

Government Contracts, False Claims and the Aviation Industry

June 20, 2019

The Aviation Webinar Series



Presenters



Mark Dombroff



Joanne Zimolzak



Brian Stolarz



William Janicki



CRAF

- **Civil Reserve Air Fleet**

- The CRAF program was established by a joint agreement between the DOD and the Department of Commerce on December 15, 1951.
- The program was generated by DOD's realization, following the Berlin airlift, of the need for supplemental airlift to support a major national defense emergency.
- To join Civil Reserve Air Fleet, carriers must maintain a minimum commitment of 30 percent of its Civil Reserve Air Fleet capable passenger fleet and 15 percent of its Civil Reserve Air Fleet capable cargo fleet.
- Aircraft committed must be U.S. registered and carriers must also commit and maintain at least four complete crews for each aircraft.
- As of April 2019, 25 carriers and 433 aircraft are enrolled in CRAF.
- This includes 396 aircraft in the international segment with 267 in the long-range international section and 129 in the short-range international section.
- There are 37 aircraft in the national segment.



CARB

- **Commercial Airlift Review Board**

- Created in 1986 as a result of the crash at Gander, Newfoundland that killed 248 servicemen from the 101st Airborne Division and 502nd Infantry Division
- Requires that DoD inspect and certify as safe air carriers providing charter air transportation for members of the armed forces
- Adds oversight in addition to normal FAA safety oversight responsibilities;
- The CARB has the authority to suspend air carriers from DOD use or take other actions when issues of air carrier quality and air safety arise.
- CARB process extended by DoD directive to cargo transportation and 'operational support services' (such as target-towing, range instrumentation services, etc) , but still limited to civil aircraft.



Other Special Concerns for Aviation Contracts

- **Public vs Private Aircraft**

- FAA only has oversight over private aircraft operations
- What does your contract say? Most contracts require operations to be conducted under Part 121 or Part 135.
- DoD directives generally require the carrier to maintain FAA certification throughout performance
- Any aircraft modifications generally still have to be approved by FAA or operated under an applicable waiver
- Secretary of Defense can designate an operation to be a public aircraft operation when it is in the “national interest”



Government Agency Acquisition Process: What Law Governs?

- **Procurement statutes, including:**
 - Competition in Contracting Act (CICA)
 - Federal Acquisition Reform Act (FARA)
 - Federal Acquisitions Streamlining Act (FASA)
 - Armed Services Procurement Act (ASPA)
- **Regulations**
 - FAR – Federal Acquisition Regulations (not to be confused with FAA’s **F**ederal **A**viation **R**egulations)
 - Codifies uniform policies for acquisition of supplies/services for executive agencies
 - 52 parts – plus numerous clauses/provisions
 - Agency FAR Supplements: e.g., DFARS, HSAR, AFFAR, NFS
 - Supplements FAR requirements to reflect unique agency policies
 - FAA’s Acquisition Management System (AMS) Policy
- **Other:** case law, Executive Orders, Agency-issued guidance, protests.



Government Agency Acquisition Process: Is it Worth the Effort?

- **The U.S. Government is the world's largest purchaser of goods and services.**
 - Approximately \$1 billion in new opportunities in the services sector of Government contracting are available to bid on by private business each day.
 - The federal government signs over 11 million contracts a year.
 - Less than 5% of the businesses in the United States do business with the U.S. Government.
 - Even during an economic downturn, the Federal Government awards billions of dollars in contracts
- **All federal procurements over \$25,000 must be published.**
 - Fed Biz Ops; purchasing authority websites; aggregators/other sources.
 - Response time depends on acquisition type/dollar value
 - Exceptions:
 - National Security, Compelling urgency, Small/Disadvantaged Businesses set aside, Mandatory Sources, GSA
- **Confirm Your Role:**
 - Prime Contractor
 - Subcontractor / Teaming Partner



Government Agency Acquisition Process: What are the Different Types of Solicitations?

- **Invitation for Bid (IFB)**
 - Used when requirements are well-defined (no ambiguity)
 - Award based on lowest price only
 - Most often used for construction contracts and some supply purchases
- **Request for Proposals (RFP)**
 - Used when technical, schedule, and/or cost factors play a role in decision-making
 - Contract award based on best value – involves tradeoffs between technical, schedule, and cost considerations
 - Most often used for wide variety of service contracts
- **Request for Quote (RFQ)**
 - Used for smaller, less complex purchases – commercially available products/equipment/supplies and services (typically under \$100K)
 - Contract award usually based on lowest price
 - Most often used for equipment and supplies
- **Sole Source**
 - Only one source available to provide goods or services
 - Unique/proprietary goods or services or where development of an alternative source would not be realistic/viable (cost/schedule/technical)
 - Requires justification, review, and approval – varies depending on complexity and dollar value
 - Must be publicly posted for public scrutiny



Government Agency Acquisition Process: What are the Types of Contracts?

- **Fixed Price (FFP, FPIF)**
 - Contract requirements are well defined
 - Majority of performance risk assumed by the contractor.
- **Cost Reimbursement (CR, CPFF, CPAF, CPIF)**
 - Requirements not well defined; difficult to accurately determine final price; contractor reimbursed as costs are incurred, typically up to some limit.
 - Majority of performance risk assumed by government.
- **Indefinite-Delivery Indefinite Quantity (IDIQ)**
 - Lack of firm requirements (services/supply) and lack of firm delivery schedule over a longer (usually multi-year) planning horizon; minimum obligation requirements usually apply.
- **Requirement Contracts**
 - Very general/high level requirements, cannot determine exactly how much or when products or services will be needed.
 - Promises all contract requirements to the contracted vendor.
 - Do not require minimum obligation by the government.



Government Agency Acquisition Process: Bids and Proposals

- **What is the difference between a bid and a proposal?**
 - Bids are used in sealed bidding purchases.
 - Proposals involve awards to be made following negotiation.
- **What are the risks involved?**
 - Bids or contracts awarded on erroneous offers may result in serious financial loss or other difficulty for the bidder.
 - Before preparing an offer, close study should be made of the specifications to be sure that all requirements can be met.
 - Particular attention should be given to the instructions to bidders and to conditions of purchase, delivery and payment.
- **Legal Traps for the Unwary**
 - Gifts/Bribes
 - Anti-kickback, bid rigging, anti-competitive behavior
 - False claims
 - False statements



Government Agency Acquisition Process: You Won the Contract, Now What?

- **Managing performance / Program / Contracts**
 - Representations/Certifications Compliance, Flow Down Requirements, Supervising Subcontractors, Proprietary Data Protection/FOIA Responses, GSA Schedule Contract Obligations
- **More managing performance / HR**
 - Managing Employees: background checks, timekeeping, training, anti-discrimination policy
 - Executive Compensation / Disclosure / Revolving Door / OCI
 - Pay and Benefits: Service Contract Act/ Davis Bacon Act
 - Lobbying Restrictions
- **Meeting Production Schedules/Milestones!**
- **Managing Disputes**
 - Various types:
 - Bid protests
 - Claims proceedings
 - Prime/subcontractor disputes
 - FOIA requests/opposition to disclosure (reverse FOIA)
 - Various venues (Contract Disputes Act – CDA)



Government Agency Acquisition Process: The Contract is Over - Closeout

- **Contract Closeout**

- Contract Closeout occurs when a contract has met all the terms of a contract and all administrative actions have been completed, all disputes settled, and final payment has been made.
- This includes those administrative actions that are contractually required; i.e. property, security, patents and royalties. The procedures for contract closeout are located in Federal Acquisition Regulation (FAR) 4.804-5.

- **Required Closeout Actions:**

- Issue interim contract completion statement
- Ensure disposition of classified material is completed
- Receive final patent/royalty report clearance
- Ensure no outstanding value engineering change proposals and
- Ensure property clearance is recorded in MOCAS
- Receive and file plant clearance report
- Settle all interim or disallowed costs
- Complete price revision
- Ensure Prime contractor has settled Subcontracts
- Settle prior year indirect cost rates
- Ensure submission of final subcontracting plan report
- Complete termination docket, contract audit
- Contractor's closing statement and final invoice/voucher
- Ensure final voucher has been paid
- Complete contract funds review and de obligate excess funds



Bid Disputes – Where, When and How

- Where a bid protest is made?
 - Protest Direct to Agency / Contracting Officer
 - GAO Bid Protest
 - Court Of Federal Claims
 - Court of Appeals Federal Circuit
- Considerations in preparing a bid protest
 - Timing
 - Procedures
 - Stay of Contract Award
 - Scope of Administrative Record / Discovery
 - Standard of Review
 - Appeal of Decision
 - Relative Costs



Bid Disputes – Direct to Agency

- **Protest Direct to Agency**
 - Informal – Often Letter Format
 - Facilitate Discussion / Negotiation
 - Automatic Stay of Award
 - Agency Represents Itself
 - May be able to obtain Voluntary Corrective Action
 - Limited Cost / Effort
 - No Appeal



Bid Disputes – GAO

- **Protests to GAO – The Numbers**

- GAO / COFC - Have Concurrent Jurisdiction
- GAO - 20-25 times more protests than COFC
- Between 2400 and 2600 Protests to GOA Made Each Year
- Majority Resolved Without Written Decisions
 - Agency Issues Corrective Action
 - Dismissed
- 600-700 Written Decision on Merits Per Year
- GAO Tends to be Deferential to Contracting Agency

- **Process Overview**

- Informal - Often Letter Format
- Filing Fee - \$350.00
- Automatic Stay of Awarded Contract
- Often results in extension of service contract for incumbent
- Agency Represents Itself
- Agency May Take Corrective Action Rather Than Respond
- Protective Order for Confidential Information



Bid Disputes – GAO

- **GAO Protest - Timing**
 - 10 Days From When Protestor Knew Basis For Protest
 - Protest of Solicitation - Before Time set for Receipt of Proposals
 - Agency Files Report and Produces Record Within 30 Days
 - Protestor / Awardee Files Response to Agency Within 10 days
 - Decision Within 100 days From Protest
- **GAO Protest - Procedures**
 - Standing - Interested Party
 - Actual or Prospective Bidders With Economic Interest
 - Awardee May Intervene
 - Agency Produces Written Record
 - Narrowly Tailored to Allegations in Protest
 - Includes Statement From CO
 - Protestor/Awardee Respond to Agency Report
 - No Further Discovery
 - No Rules of Evidence
 - No Right to Hearing - may have 5% of the time
 - GAO Issues Recommendations to Agency on Written Record
 - GAO May Recommend Award of Costs to Prevailing Protestor



Bid Disputes – GAO

- **GAO Protest - Standard of Review**

- Decision Lacks Rational Basis
 - Agency must show reasonable explanation for exercise of discretion
 - Decision cannot be arbitrary, capricious, or abuse of discretion
- Violation of Regulation of Procedure
 - Clear and prejudicial violation
 - Protestor had substantial chance of winning contract but for violation
- Protestor must show colorable basis that agency abused discretion in procurement, or action is dismissed

- **GAO Protest - Decision**

- GAO will issue written recommendations to agency
- GAO normally will recommend prevailing protestor is awarded fees
- No Appeal From GAO Decision -
- Protestor or Awardee May File Claim in COFC if not happy with GAO decision
 - COFC - Reviews Agency's Decision - Not GAO's Decision
 - Appeal Decision of COFC to CAFC



Bid Disputes – COFC

- **COFC Protest - Overview**

- Average less than 200 per year
- About half originate at GAO
- 24 Hour Pre-filing Notice - Court, DOJ, CO, Awardee
- Must state whether preliminary of injunctive relief will be requested
- Formal Federal Court Complaint
- Filing Fee \$400.00
- DOJ Represents Agency
- No Automatic Stay
 - DOJ May agree to stay
 - Court may issue TRO / PI Upon Motion
- Protective Order for Confidential Information
- Decision Expected to Take 4-5 Months

- **COFC Protest - Timing**

- No time limit to file complaint
 - Waiver - patent errors in solicitation must be brought before close of bidding
 - Laches - no unreasonable delay which causes prejudice to awardee
- Judge Holds Early Status Conference to Establish Schedule
- DOJ may take several weeks to produce administrative record
- Each party files motion for judgment on administrative record



Bid Disputes – COFC

- **COFC Protest - Procedures**

- Agency Produces Complete Administrative Record
 - Everything before decision maker at time of award
 - Record is certified by agency and filed with court
 - On rare occasions record may be supplemented by deposition of agency or interrogatories
 - Complete record may show additional areas of agency errors in procurement
- FRCP and FRE are followed
- Protestor files motion for judgment on administrative record
- DOJ and Awardee both file opposition and cross motion for judgment on administrative record
- No right to a hearing - some judges request oral argument
- Standard
 - Arbitrary and capricious or an abuse of discretion
 - Violation of law or procedure



Bid Disputes – COFC

- **COFC Protest - Decision**

- COFC Decision

- Any relief considered proper
 - Injunctive relief
 - May award costs to prevailing protestor
 - Monetary relief limited to bid preparation and proposal costs

- Majority of protests seek declaration that agency decision was not rational or not in accordance with the law

- Injunctive Relief

- Protestor succeeds on merits
 - Irreparable harm if no relief
 - Balance of hardships favors Protestor
 - Public interest served



Bid Disputes – Recent Decisions

- **Matter of National Air Cargo March 9, 2016**
 - Multiple award IDIQ contract for international commercial air services
 - TRANSCOM made 5 contract awards including National
 - Later, a sixth contract awarded to United
 - National protested, arguing terms of RFP did not permit additional contract award to United
 - GAO dismissed protest – National was not an interested party
 - National was already awarded a contract and was therefore not an actual or prospective bidder who would be in line if protest was sustained
- **Matter of Western Pilot Service March 6, 2018**
 - DOI awarded IDIQ contracts for flight services to fight wildfires
 - Contract was for “on call services”
 - DOI issued IDIQ solicitation similar flight services for set period of time
 - Solicitation was cancelled following protest
 - DOI issued task order request under first contract for set period of time
 - GAO sustained protest – task order beyond scope of contract



False Claims Act – What is it?

- False Claims Act is the “primary litigation tool for recovering losses resulting from fraud.”
- Civil War-era law – called “Lincoln’s Law.” Initially used to combat contractors defrauding the Union Army by selling sawdust instead of gunpowder, and rotting ships with fresh paint.
- Not used often, but was revitalized in 1986 with amendments – mainly increasing incentives for whistleblowers, called “relators” to file false lawsuits on behalf of the government.
- Suits are called “*qui tam*” actions (“who sues in this matter sues for the King and himself”) and the government can elect to intervene and take over the prosecution of the claim, or decline and the relator prosecutes the claim themselves.



False Claims Act – Consequences

- The FCA provides civil penalties for any person who:
 - Knowingly presents a false or fraudulent claim for payment or approval to the United States Government.
 - Knowingly means:
 - Actual knowledge of the information;
 - Acting in deliberate ignorance of the truth or falsity of the information (“wilful blindness”);
 - Acting in reckless disregard of the truth or falsity of the information.
- Government intervenes in approximately 1 in 5 cases.
- Significant financial windfalls for relators -- if government intervenes, relator receives between 15 and 25 percent of the recovery.
- Penalties for FCA violations can be severe:
 - Minimum of \$10,781 **per false claim**
 - Maximum of \$21,563 **per false claim**
 - Trebled damages.
 - Can add up fast when submitting multiple claims to the government for payment.
- Significant collateral consequences including suspension and debarment proceedings for government contractors.



False Claims Act – Recoveries

- DOJ issues statistics for FCA Recoveries – 2018 was **\$2.9 billion**.
 - Seems like a large number, but lower than 2017 (\$3.4 billion) and 2016 (a whopping \$4.9 billion).
 - \$2.5 billion of the 2018 recoveries were from the health care industry.
 - Government contractors paid \$220 million in FCA settlements in 2017, and that dropped to approximately \$100 million in 2018.
 - Notable settlement in 2018 - \$5 million settlement with Lance Armstrong regarding false statements denying performance enhancing drug use during the USPS sponsorship during the Tour de France.
 - 767 new FCA cases filed in 2018, and more than 500 in the health care space.



False Claims Act – Aviation Industry

- Wide-ranging types of cases, from selling the wrong parts to false billing – a number of ways for industry participants to run afoul of the FCA:
- British Airways and Iberia Airlines paid \$5.8 million to resolve allegations of falsely reporting the times they transferred US Mail to foreign postal administrations or other intended recipients.
 - USPS contracted with BA and IA to take possession of US Mail at six locations in the US or at DoD and State Department locations abroad, and deliver that mail to international and domestic destinations.
 - Airlines were required to submit electronic scans of the mail reporting the times the mail was delivered and the claims related to scans falsely reporting the time the airlines transferred possession of the mail.



False Claims Act – Aviation Industry

- Air Industries Corporation (AIC) paid \$2.7 million to resolve allegations that it falsely certified it had performed required inspections on aerospace parts used in military aircraft.
 - Company manufactures bolts, screws, and aerospace fasteners, and allegedly falsely certified that it had performed certain testing on those parts when it had not.
- Boeing paid \$18 million in 2015 and \$23 million in 2014 to settle allegations that the company submitted false claims for labor charges on maintenance contracts with the Air Force for the C-17 Globemaster aircraft.
 - Globemaster is manufactured by Boeing and is one of the military's major systems for transporting troops and cargo throughout the world.
 - Boeing allegedly charged mechanic time to the government while those mechanics were on extended breaks or lunch hours and for meetings not related to the contracts.



False Claims Act – Aviation Industry

- General Dynamics paid \$4 million to resolve allegations that it fraudulently billed for defective military equipment.
 - Company defectively manufactured or failed to test parts used in various Navy aircraft, including C-41 transport plane, and the Trident Class submarines.
- Boeing paid \$4.4 million to resolve allegations that it falsely billed for modification work to produce, maintain, repair or modify the Chinook CH-47D and MH-47 helicopters.
 - Allegedly charged for “over and above” work which was actually included in the standard work covered by the contract.



False Claims Act – Aviation Industry

- General Dynamics paid \$4 million to resolve allegations that it fraudulently billed for defective military equipment.
 - Company defectively manufactured or failed to test parts used in various Navy aircraft, including C-41 transport plane, and the Trident Class submarines.
- Boeing paid \$4.4 million to resolve allegations that it falsely billed for modification work to produce, maintain, repair or modify the Chinook CH-47D and MH-47 helicopters.
 - Allegedly charged for “over and above” work which was actually included in the standard work covered by the contract.



False Claims Act – Recent Trends

- Attorney General Barr called the FCA unconstitutional and “an abomination.”
- 2015 Supreme Court case *Universal Health Services, Inc. v. United States ex. rel. Escobar*, held that the misrepresentation in a FCA case must be “material,” which is a “rigorous” and “demanding” standard.
 - Court held that “Not every undisclosed violation of an express condition of payment automatically triggers liability; [not enough] for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant’s noncompliance.”
 - Furthermore, materiality cannot be found where noncompliance is “minor or insubstantial.”
- DOJ Granston Memo directs government lawyers evaluating whether to intervene to consider seeking dismissal of meritless *qui tam* suits. DOJ has “an important gatekeeper role in protecting the FCA.”
 - Since 2017, DOJ has moved to dismiss two dozen cases.
- Cooperation credit for companies that work with the DOJ to provide evidence of wrongdoing:
 - Justice Manual: “To earn maximum cooperation credit, a corporation must do a timely self-analysis and be proactive in voluntarily disclosing wrongdoing and identifying all individuals substantially involved in or responsible for the misconduct, without making the government compel such disclosures with subpoenas or other investigative demands.”
 - Cooperation credit also requires remedial action including termination or reprimand for wrongdoers, and modifying/enhancing compliance programs.

