Defence & Security Procurement

Contributing editor
Matthew L Haws

2018

GETTING THE DEAL THROUGH

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Defence & Security Procurement 2018

Second edition

Getting the Deal Through is delighted to publish the second edition of *Defence & Security Procurement*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Canada.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to Matthew L Haws of Jenner & Block LLP, the contributing editor, for his assistance in devising and editing this volume.

GETTING THE DEAL THROUGH

London
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Global overview

Matthew L Haws
Jenner & Block LLP

The world is complicated. One need only scan the headlines to understand that events around the globe have brought significant uncertainty and disruption to traditional geopolitical assumptions. Tensions have reached a fever pitch in the Pacific area and Eastern Europe. Countries throughout the world remain on guard for asymmetrical terrorist threats. And the significance of cyberspace threats has never been greater. In the midst of this uncertainty, countries are seeking to ensure they are well-positioned to deter aggression and protect their interests.

One result of this complicated landscape is that global defence and security procurement spending rose for the second straight year in 2016, increasing 0.4 per cent to reach an estimated US$1,686 billion, according to the Stockholm International Peace Research Institute (SIPRI). It is now nearing its historic peak of US$1,699 billion in 2011. The values of some of these defence procurements are staggering: US$50 billion for submarines in Australia, US$10 billion for armoured vehicles in Saudi Arabia, US$17.6 billion for additional United States nuclear attack submarines, US$2.3 billion for attack helicopters in the United Kingdom and a potential US$25 billion deal for new fighter jets in India.Nor does it appear that this trend will abate in the near future. Among NATO countries, for example, presently only the United States, the United Kingdom and Estonia spend at least 2 per cent of their GDP on defence, a benchmark all 28 NATO members have agreed to achieve by 2024.

Of course, defence and security spending is not distributed evenly throughout the world, and threat perception is not the only factor at play in this complicated market. Economic factors play a significant role in defence procurement decisions – most notably, declining oil prices have resulted in lower defence spending in parts of the Middle East, North Africa and South America. Political factors, of course, also play an outsize role – for example, potential changes to Japan's pacifist constitution could mean greater spending in the years to come.

As some defence budgets stagnate or shrink, a common practice is to look internationally. But international expansion is not for the faint of heart or the ill-prepared. It requires long-term strategic planning, substantial due diligence and expert insight into the national procurement system of the target market. For many nations, defence and security spending is one of the largest portions of government procurement expenditures. These procurements directly impact a nation's ability to defend its people and maintain its sovereignty. As a result, they can frequently be controversial, both for the country making the procurement and for the country providing the goods and services. Companies in the defence and security sector must also diligently mitigate the risk of corruption. Companies frequently miscalculate the cost, duration and complexity of international procurements.

In many countries, the rules for defence and security procurements are significantly different from those for commercial transactions and may differ even from the rules applicable to the rest of the government procurement system. The procurement systems in each of the countries in this book are very different. Conducting due diligence can be difficult and expensive; where do you start and who can you trust?

Defence and security contractors need an initial reference to understand the basics of what it will take to complete a deal for a defence and security procurement in various jurisdictions. To this end, we present the second annual edition of *Getting the Deal Through – Defence & Security Procurement*.

United States

Matthew L Haws, Steven J Seiden, Grant B Schweikert, Marc A Van Allen and Carla J Weiss
Jenner & Block LLP

Legal framework

1 What statutes or regulations govern procurement of defence and security articles?

Most defence and security procurement takes place at the federal level and is governed by federal statute and regulation. Title 41 of the United States Code for non-Department of Defense (DoD) procurements and Title 10 for DoD procurements provides the statutory guidance. Those statutes are then implemented and expanded upon in the Code of Federal Regulations (CFR), where the Federal Acquisition Regulation (FAR) is located at Chapter 1 of Title 48. The FAR serves as the foundational procurement regulation for all federal procurements, including defence and security, conducted by the departments and agencies of the executive branch of the United States. In addition, an individual agency or department may expand upon the rules set out in the FAR in a supplemental regulation. Most notably, the Defense Federal Acquisition Regulation Supplement (DFARS) provides additional rules for DoD procurements.

At an even more granular level, the service branches, agencies and specific commands of the DoD may have additional supplemental regulations that apply to their procurements. The higher level regulation will have authority and will control in the event of conflicts and, in each case, the bulk of the regulations will be at the FAR and DFARS levels as the lower-level supplements tend to address minor and specific details. For example, an acquisition conducted by the Air Force Material Command will be governed by the FAR, DFARS, Air Force Federal Acquisition Regulation Supplement and the Air Force Material Command Mandatory Procedures. Other notable department and agency FAR supplements are the Department of Energy Acquisition Regulation, Department of State Acquisition Regulation, Department of the Treasury Acquisition Regulation, Department of Homeland Security Acquisition Regulation, Department of Justice Acquisition Regulation, and Nuclear Regulatory Acquisition Regulation. Members of the US intelligence community also often have FAR supplements, which are not generally publicly available. Finally, the US Air Force maintains an excellent website where current (and previous) electronic versions of the FAR and various FAR supplements can be found: http://farsite.hill.af.mil. Security procurement may also occur at the state or local level, but these procurements will typically be for non-military equipment utilised by state and local law enforcement activities. The rules for state and local procurements are not standardised and can vary greatly by jurisdiction.

2 How are defence and security procurements identified as such and are they treated differently from civil procurements?

Defence and security procurements constitute a broad range of acquisitions. They are not necessarily identified or treated differently from civil procurements. For example, a defence or security agency may conduct a procurement through the General Services Administration and this would be conducted like any other civil procurement for products such as office supplies. Such a procurement would be subject to the FAR and the General Services Acquisition Regulation, even though it was ultimately being procured for a defence or security agency. In recent years, this has become increasingly common, with the use of Government Wide Acquisition Contracts (GWACs) in addition to General Services Administration (GSA) Schedule contracts. But large traditional defence and security procurements will still be identifiable as such – by the agency issuing the solicitation and, ultimately, the type of appropriation being used to pay for them. The US Congress annually passes a National Defense Authorization Act, which authorises the agencies to make the expenditure by identifying the relevant section of the federal budget from which the funds will ultimately be withdrawn, and a National Defense Appropriations Act, which will make the funds available. As discussed above, the primary difference between a defence and security procurement and a civil procurement is likely to be that the DFARS or other agency FAR supplement will apply in addition to the FAR.

3 How are defence and security procurements typically conducted?

Defence and security procurements are conducted on a spectrum of procedures that grow increasingly complicated and intricate the larger the dollar value of the procurement. At one end of the spectrum, the micro-purchase threshold allows for greatly abbreviated procedures for procurements below US$3,000 (US$5,000 or higher for some DoD procurements). The next step up is procurements below the simplified acquisition threshold, which is generally US$150,000. Procurements below this threshold apply only the most basic requirements of the FAR. At the other end of the spectrum, the highest dollar-value procurements within the DoD are conducted in accordance with the full FAR, DFARS and other procedures, including DoD Instruction 5000.2. DoD Instruction 5000.2 procurements are among the most sophisticated acquisition processes in the world, complete with milestone decisions and a system that interweaves the capability requirements determination process, budgeting and actual acquisition.

4 Are there significant proposals pending to change the defence and security procurement process?

While there are always changes being proposed and implemented to the defence procurement process, there are no proposals pending that would radically alter the process. While some politicians talk about significant wholesale acquisition reform, the system is generally slow to be altered. When significant changes to the defence procurement process do occur, they are most typically achieved through section 800 of the National Defense Authorization Act for that year. Those changes are then implemented as amendments to the FAR or DFARS through a rule-making process that allows for notice and comment in the Federal Registrar. They are assigned a case number and move through a process that typically allows for the public to comment on proposals, and for the government to adjust the proposals accordingly. Occasionally, when there is a documented urgent and compelling need for a new rule, an interim rule will be published, meaning the rule comes into effect immediately. In this instance, however, there is still an opportunity to make changes through the notice and comment process. Occasionally, a significant change to the procurement process occurs as a result of an administrative or judicial proceeding, resulting in a published decision that clarifies existing regulations. This can occur at numerous levels, from a Government Accountability Office (GAO) bid protest decision, to the Court of Federal Claims, or Armed Services Board of Contract Appeals, all the way up to the Supreme Court of the United States. Occasionally these decisions will also drive the creation

of new regulations. Finally, in recent years, the DoD has published a series of 'Better Buying Power' (BBP) memoranda, which are:

> *a set of fundamental acquisition principles to achieve greater efficiencies through affordability, cost control, elimination of unproductive processes and bureaucracy, and promotion of competition. BBP initiatives also incentivise productivity and innovation in industry and government, and improve tradecraft in the acquisition of services.*

Some items proposed in these memoranda are policy objectives that will require the passing of new statutes; others simply require rule-making through the Federal Registrar process discussed above; but most are simply best practices that the DoD acquisition workforce will need to incorporate into the existing process.

5 Are there different or additional procurement rules for information technology versus non-IT goods and services?

No. There are provisions and clauses in the FAR and DFARS applicable to intellectual property rights and data security that may be relevant depending on the IT being acquired. For example, the clause for data rights in software would apply to software delivered under a government contract, but not necessarily to computer monitors or IT support services. In addition, agencies may use GSA GWAC or Schedule contracts to make IT acquisitions and these types of contracts themselves include unique provisions, although not necessarily specific to IT.

6 Are most defence and security procurements conducted in accordance with the GPA or other treaty-based procurement rules, or does this jurisdiction commonly use the national security exemption to procure them?

The United States is a signatory to the GPA and Revised GPA. Defence and security procurements in the United States are conducted in accordance with the FAR as discussed above, and requirements of treaties are incorporated into that regulation. Like most countries, the United States' accession to the GPA was made with qualifications and some domestic and socio-economic preferences remained. DoD procurements for which the United States exempted GPA coverage are identified in the GPA Appendixes (available at: www.wto.org/english/tratop_e/gproc_e/appendices_e.htm#us). In addition, the United States takes the position that many non-DoD procurements are similarly exempt, such as national security procurements by of the Department of Homeland Security, the Transportation Security Administration, US Coast Guard and so on.

Disputes and risk allocation

7 How are disputes between the government and defence contractor resolved?

Disputes between the DoD and a contractor regarding matters of contract performance are covered under the Contract Disputes Act, 41 USC Chapter 7. The CDA is implemented and incorporated into the FAR at Subpart 33.2 Disputes, and ultimately into each contract through the use of the mandatory contract clause FAR 52.233-1. Contract disputes often begin as a request for equitable adjustment. If an REA is not resolved, it can be converted into a certified claim, which then must receive a Contracting Officer's Final Decision (COFD). The COFD can then be appealed and litigated at either the Armed Services Board of Contract Appeals, Civilian Board of Contract Appealse, or the Court of Federal Claims. For disputes regarding matters of contract formation, bid protests (also referred to as 'challenges' outside the United States) can be filed by disappointed offerors at either the GAO under jurisdiction of the Competition in Contracting Act, 31 USC section 3556, and FAR 31.104; the Court of Federal Claims under jurisdiction of the Tucker Act, 28 USC section 1491(b), as amended by the Administrative Dispute Resolution Act of 1996 and FAR 31.105; or with the procuring agency under FAR 33.103. Protests for issues regarding the solicitation should be raised before contract award, and protests regarding award decisions have strict timelines requiring them to be filed soon after award.

8 To what extent is alternative dispute resolution used to resolve conflicts? What is typical for this jurisdiction?

Alternative dispute resolution (ADR) is available as part of the disputes process described above. At the GAO, ADR exists in the form of outcome prediction and the agency's ability to take corrective action prior to a decision by the GAO. At the Court of Federal Claims, the ADR Automatic Referral Program utilises early neutral evaluation, mini-trials, settlement judges and third-party neutrals. At the Boards of Contract Appeals, the parties can agree to enter into either binding or non-binding ADR. Many companies operating as prime contractors under a defence and security contracts prescribe ADR in their standard terms and conditions with subcontractors. Of course, those terms and conditions are subject to negotiation between the prime and subcontractor.

9 What limits exist on the government's ability to indemnify the contractor in this jurisdiction and must the contractor indemnify the government in a defence procurement?

The federal government generally refuses to indemnify government contractors because the Anti-Deficiency Act, 31 USC section 1341, prohibits an officer or employee of the United States from creating any unfunded obligation for the government, which includes blanket indemnification of contractors. Nonetheless, several statutes provide authorisation for the government to do so in narrow circumstances, some of which arise in the defence and security context. For example:

- the National Defense Contracts Act, 50 USC section 1431, as implemented by Executive Order 10789 (this provides indemnification under defence contracts for unusually hazardous or nuclear risks);
- 10 USC section 2354 (this provides indemnification for unusually hazardous defence research and development);
- the Atomic Energy Act, as amended by the Price-Anderson Act of 1957, 42 USC section 2210(d) (this provides indemnification for the risk of a substantial nuclear incident);
- the Federal Aviation Act, as amended, 49 USC section 1531 et seq (this provides indemnification for aircraft operations risks necessary to carry out US foreign policy); and
- the National Aeronautics and Space Act, as amended, 42 USC 2458b (providing for indemnification for damages related to the launch, operation or recovery of space vehicles).

Government contractors can also raise a legal defence for tort liability in state and federal law suits known as the 'government contractor defence'. While not an indemnification or absolute defence, this legal argument can protect contractors in cases where third parties sustain injuries from defects in products or equipment supplied or built to specifications under a government contract. This legal defence has also been successfully used to protect contractors providing services to the government. The government does not typically require contractors to indemnify the government. However, the government does often require that contractors obtain insurance or demonstrate self-insurance as set forth in clauses such as FAR 52.228-5, -7 and -8, and DFARS 252.247-7007. The government also frequently requires irrevocable letters of credit and performance and payment bonds from contractors, as set forth in FAR 52.228-14, -15 and -16.

10 Can the government agree to limit the contractor's liability under the contract? Are there limits to the contractor's potential recovery against the government for breach?

Yes. Government limitations of contractor liability are standard contract clauses at FAR 52.246-23, -24 and -25, which are utilised in procurements over the simplified acquisition threshold (generally US$150,000). The government also uses a very simple limitation of government liability clause at FAR 52.216-24 for letter contracts, where the government issues an abbreviated contract for expediency in the anticipation of finalising a full contract at a later date. On the other hand, contractors are limited in their recovery against the government for breach, based on the form of pricing in the contract. The federal government uses a variety of contract types, including fixed-price, cost-type and time-and-materials contracts. Under a fixed-price contract, the government's liability will usually be limited to the total contract price, unless the contract contains a price adjustment clause and the government either constructively or actually changes the contract. Under cost-type and time-and-materials contracts, the government is

generally liable for actual allowable costs incurred by the contractor in performance of the contract but only up to a ceiling amount. Cost-type and time-and-materials contracts must contain either the limitation-of-costs or limitation-of-funds clause, at FAR 52.232-20 and 52.232-22, respectively. These clauses, discussed further below, limit the total liability of the government in order to comply with the Anti-Deficiency Act described above.

11 Is there risk of non-payment when the government enters into a contract but does not ensure there are adequate funds to meet the contractual obligations?

No. As discussed above, the Anti-Deficiency Act prohibits the US government from undertaking contractual liabilities in excess of the funds obligated to the contract. In other words, the US government's contractual liability to a contractor is tied to the funds obligated to the contract. With respect to fixed-price contracts, the government will obligate funds in the amount of the contract price. With respect to cost-reimbursable contracts, the government may 'fully fund' the contract before the contractor begins performing work or 'incrementally fund' the contract during contract performance. Even in the latter situation, the contract does not authorise the contractor to perform work and incur costs in excess of funds obligated to the contract. The Limitation of Costs clause at FAR 52.232-20 applies to fully funded contracts. The Limitation of Costs clause requires a contractor to notify the government when it expects in the next 60 days to have spent 75 per cent of the estimated cost, or expects expenses to be greater or substantially less than previously estimated. The clause allows variations in the number of days (between 30 days and 90 days) and variations in the percentage (between 75 per cent and 85 per cent). The Limitation of Funds clause at FAR 52.232-22 applies to incrementally funded contracts. The Limitation of Funds clause requires a contractor to notify the government that it is coming to the end of obligated funding, and send notification to the contracting officer that obligated funds will be spent within the next 60 days. As discussed above, there is a risk of non-payment if a contractor performs work and incurs costs in excess of the funds obligated to the contract.

12 Under what circumstances must a contractor provide a parent guarantee?

Before entering into a contract with the US government, a contractor must qualify as a 'responsible source' to perform the contract (see FAR 9.104). Under this procurement rule, the contracting agency will conduct a pre-award survey to evaluate the contractor's financial condition and to determine if the contractor has 'adequate financial resources to perform the contract, or the ability to obtain them' (see FAR 9.104-1(a)). If the contractor does not have adequate financial resources, it must provide 'acceptable evidence' of its ability to obtain 'adequate financial resources' to perform the contract (see FAR 9.204-3(a)). In some cases, this 'acceptable evidence' may consist of a letter of credit setting aside immediately available funds in the event of a contractor default. In other cases, the contractor may ask the contracting agency to rely on the financial position of the contractor's parent corporation. In these situations, the contracting agency will likely require a financial guarantee from the contractor's corporate parent. In addition, a contracting agency will likely require a corporate parent guarantee if the contractor is a new entity formed solely to perform the contract. A corporate parent guarantee may not be an option if the parent is a foreign company (see *Betakut USA Inc*, Comp Gen Dec B-234282, 89-1 CPD paragraph 432 (a contracting agency declined to accept a corporate parent guarantee due to the difficulty of making collections from a foreign company in the event of the subsidiary's default)).

Defence procurement law fundamentals

13 Are there mandatory procurement clauses that must be included in a defence procurement contract or that will be read into the contract regardless of their actual inclusion?

Yes, there are mandatory procurement clauses that will be 'read into' a US government contract. In other words, certain procurement regulations are incorporated 'as a matter of law' into US government contracts. Under the '*Christian* doctrine', a procurement regulation that 'expresses a significant or deeply ingrained strand of procurement policy is considered to be included in a contract by operation of law'. For more details, see *SJ Amoroso Const Co v United States*, 12 F.3d 1072, 1075 (Fed Cir 1993) (citing *GL Christian & Assocs v United States*, 312 F2d 418, 426 (Ct Cl1963)). To determine if an omitted clause should be included in the contract, courts and boards of contract appeals apply a two-part test. First, was the omitted clause a mandatory FAR or DFARS clause? Second, does the clause express a significant or deeply ingrained public procurement policy? If the answer is 'yes' to both questions, then the omitted clause will be incorporated into the contract by operation of law. Examples of clauses that will be incorporated by operation of law into a US government contract include:

- the Disputes clause at FAR 52.233-1;
- the Changes clause at FAR 52.243-1; and
- the Termination for Convenience of the Government clause at FAR 52.249.

14 How are costs allocated between the contractor and government within a contract?

Cost allocation between the contractor and the US government depends on the contract type. There are three basic contract types for allocating costs between the US government and the contractor. Under a cost-reimbursement contract, the contractor has very little risk. All of the contractor's reasonable, allowable and allocable costs will be paid by the US government (up to the ceilings discussed above). In addition, the contractor will typically earn some form of fee for performing the cost-reimbursement contract. Under a 'fixed-price' contract, the contractor has significant risk. When it performs the work, the contractor will receive a fixed sum, regardless of the actual costs incurred. Between these two extremes is a 'fixed-price incentive' contract. Under this arrangement, the parties share the cost risk. The parties will agree to a 'target-cost' figure, which reflects the expected cost of the work when the contract is awarded. Cost overruns occur when actual costs exceed the target cost. Cost underruns occur when actual costs are less than the target cost. The parties agreed to share a percentage of cost overruns or cost underruns. There may also be a ceiling amount, above which the contractor bears 100 per cent of any cost overrun.

15 What disclosures must the contractor make regarding its cost and pricing?

The Truth in Negotiations Act (TINA) requires the contractor to certify that it has provided cost or pricing data that is accurate, current and complete as of the date of agreement on price (see 10 USC section 2306(f) (1983)). A TINA certification is required for all sole-source, non-competitive contracts with an award worth US$750,000 or more (see FAR 15.403-4). Contractors are not required to disclose TINA-certified cost or pricing data in procurements where:

- there is adequate price completion;
- the price is set by statute or regulations; or
- the contract is for a commercial item (see FAR 15.403-1(a)–(b)).

For procurements where TINA applies, the contractor's certified cost or pricing data must include 'all facts that a prudent buyer or seller would reasonably expect to affect the negotiations of price significantly' (see 10 USC section 2306a(i)). Examples of information that may constitute 'cost or pricing data' include:

- vendor quotations;
- non-recurring costs;
- information on changes in production methods or volumes;
- projections of business prospects and related operational costs;
- unit-cost trends associated with labour efficiency;
- make-or-buy decisions; and
- management decisions that could have a significant bearing on costs.

If the contractor submits inaccurate, incomplete, or non-current data, the contractor will be subject to contractual, civil, and possible criminal liability, including fraud. If pricing is found to be defective, this can result in the reduction of contract price.

16 How are audits of defence and security procurements conducted in this jurisdiction?

Contractors are subject to audits performed by the US government to assure compliance with the terms of the contract. The primary federal agency with responsibility for overseeing contractor performance is

the Defense Contract Audit Agency (DCAA). For most competitive and non-competitive negotiated acquisitions, the contract will contain FAR 52.215-2 (Audit and Records – Negotiation). Under this clause, the term 'records' includes books, documents, accounting procedures and practices, and other data. Under this clause, the DCAA has the right to audit the following contract types:

- cost-reimbursement;
- incentive;
- time-and-materials;
- labour-hour; and
- price re-determinable contracts.

For these contract types, the contractor must maintain, and the DCAA has the right to examine and audit, all records and other evidence sufficient to properly reflect all costs claimed to have been incurred or anticipated to be incurred directly or indirectly in performance of the contract.

17 Who gets the ownership rights to intellectual property created during performance of the contract? What licences are typically given and how?

Under US government contracts, there are two general categories of intellectual property:

- patent rights; and
- rights in technical data and computer software.

With respect to patent rights, the contractor may elect to retain title of any invention reduced to practice in the performance of work under a US government contract (see FAR Subpart 27.3 – Patent Rights under Government Contracts). Under these circumstances, the US government obtains a licence to use the invention, which is non-exclusive, non-transferable, irrevocable and paid-up. If the contractor does not elect to retain title, the US government obtains title to the invention. Under these circumstances, the contractor gets a licence that is revocable, non-exclusive and royalty-free. With respect to technical data and computer software, the contractor gets title and the US government gets a licence (see FAR Subpart 27.4 – Rights in Data and Copyrights). There are three categories of licence rights:

- unlimited rights;
- limited or restricted rights; and
- government purpose rights.

If the data or software is developed exclusively with government funds, the US government gets unlimited rights and can use the data or software for essentially any purpose. If the data or software is developed at private expense (ie, it is not developed with government funds), then the US government gets only limited or restricted rights and may not use the information for manufacture or disclose it outside the government (except in narrow circumstances and with adequate protection). If the data or software is developed with mixed government and private funding, then the US government is restricted from using the data for commercial purposes for five years, but may use the data (and may authorise others to use it) for any government purpose. After five years, the government obtains unlimited rights in the data. Thus, tracking development costs for technical data and computer software is essential.

18 Are there economic zones or other special programmes in this jurisdiction commonly utilised by foreign defence and security contractors for financial or other procurement related benefits?

While there are no special economic zones for foreign contractors per se, there are special economic zones for small contractors (see FAR Subpart 19.13 – Historically Underutilised Business Zone (HUBZone) Program). The HUBZone programme helps small contractors located in certain urban and rural communities gain preferential access to federal procurement opportunities. The federal government has a goal of awarding at least 3 per cent of all dollars for federal prime contracts to HUBZone-certified companies. Agencies may set aside contracts for which only HUBZone companies are allowed to bid, or they may award sole-source contracts to HUBZone firms in an effort to meet that goal. HUBZone-certified contractors may also be eligible for a 10 per cent price evaluation preference in some cases. There are about 5,000 small contractors certified in the HUBZone programme. To qualify for the programme, a business must:

- be a 'small business' (under the Small Business Association's rules);
- be owned and controlled at least 51 per cent by US citizens, or a community development corporation, an agricultural cooperative or an Indian tribe;
- have its principal office located within a 'historically underutilised business zone', which includes lands considered 'Indian country' and military facilities closed by the Base Realignment and Closure Act; and
- have at least 35 per cent of its employees residing in a HUBZone.

19 Describe the process for forming legal entities, including joint ventures, in this jurisdiction.

In the United States, legal entities are formed under state law. Business entities may be unincorporated (eg, a general partnership) or incorporated (eg, a limited liability company or C corporation). An unincorporated business does not need special formation documents to come into existence, and its partners are liable for any debts the business incurs. An incorporated business is an independent legal entity. An incorporated business is legally liable for debts the business and provides limited liability to the shareholders or members that own it. The incorporated JV is governed by the law of the state where it is incorporated. To create an incorporated JV, the parties must file a document called the 'articles of incorporation' with the Secretary of State or other appropriate state agency. In addition, in most states, by-laws and organising resolutions must be adopted. An incorporated JV will also need to apply for a tax identification number with the Internal Revenue Service. In addition, most states require incorporated JVs to have and maintain a registered agent who resides in the state. Finally, most states now allow for a hybrid business entity called a Limited Liability Company or LLC. LLCs are an independent legal entity providing limited liability to its members but allowing for simplified procedures and 'pass through' taxation similar to a partnership.

A joint venture (JV) is a business entity in the nature of a partnership created by two or more parties for a particular project where the parties agree to contribute equity to the new entity and to share in its control, revenues and expenses. The FAR provides that the government will recognise a joint venture if the arrangement is identified and fully disclosed to the government. When including a small business, the formation of a joint venture can affect status under the FAR size standards.

20 Are there statutes or regulations enabling access to copies of government records? How does it work? Can one obtain versions of previous contracts?

Under the Freedom of Information Act (FOIA) (5 USC section 552), federal agencies are required to disclose records upon receiving a written request for them, subject to several exemptions. On 30 June 2016, the then President Barack Obama signed into law the Freedom of Information Act (FOIA) Improvement Act of 2016, which revised the FOIA to codify the presumption that openness prevails. FOIA requests may be made by 'any person', which includes foreign citizens, corporations and governments (see *Stone v Export-Import Bank of the United States*, 552 F2d 132 (5th Cir 1977). A FOIA request must 'reasonably describe' the records sought – the more detailed the description, the better (see 5 USC section 552(a)(3)). For example, a date range provides a good method for narrowing a search for documents. The request should mention that a reply is expected within the statutory time frame, which is 20 days (see 5 USC section 552(a)(6)(A)(i)–(ii)). The most relevant exemptions under FOIA are Exemptions 3 and 4. Exemption 3 encompasses information specifically exempted by statute. Because Congress has exempted proposal information by statue, it will not be provided under FOIA (unless the information is otherwise incorporated into the contract). Exemption 4 excludes 'trade secrets and commercial or financial information obtained from a person and privileged or confidential'. If the agency believes requested information may fall within Exemption 4, it must provide notice to the submitter and an opportunity for the submitter to object to release. A FOIA request can seek copies of contracts, but the released documents will be redacted to protect trade secrets and other proprietary information.

21 What are the rules regarding eligible suppliers and supply chain management and anti-counterfeit parts for defence and security procurements?

The Department of Defense and the intelligence community require contractors to mitigate supply chain risk. The DoD imposes obligations on defence contractors regarding sourcing of electronic parts and on contractors and their suppliers to maintain a counterfeit electronic parts detection and avoidance system (DFARS 252.246-7007 & -7008). The sourcing requirements mandate a specific purchasing hierarchy, focused on purchasing from the original manufacturer or authorised suppliers when available. The detection system requirement applies to all contractors that supply electronic parts and are subject to CAS, as well as their subcontractors that produce electronic parts. Such a system must include risk-based policies and procedures that address 12 areas, including personnel training, inspections and testing, removing counterfeit parts from the supply chain, promoting traceability and reporting and quarantining suspected counterfeit parts. In addition, DFARS 252.239-7017 and -7018 require that DoD agencies use supply chain risk as an evaluation factor in procurements for information technology related to National Security Systems and allow the DoD to exclude contractors due to such risk. The intelligence community follows a similar directive.

International trade rules

22 What export controls limit international trade in defence and security articles? Who administers them?

The International Traffic in Arms Regulations (ITAR) control the export of defence-related articles and services (including technical data and software) on the United States Munitions List. The ITAR also regulates temporary imports. The Department of State Directorate of Defense Trade Controls (DDTC) is responsible for administering the ITAR. Generally, licences or other approvals are required for all exports, re-exports or re-transfers under the ITAR, including sharing controlled technical data to foreign persons in the US or providing defence services. The Department of Commerce's Bureau of Industry and Security (BIS) is responsible for administering export controls of most commodities, technology and software not controlled by the ITAR (though specialty export control regimes are administered by the Department of Energy and Nuclear Regulatory Commission). The BIS export controls regime is known as the Export Administration Regulations (EAR) and covers very low level commercial items, 'dual-use' items, which are those having both commercial and military applications, and some lower level military items that recently transitioned from the ITAR as a result of export control reform. BIS export licences under the EAR are required in certain situations involving national security, foreign policy, short-supply, nuclear non-proliferation, missile technology, chemical and biological weapons, regional stability, crime control or terrorist concerns and will depend on the item and country involved. There are also additional restrictions that relate to certain end-uses and end users. Accordingly, whether a licence is required will depend on a number of factors.

23 What domestic preferences are applied to defence and security procurements? Can a foreign contractor bid on a procurement directly?

Several laws provide domestic preferences for government procurements. The Buy American Act (BAA), as applied, provides that manufactured products made wholly in the US, or products from 'substantially all' domestic components, are eligible for a price advantage over foreign products. The BAA applies a two-part test: the item must be (i) manufactured in the United States, and (ii) comprising US 'manufactured' components, the cost of which exceeds 50 per cent of the total component cost. The component test is waived for commercial off-the-shelf items. Exemptions for public interest and domestic non-availability may also be granted. It should be noted, however, that the Department of Defense has modified the application of BAA requirements to its procurements. Among other things, the DoD has determined it is inconsistent with the public interest to apply BAA restrictions to countries with which DoD has a Memorandum of Understanding regarding reciprocal procurement. The Trade Agreements Act (TAA), enacted in 1979, provides authority for the President to waive BAA restrictions for products from countries that have signed an international trade agreement with the United States agreeing not to discriminate against US products in their procurements. The President has delegated the waiver authority to the US Trade Representative, and it has issued waivers pursuant to relevant international trade agreements. The TAA applies a 'rule of origin' test where a product is of the country in which it was 'substantially transformed into a new and different article'. Other domestic preferences address specific types of acquisitions, for example, those for textiles (Berry Amendment, 10 USC 2533a) and specialty metals.

24 Are certain treaty partners treated more favourably?

Different trade agreements may contain different coverage exclusions and thresholds. These are addressed at FAR 25.4.

25 Are there any boycotts, embargoes or other trade sanctions between this jurisdiction and others?

The Office of Foreign Asset Control (OFAC) within the Department of Treasury administers a number of different sanctions programmes. Some are 'comprehensive' and widely prohibit dealings with or related to a sanctioned country and persons/entities associated with it. Others are targeted to certain activities and actions in or related to a sanctioned country. Finally, certain programmes are transnational and deal with terrorism, cybersecurity and narcotics trafficking. Countries and regions currently subject to comprehensive OFAC sanctions are the region of the Crimea, Cuba, Iran, North Korea and Syria – there are targeted programs involving a number of other countries, including – for example, Russia/Ukraine and Venezuela. The rules (both for comprehensive and targeted sanctions) vary by programme and are subject to frequent change. Some transactions can be exempt. Others are subject to 'general licences'. In some instances, OFAC can also issue 'specific licences'. There can also be significant parallel export control restrictions.

Pursuant to section 126.1 of the ITAR, the United States also maintains various arms embargoes and related country policies, which lists a number of countries, including China.

26 Are defence trade offsets part of this country's defence and security procurement regime? How are they administered?

The United States does not use defence trade offsets in its procurement regime.

Ethics and anti-corruption

27 When and how may former government employees take up appointments in the private sector and vice versa?

Federal employees in the executive branch of government are restricted in performing certain post-employment 'representational' activities for private parties, including:

- a lifetime ban on 'switching sides', that is, representing a private party on the same 'particular matter' involving identified parties on which the former executive branch employee had worked personally and substantially for the government;
- a two-year ban on 'switching sides' on a somewhat broader range of matters that were under the employee's official responsibility;
- a one-year restriction on assisting others on certain trade or treaty negotiations;
- a one-year 'cooling-off' period for certain 'senior' officials barring representational communications to and attempts to influence persons in their former departments or agencies;
- a two-year 'cooling-off' period for 'very senior' officials barring representational communications to and attempts to influence certain other high-ranking officials in the entire executive branch of government; and
- a one-year ban on certain former high-level officials performing certain representational or advisory activities for foreign governments or foreign political parties.

In addition to the above restrictions, 'procurement personnel' are also prohibited from receiving compensation from certain private contractors for a period of time after being responsible for procurement action on certain large contracts as government officials. Procurement personnel also have additional rules on reporting 'contacts' from prospective employers who are government contractors. For defence contractors looking to hire a 'covered' current or former government

official (generally, an official who has participated 'personally and substantially' in the procurement or management of a DoD contract or programme valued in excess of US$10 million), DFARS 252.203-7000 requires that the official must seek, and the contractor must review, 'a written opinion from the appropriate ethics counselor regarding the applicability of post-employment restrictions to the activities that the former official is expected to undertake on behalf of the contractor'. In the legislative branch, members of the House and senior legislative staff have a one-year cooling-off period, as well as restrictions on representations on behalf of official foreign entities and assistance in trade negotiations. United States Senators are subject to a two-year cooling-off period in which they may not lobby Congress after leaving the Senate.

28 How is domestic and foreign corruption addressed and what requirements are placed on contractors?

To address domestic corruption, 18 USCA section 201, a criminal statute, prohibits bribery and gratuities. Both the government official and the offeror of the bribe or gratuity are responsible under the statute. Contractors that violate criminal statutes related to bribery or illegal gratuities can have their contract terminated and may face suspension or debarment from government contracting altogether. In addition, under FAR 52.203-13, the Contractor Code of Business Conduct and Ethics, contractors are required to disclose to the government any credible evidence that the contractor has committed a violation of this and certain other laws. The government also has limitations on gifts and hospitality that can be given to government employees by contractors. As a general rule, government employees are prohibited from (directly or indirectly) soliciting or accepting 'gifts' from a 'prohibited source' or that are given because of the employee's official position. Government contractors fall within the definition of 'prohibited source'. The primary tool to address foreign public corruption is the Foreign Corrupt Practices Act (FCPA or the Act). In general, the FCPA's anti-bribery provisions prohibit offering to pay, paying, promising to pay or authorising the payment of money or anything of value to a foreign official in order to influence any act or decision of the foreign official in his or her official capacity or to secure any other improper advantage in order to obtain or retain business. There are also books-and-records and internal control provisions applicable to companies that are considered 'issuers' of US securities as defined by the Act. There are various bases for the US Justice Department and/or SEC to assert jurisdiction under the FCPA, including status as a: US company, US citizen, US permanent resident or foreign company or person whose conduct either occurs within the US or that issues US securities. Contractors should maintain robust compliance programmes appropriate for the size and risk profile of their organisation and make sure that the programme is operating effectively by updating it and testing it on an ongoing basis.

29 What are the registration requirements for lobbyists or commercial agents?

The Lobbying Disclosure Act requires individuals who are paid for lobbying at the federal level to register with the Secretary of the Senate and the Clerk of the House. Lobbying firms, self-employed lobbyists and organisations employing lobbyists must file regular reports of lobbying activity. A lobbyist includes any person who:

- receives financial or other compensation for lobbying in excess of US$3,000 per three-month period;
- makes more than one lobbying contact; and
- spends 20 per cent or more of his or her time over a three-month period on lobbying activities on behalf of an employer or individual client.

All three criteria must be met to require registration.

In addition, the Foreign Agents Registration Act (FARA) requires every agent of a foreign principal, not otherwise exempt, to register with the Department of Justice and file forms outlining its agreements with, income from, and expenditures on behalf of the foreign principal. These forms are public records and must be supplemented every six months. FARA also requires that informational materials (formerly propaganda) be labelled with a conspicuous statement that the information is disseminated by the agents on behalf of the foreign principal. The agent must provide copies of such materials to the Attorney General. The term 'foreign principal' includes foreign governments, foreign political parties, a person or organisation outside the United States, except US citizens, and any entity organised under the laws of a foreign country or having its principal place of business in a foreign country.

30 Are there limitations on the use of agents or representatives that earn a commission on the transaction?

Contractors' arrangements to pay contingent fees for soliciting or obtaining government contracts have long been considered contrary to public policy because such arrangements may lead to attempted or actual exercise of improper influence (FAR 3.4). By statute, the government:

- requires in every negotiated contract a warranty by the contractor against contingent fees;
- permits, as an exception to the warranty, contingent fee arrangements between contractors and bona fide employees or bona fide agencies; and
- provides that, for breach or violation of the warranty by the contractor, the government may annul the contract without liability or deduct from the contract price or consideration, or otherwise recover, the full amount of the contingent fee.

'Bona fide agency' means an established commercial or selling agency, maintained by a contractor for the purpose of securing business, that neither exerts nor proposes to exert improper influence to solicit or obtain government contracts nor holds itself out as being able to obtain any government contract or contracts through improper influence. 'Bona fide employee' means a person, employed by a contractor and subject to the contractor's supervision and control as to time, place and manner of performance, who neither exerts nor proposes to exert improper influence to solicit or obtain government contracts nor holds out as being able to obtain any government contract or contracts through improper influence.

Aviation

31 How are aircraft converted from military to civil use, and vice versa?

In the United States, the Federal Aviation Administration (FAA) has jurisdiction over civilian airports, air traffic control, aviation safety and aircraft certification and registration. While military aircraft are technically governed by military regulations and not the FAA, practically speaking, they operate in accordance with FAA regulations when flying in the United States. Generally, aircraft used by the DoD for military purposes are manufactured as military aircraft and delivered directly to the customer as such. Most military aircraft spend their lifetime in military service. However, some are sold through the DoD's Foreign Military Sales programme and, in limited instances, a small number of surplus aircraft may be converted to non-commercial civilian use by obtaining a Special Airworthiness Certificate from the FAA. If a commercial enterprise desires to purchase military aircraft for civilian commercial use, the aircraft would then become subject to FAA regulations governing all commercial aircraft. In general, due to numerous technical specifications and requirements, military aircraft are more expensive than their civilian counterparts and, as a result, conversion of aircraft from civilian to military use is more common in the United States than conversion from military to civilian use. The conversion of a civilian aircraft to military use will largely depend on the requirements of the customer requesting the conversion. For example, the Department of the Navy would have authority in making decisions regarding the purchase of a civilian aircraft to be converted for Navy military transport purposes. The military customer is given the ultimate responsibility of ensuring airworthiness and compliance with both FAA and DoD regulations governing the operation of aircraft in the United States and abroad.

32 What restrictions are there on manufacture and trade of unmanned aircraft systems or drones?

The FAA has authority regarding the operation of civilian unmanned aircraft systems (UAS) in the United States (see www.faa.gov/uas; 14 CFR Part 107). In June 2016, the FAA issued a comprehensive rule governing small (less than 25kg) UAS. The rule, which took effect in August 2016, provides a set of regulations (Part 107) allowing the routine commercial use of small UAS in the United States subject to prescribed operating limitations and conditions. For example, pilots must be FAA and Transportation Safety Administration approved, and the UAS

must be kept within the visual line of sight of the pilot; cannot operate at night, above 400 feet or faster than 100mph; cannot be flown over anyone who is not directly participating in the operation or from a moving vehicle; and must yield to manned aircraft. Many of these operating limitations are waivable upon a showing that the operation can be conducted safely. Part 107 does not impose specific airworthiness standards on UAS; instead, the rule simply requires the pilot to perform a pre-flight visual and operational check to ensure safety-pertinent systems are functioning properly. Because the military departments do not fall under the authority of the FAA (although they typically comply with FAA rules), they are free to direct the manufacture and operation of UAS according to their own requirements. Civilian manufacturing of UAS is generally unrestricted, and the FAR and DFARS do not specifically address the procurement of unmanned aircraft. However, certain systems might be restricted from private sales due to national security or informational classifications.

Miscellaneous

33 Which domestic labour and employment rules apply to foreign defence contractors?

Defence contractors are subject to a host of labour and employment regulations, which are administered by the Department of Labor through the Office of Federal Contract Compliance Programs (OFCCP; www.dol.gov/ofccp/). The Equal Opportunity Clause, established by Executive Order (EO) 11246 and set out in FAR 52.222-26, applies to all contracts exceeding US$10,000, as well as those below US$10,000 if the contractor has contracts with the federal government with an aggregate value exceeding US$10,000 in a 12-month period, and requires the contractor not to discriminate against any employee or applicant for employment because of race, colour, religion, sex or national origin. EO 11246 also establishes an affirmative action requirement (41 CFR 60-2), which requires the contractor to 'take affirmative action to ensure that applicants are employed [and treated] without regard to race, colour, religion, sex or national origin'. FAR 22.804-1 requires contractors to develop a written affirmative action programme and to include an Affirmative Action Compliance clause in applicable contracts (see FAR 52.222-25). Complaints of equal opportunity violations are required to be forwarded to the OFCCP, and violators may be suspended or debarred from eligibility for future contracts. Another equal opportunity regulation applies specifically to veterans. The Vietnam Era Veterans' Readjustment Assistance Act of 1972 (VEVRAA), 38 USC section 4211 and section 4214, as amended, requires that contractors take similar equal-opportunity steps with regard to 'qualified covered veterans', but only applies to contracts to be performed in the United States. EO 11141 prohibits contractor discrimination on the basis of age under FAR 22.901(c). Other labour and employment statutes include the Davis-Bacon Act, the Walsh-Healey Act and the Service Contract Act, which establish minimum wages for different classifications of contracts (in certain instances, contracts to be performed outside of the United States are exempt from these minimum wage laws).

34 Are there any specific rules that contractors, foreign or domestic, are bound by in defence contracts?

The answers above have discussed in detail numerous laws and regulations applicable to government and defence contractors, notable among them, the FAR and DFARS.

35 Do contractors avail themselves of these rules when they perform work exclusively outside of the jurisdiction?

The FAR and DFARS generally apply to all contractors performing under contracts with the federal government and the DoD, regardless of location. Certain labour laws specifically do not apply to contracts to be performed outside of the US. For example, VEVRAA and the minimum wage laws generally do not apply to contracts to be performed outside the United States.

36 Must directors, officers or employees of the contractor provide personal information or certify that they fulfil any particular requirements to contract with a government entity?

Personal information is generally not required initially but, depending on the sensitivity of the contract, may be required in conjunction with a specific contract. However, during the System for Award Management (SAM) registration process (see question 37), the contractor will be asked a series of questions, several of which are about past wrongdoing. The first asks the entity if any of its principals are currently debarred, suspended, proposed for debarment or declared ineligible for the award of contracts by a federal agency. The second asks if in the past three years, the entity, or any of its principals, has been convicted or had a civil judgment rendered against it for:

- commission of fraud or a criminal offence in connection with obtaining, attempting to obtain or performing a public (federal, state or local) contract or subcontract;
- violation of federal or state antitrust statutes relating to the submission of offers; or
- 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.

The third asks if in the past three years the entity has been notified of any delinquent federal taxes in an amount that exceeds US$3,000 for which liability remains unsatisfied. Additionally, the FAR implements the Federal Funding Accountability and Transparency Act of 2006 by requiring all solicitations and contracts for US$30,000 or more to include the clause found in section 52.204-10, which requires contractors to report the total compensation of the five most highly compensated executives of the contractor and the first-tier subcontractor. Contractors who had a gross income of less than US$300,000 during the previous tax year are exempt from this reporting requirement. This information will be requested during the SAM registration process and is made available to the public on www.usaspending.gov.

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37 What registration or licensing requirements exist to operate in the defence and security sector in the jurisdiction?

In order to bid on federal contracts, contractors must first register on the SAM website at www.sam.gov. During the SAM registration process, the contractor will be asked to provide a Taxpayer Identification Number (TIN) or Employer Identification Number (EIN). Contractors can obtain a TIN or EIN from the Internal Revenue Service online at www.irs.gov/businesses/small-businesses-self-employed/apply-for-an-employer-identification-number-ein-online. Also, during the SAM registration process, contractors will be asked to provide their DUNS number. DUNS numbers are provided free of charge by Dun & Bradstreet (D&B) and can be obtained online at https://fedgov.dnb.com/webform. In addition to SAM registration, most states require companies to register to do business in their state. This type of registration can typically be done online, for a small annual fee, at each particular state's Secretary of State website. Depending on the type of entity, state and local tax authorities may also require registration for tax purposes.

38 What environmental statutes or regulations must contractors comply with?

Any business operations within the United States are subject to generally applicable US environmental laws. Most sectors of the economy are subject to a number of major environmental laws. For example, the discharge of pollutants into the air and water is regulated under the Clean Air Act and Clean Water Act. Under these laws, the Environmental Protection Agency sets emissions standards for various pollutants. Complying with these emissions standards often involves extensive permitting and monitoring. In some cases, violation of these environmental laws can led to debarment from federal government contracting.

39 Must companies meet environmental targets? What are these initiatives and what agency determines compliance?

US environmental laws typically regulate pollutants instead of providing incentives to meet environmental targets. There are some tax credits and incentives for environmental improvements, such as clean energy investments.

40 Do 'green' solutions have an advantage in procurements?

Statutes, executive orders and FAR provisions create a host of specific preferences for environmentally friendly products. Agencies are required to ensure that 95 per cent of products purchased are energy-efficient (Energy Star or Federal Energy Management Program designated); water-efficient; bio-based; environmentally preferable; non-ozone depleting or made with recovered materials. This does not necessarily require preference in a specific procurement, and there are significant exceptions to this preference, including for weapon systems and contracts performed outside the United States. Many of the specific preferences for environmentally friendly products are addressed in Part 23 of the FAR. A solicitation will identify specific clauses containing prohibitions or preferences for environmentally friendly products.

Getting the Deal Through

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