strategy as new laws and regulations change market dynamics.

PwC is thoroughly versed in government contracting. We can help you navigate the challenging and conflicting demands from strategy through execution to help meet your government contracting needs.

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