

Newsletter

December 2022



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Tip of the Month:

Ensuring Confidentiality Agreements Meet FAR Requirements

Federal government contracting is a highly competitive industry. To help safeguard their confidential information, contractors often require their employees, subcontractors, and independent contractors to sign confidentiality agreements. Adopting confidentiality policies can be a smart practice. Unfortunately, though, many contractors don't realize that the Federal Acquisition Regulation (FAR) places an important restriction on the contents of confidentiality agreements.

FAR clauses 52.203-18 and 52.203-19 appear in most federal contracts. Together, these clauses protect whistleblowers by limiting the permissible scope of contractors' confidentiality agreements. FAR 52.203-19(b) states, in relevant part, that the prime contractor:

Shall not require its employees or subcontractors to sign or comply with internal confidentiality agreements or statements prohibiting or otherwise restricting such employees or subcontractors from lawfully reporting waste, fraud, or abuse related to the performance of a Government contract to a designated investigative or law enforcement representative of a Federal department or agency authorized to receive such information (e.g., agency Office of the Inspector General).

This restriction does not apply only to confidentiality agreements entered into after the prime contract award. Instead, FAR 52.203-19(c) effectively makes the provision retroactive, stating:

The Contractor shall notify current employees and subcontractors that prohibitions and restrictions of any preexisting internal confidentiality agreements or statements covered by this clause, to the extent that such prohibitions and restrictions are inconsistent with the prohibitions of this clause, are no longer in effect.

While few, if any, contractors intentionally set out to violate these provisions, some contractors may inadvertently do so. For example, consider a typical non-disclosure agreement that prohibits an employee or subcontractor from disclosing so-called "Confidential Information" and defines that term to include the contractor's "business practices." This restriction arguably prevents an employee from informing the government,

for example, that the contractor is managed by a man despite holding itself out as a woman-owned small business, or that the contractor failed to notify the General Services Administration of a commercial discount triggering the price reduction clause, GSAR 552.238-81.

To better ensure compliance with the FAR, contractors should carefully review their non-disclosure agreements, confidentiality agreements, and similar documents, such as confidentiality provisions in an employee handbook. If appropriate, contractors may wish to consider including “carve outs” in these documents, explicitly stating that the restrictions on disclosure don’t apply to information covered by the FAR clauses.

PTAC News You Can Use:

The U.S. Small Business Administration has released details about the SBA’s plans for the certification of service-disabled veteran-owned small businesses and veteran-owned small businesses. The SBA takes over SDVOSB and VOSB certification from the Department of Veterans Affairs on January 1, 2023. In its announcement, the SBA stated that it would honor existing VA certifications for the remainder of each certified company’s eligibility period. Additionally, to ease the burden of transitioning the certification program, the SBA will grant a one-time, one-year extension to all firms certified as of January 1, allowing those firms an extra year to become recertified under the new SBA system. Read the [SBA’s full announcement](#). If you have questions about this transition, please reach out to your counselor.

Govology Webinars

*Please use the new code **2202NICC** when registering for Govology webinars.*



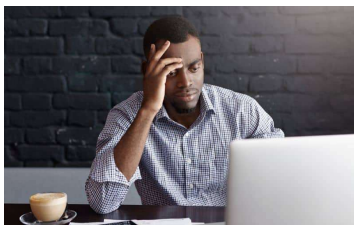
Intervention in Federal Bid Protests: Defending Your Contract Award

Date: December 5, 2022

Time: 1:00 pm EST

Presenter: Maria Panichelli, McCarter & English

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Breaking Down Federal Solicitations

Date: December 7, 2022

Time: 1:00 pm EST

Presenter: Carroll Bernard, Govology

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2022 Government Contracts Year-End Review

Date: December 8, 2022

Time: 1:00 pm EST

Presenter: Shane McCall, Koprince McCall Pottroff LLC and Steven Koprince, Govology Legal Analyst

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Recommended Readings:

SBA Adjusts Size Standards, Economic Disadvantage Limits, and 8(a) Sole Source Dollar Limits

SBA recently [released a final rule](#) significantly adjusting size standards, economic disadvantage limits, and the 8(a) Business Development Program sole source limits. These changes have significant implications for small businesses that barely exceeded the applicable size standards this year. The recently published [SmallGovCon.com article explains the SBA's rule](#) in detail.

EEOC Releases Updated “Know Your Rights” Poster

The U.S. Equal Employment Opportunity Commission has released an updated “Know Your Rights” poster. The new poster updates and replaces the previous poster, “EEO is the Law.” Among other updates, the new poster includes a QR code employees can use to link directly to additional EEOC information. Covered employers, including many federal government contractors, are required to prominently display the poster at work sites. Read the [EEOC's announcement](#) and download the [new “Know Your Rights” poster](#).

Franchise-Type Agreement Sinks SDVOSB Application

Under the rules governing service-disabled veteran-owned small businesses, one or more disabled veterans must unconditionally control the company. These requirements can make it very difficult for companies operating under franchise agreements, or agreements similar to franchise agreements, to obtain SDVOSB certification. In a recent decision, the SBA's Office of Hearings and Appeals held that an applicant was ineligible for certification because the applicant was participating in an “affiliate agreement” that placed restrictions on the veteran's control. Read [Franchise-Type Agreement Sinks SDVOSB Application](#) for details.

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