


GSA Schedule Contracting for In-House Counsel



Today

8:30 – 9:00	GSA Schedule Program Overview	Roger Waldron
9:00 -10:00	Resources for In-house Counsel	Lorraine Campos
10:00 – 10:15	Break/Card exchange	
10:15 – 11:30	MAS Pricing and Significant Contract provisions	Lorraine Campos
11:30 – 1:00	Working Lunch Domestic Preferences	Jason Workmaster
1:15 – 2:15	Audits, Oversight and Enforcement	Jason Workmaster
2:15 – 2:30	Break/Card exchange	
2:30 – 3:00	Ethics	Lorraine Campos & Jason Workmaster
3:00 - 3:30	Mandatory Disclosure	Jason Workmaster



Roger Waldron
President
Coalition for Government Procurement

rwaldron@thecgp.org
202-600-2915

GSA Schedule Program Overview

- Description
- Benefits and Risks
- Most Favored Customer Pricing
- Significant Changes – Transactional Data Reporting

GSA Schedule

- Commercial Items
- Major Acquisition Vehicle
 - 40 Schedules 15,000 plus contracts
 - 11 million services and products
 - \$47 Billion GSA and VA
- Small business – 33% of sales

Schedule Characteristics

- Indefinite Delivery Indefinite Quantity (IDIQ)
- Multiple Award
- Multi-Year
- Non-Mandatory on the Government
- Regulatory Ordering Procedure (FAR 8.4)

Schedule Pricing

- Why Most Favored Customer Pricing
 - Multiple Contracts – Similar items
 - No Government Specifications
 - No head to head competition
- Unique Contracting Method
 - Commercial Disclosure
 - Link to the Commercial Market for Price Evaluation and Reasonableness

Evolving Pricing Philosophy

- From MFC to Best Price
 - Leveraging prices down
- Horizontal Pricing (MOBIS Pricing Tool)
- Data Driven - TDR
 - Price Comparisons – transactional data
 - UPC/Manufacturer Part Number
- Next - Standardized labor categories?
- Next – Consolidation of Schedules?

What's the Difference

- Government wide Acquisition Contracts (GWAC)
- Multi Agency Contracts (MAC)
- Blanket Purchase Arrangements (BPA)
- Basic Ordering Arrangements (BOA)

GSA Schedule Benefits

A Platform for Selling

- Access to Government, world-wide market
- State and Local governments
 - Cooperative Purchasing (Schedules 70 and 84)
 - Disaster Recovery
- GSA Order Eligibility to Use GSA Sources

ADM 4800.2 H <http://www.gsa.gov/portal/content/104212>

GSA

GSA Schedule Benefits

- Lower Bid and Proposal Costs
 - Commercial services and products
 - Commercial terms
 - Streamlined Ordering Process
- Customer preference

Risks

- Price Adjustments
 - Defective Pricing
 - Price Reductions
- Civil False Claims Act
 - DOJ initiated
 - Whistleblower suits
- Criminal Penalties
- Suspension/Debarment
- Commercial Reputation



Lorraine Campos

Crowell & Moring

lcampos@crowell.com
202.624.2786

The Role of In-House Counsel

- Review disclosures and other government submissions
- Establish Compliance Procedures
- Monitor Transactions/Internal Audits
- Audit Support
- Identify outside resources

Enhancing Benefits, Minimizing Risks

Getting Started

What You Need to Know

GSA Statutory Authority
Solicitation
Regulations
Clauses
Helpful Websites

General Services Administration

- Mission and Authorities
 - Procures on behalf of the U.S. Government
 - Establishes Procurement Policy
- Delegation to operate VA Schedules
 - Pharmaceuticals
 - Medical Devices
 - Services

Statutes, Regulations, & Policy

- Federal Property And Administrative Services Act (1949)
- Competition in Contracting Act (1984)
- Federal Acquisition Regulation (FAR)
- General Services Acquisition Regulation (GSAR)
- General Services Acquisition Manual (GSAM)

Statutes, Regulations, & Policy

- For Pharmaceutical Companies
 - Veterans Healthcare Act of 1992
 - Innovator products (i.e. any prescription drug originally marketed under an original NDA (single source & innovator multiple source drugs))
 - Biological products marketed under a Biologics License Agreement
 - Certain insulin products
 - Does not include
 - » generics marketed under an ANDA (i.e. noninnovator multisource drugs)
 - » OTCs

Finding the Solicitation . . . Soon One Solicitation

GSA e-library

- 02 - Solicitation
- 03 - SF1449 (be sure to read the instructions)
- 04 - Regulations Incorporated by Reference
- 05 - Past Performance Evaluation
- 06 - Small Business Subcontracting Plan
- 07 - Price Proposal Template
- 08 - Commercial Sales Practice Format(CSP-1)
- 09 - Executive Summary
- 10 - Letter of Supply Template
- 11 - Agent Authorization Letter
- 12 - Sample Labor Category Matrix
- 13 - SCA Wage Determination Index
- 15 - Technical Evaluation Criteria

Finding the Solicitation

GSA eLibrary GSA Federal Acquisition Service

Home eBuy - quotes GSA Advantage - online shopping Help

Search: all the words

Schedule Summary

For general questions, contact:
IT Schedule 70 Helpline (Sunday 8:00pm- Friday 8:30pm)
Phone: (855) 482-4348
E-mail: ITCSC@gsa.gov

70 GENERAL PURPOSE COMMERCIAL INFORMATION TECHNOLOGY EQUIPMENT, SOFTWARE, AND SERVICES

- Pursuant to Section 211 of the e-Gov Act of 2002, Cooperative Purchasing provides authorized State and local government entities access to information technology items offered through GSA's Schedule 70 and the Corporate contracts for associated special item numbers. Contracts with the COOP PURC icon indicate that authorized state and local government entities may procure from that contract.

GSA Contracts Online
Federal Buyers...
[View Contract Clauses >>](#)

Vendors
Click here to view the current solicitation on [FedBizOpps](#)

70 Category list:

[Download Contractors \(Excel\)](#)

Finding the Solicitation (continued)

The screenshot displays the FEDBIZOPPS.GOV website interface. At the top, the header includes the site logo, "Federal Business Opportunities", and logos for IAE, E.GOV, and USA.gov. A navigation menu below the header contains links for Home, Getting Started, General Info, Opportunities (highlighted), Agencies, and Privacy. User links for Buyers and Vendors are also present.

The main content area features a GSA logo and the title "70--General Purpose Commercial Information Technology Equipment, Software and Services". Below the title, the solicitation number (FCIS-JB-980001-B), agency (General Services Administration), office (Federal Acquisition Service (FAS)), and location (Center for IT Schedule Operations (QTFA)) are listed. Navigation tabs for "Notice Details", "Packages", and "Interested Vendors List" are shown, along with "Print" and "Link" icons.

A yellow warning box contains a note: "Note: There have been modifications to this notice. To view the most recent modification/amendment, [click here](#)".

On the left, a "Complete View" section lists "Original Synopsis" and "Changed" entries with their respective dates and times. In the center, there are buttons for "Return To Opportunities List", "Watch This Opportunity", and "Add Me To Interested Vendors". Below these buttons, the "Solicitation Number" (FCIS-JB-980001-B) and "Notice Type" (Combined Synopsis/Solicitation) are displayed. The "Synopsis" section states "No Description Provided" and includes a "Track Changes" link.

On the right, an "ALL FILES" section lists seven documents: "Solicitation 1", "01 - Read Me First", "02 - Solicitation", "03 - SF1449", "04 - Regulations Inc...", "05 - Past Performanc...", "06 - Small Business...", and "07 - Price Proposal...".

Regulations Incorporated

TABLE OF CONTENTS

REGULATIONS INCORPORATED BY REFERENCE.....

<i>52.202-1 - DEFINITIONS (NOV 2013).....</i>	<i>1</i>
<i>52.203-13 - CONTRACTOR CODE OF BUSINESS ETHICS AND CONDUCT (OCT 2015).....</i>	<i>1</i>
<i>52.203-17 - CONTRACTOR EMPLOYEE WHISTLEBLOWER RIGHTS AND REQUIREMENT TO INFORM EMPLOYEES OF WHISTLEBLOWER RIGHTS (APR 2014).....</i>	<i>4</i>
<i>52.203-3 - GRATUITIES (APR 1984).....</i>	<i>4</i>
<i>52.204-15 - SERVICE CONTRACT REPORTING REQUIREMENTS FOR INDEFINITE-DELIVERY CONTRACTS (JAN 2014).....</i>	<i>5</i>
<i>52.204-19 - INCORPORATION BY REFERENCE OF REPRESENTATIONS AND CERTIFICATIONS (DEC 2014).....</i>	<i>6</i>
<i>52.204-4 - PRINTED OR COPIED DOUBLE-SIDED ON POSTCONSUMER FIBER CONTENT PAPER (MAY 2011).....</i>	<i>6</i>
<i>52.204-7 - SYSTEM FOR AWARD MANAGEMENT (JUL 2013).....</i>	<i>6</i>
<i>52.209-10 - PROHIBITION ON CONTRACTING WITH INVERTED DOMESTIC CORPORATIONS (NOV 2015).....</i>	<i>8</i>
<i>52.211-16 - VARIATION IN QUANTITY (APR 1984).....</i>	<i>8</i>
<i>52.216-19 - ORDER LIMITATIONS (OCT 1995) (DEVIATED II - FEB 2007).....</i>	<i>9</i>

Essential Regulations

- General Services Acquisition Manual (GSAM)
 - Chapter 538 Federal Supply Schedule Contracting
- Federal Acquisition Regulation (FAR)
 - Part 3 Improper Business Practices and Personal Conflicts of Interest
 - 3.10 Contractor Code of Business Ethics and Conduct
 - Subpart 8.4 - Federal Supply Schedules
 - Part 12 - Acquisition of Commercial items
 - Subpart 22.10 - Service Contract Act
 - Subpart 25.4 - Trade Agreements Act
 - Subpart 42.12 - Novations and Change of Name Agreements

Clauses

Non-Commercial . . . But TDR

- 552.215-71 - EXAMINATION OF RECORDS BY GSA (MULTIPLE AWARD SCHEDULE) (JUL 2003)
- 552.215-72 - PRICE ADJUSTMENT--FAILURE TO PROVIDE ACCURATE INFORMATION (AUG 1997)
- 552.232-23 - ASSIGNMENT OF CLAIMS (SEP 1999)
- 552.238-74 - INDUSTRIAL FUNDING FEE AND SALES REPORTING (MAY 2014) (ALTERNATE I - JUN 2016)
- 552.238-75 - PRICE REDUCTIONS (MAY 2004) (ALTERNATE I - JUN 2016)

Transactional Data Reporting Rule

- Requires vendors to report transactional data
 - Reporting must occur within 30 days after the end of the preceding month
- Contractors subject to the rule need not comply with:
 - Commercial Sales Practices disclosures
 - Proposed rule required continued compliance with CSP reporting
 - Price Reduction Clause tracking provision
- Purpose:
 - Enable GSA and other agencies to make “smarter buying decisions.”
 - Shift from “vertical pricing” model to “horizontal pricing” model
 - Vertical Pricing – comparing contractor’s prices and T&Cs to those offered to contractor’s other customers
 - Horizontal Pricing – comparing one contractor’s prices and T&Cs to other contractors

Transactional Data Points

- Contractors required to submit 11 standard transactional data points:
 - Contract or Blanket Purchase Agreement Number
 - Delivery/Task Order Number/Procurement Instrument Identifier
 - Non-Federal Entity
 - Description of Deliverable
 - Manufacturer Name
 - Manufacturer Part Number
 - Unit Measure (each, hour, case, lot)
 - Quantity of Item Sold
 - Universal Product Code
 - Price Paid per Unit
 - Total Price

Applicability

- IDIQ and GWAC:
 - Applies to all new contracts
 - May be applied to existing contracts not containing other transactional data clauses
- FSS Contracts:
 - Voluntary
 - Does not apply to Department of Veterans Affairs

Best Practices

- Begin preparing systems for capturing transaction data
- Carefully study bilateral modifications and its accompanying compliance obligations
 - Determine whether the modification removes requirements of CSP and PRC for all SINS under a particular schedule
- Consider the information and level of detail posted to the portal
 - Be cautious not to post any commercially sensitive information
 - Consider marking information viewed as confidential or business sensitive to the extent possible
- Continue collecting and monitoring commercial pricing and discounts
 - New rule is implemented in phases and gradually

Clauses Non-Commercial Trade Agreements Act

- Products available on Schedule must have been “substantially transformed” in an “designated country”
 - U.S., Mexico, and many others are “designated”
 - China, Malaysia,, among others, are not
- “Substantial transformation” requires something more than mere assembly
- “Bundling” multiple components into a system may or may not satisfy test

FAR 52.225-5

Clauses Commercial

- 52.212-4 Contract Terms and Conditions—
Commercial Items
- 52.212-5 Contract Terms and Conditions
Required to Implement Statutes or Executive
Orders – Commercial Items

General Services Administration Acquisition Regulation (GSAR)

- Federal Supply Schedule Contracting (Administrative)
 - PART 515—CONTRACTING BY NEGOTIATION
 - PART 538—FEDERAL SUPPLY SCHEDULE CONTRACTING
 - PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Helpful Websites

- www.acquisition.gov
- www.gsa.gov
 - Staff Directory
 - E-library
 - GSA interact
- www.data.gov - Certain Instructional Letters (ILs) now on the DATA.GOV website
- <http://www.fss.va.gov/>

Helpful Websites

- www.dol.gov
 - Compliance Assistance
 - Elaws – Employment Law Advisories
 - Q&A – Office of Federal Contract Compliance
- www.sba.gov
- Contracting <http://www.sba.gov/category/navigation-structure/contracting>
- <http://rulings.cbp.gov/> Customs Rulings Online Search System
- www.oge.gov Office of Government Ethics

MAS Pricing and Significant Contract Provisions

- Most Favored Customer Pricing
- Commercial Sales Practices Format
- Negotiating the Basis of Award Customer
- Price Adjustments and Price Reductions
- Audits

MAS Pricing and Significant Contract Provisions

Most Favored Customer (MFC)

- The Government will seek to obtain the offeror's best price (the best price given to the most favored customer). However, the Government recognizes that the terms and conditions of commercial sales vary and there may be legitimate reasons why the best price is not achieved.

Commercial Sales Practices Format

- Reveal information on commercial selling and pricing practices
 - Best customers
 - Discounts
 - Special offers, terms and conditions, concessions
- Current, accurate and complete
- Proprietary and Confidential

Commercial Sales Practices Format

THIS DOCUMENT IS AUTOMATED IN THE eOffer and eMod SYSTEM.

You are not required to complete the paper version of this document.

**This document is provided for reference purposes only.
COMMERCIAL SALES PRACTICES FORMAT (CSP-1)**

Name of Offeror: _____

SIN(s): _____

Note: Please refer to clause 552.212-70, PREPARATION OF OFFER (MULTIPLE AWARD SCHEDULE), for additional information concerning your offer. Provide the following information for each SIN (or group of SINs or Sub SIN for which information is the same).

(1) Provide the dollar value of sales to the general public at or based on an established catalog or market price during the previous 12-month period or the offerors last fiscal year: \$_____. State beginning and ending of the 12 month period. Beginning_____Ending_____. In the event that a dollar value is not an appropriate measure of the sales, provide and describe your own measure of the sales of the item(s).

Price Adjustments Clause

- GSAR § 552.215-70
- Triggered if the contractor fails to:
 - Provide information required by the solicitation or otherwise requested by the government
 - Submit current, accurate and complete information
 - Update its disclosures throughout negotiations
- Government may reduce contract price after award (and seek refunds) if negotiated price was increased because Contractor did not provide current, accurate or complete data

Price Reductions Clause

- GSAR § 552.238-75
- Contractors must:
 - Provide schedule customers with discounts provided to Basis of Award customers
 - Maintain the price or discount relationship throughout contract performance

Price Reductions Clause

- Items that can and should be negotiated!
 - Customer that will be the Basis Of Award
 - Government's price relationship to BOA
- Avoid a broadly worded BOA (i.e., “All commercial customers”)

Price Reductions Clause

- Price reductions can be triggered if the contractor:
 - Revises the commercial catalog, pricelist, schedule or other document upon which contract award was predicated to reduce prices;
 - Grants more favorable discounts or terms and conditions than those contained in the commercial catalog, pricelist, schedule or other documents upon which contract award was predicated; or
 - Grants special discounts to the customer (or category of customers) that formed the basis of award, and the change disturbs the price/discount relationship of the Government to the customer (or category of customers) that was the basis of award

Price Reductions Clause

- Exceptions
 - Maximum order threshold
 - Federal agencies
 - Sales to federal prime contractors, if qualified
 - Sales to State and Local governments through the schedule contract
 - An error in quotation of billing, provided the contractor provides timely notification to the CO

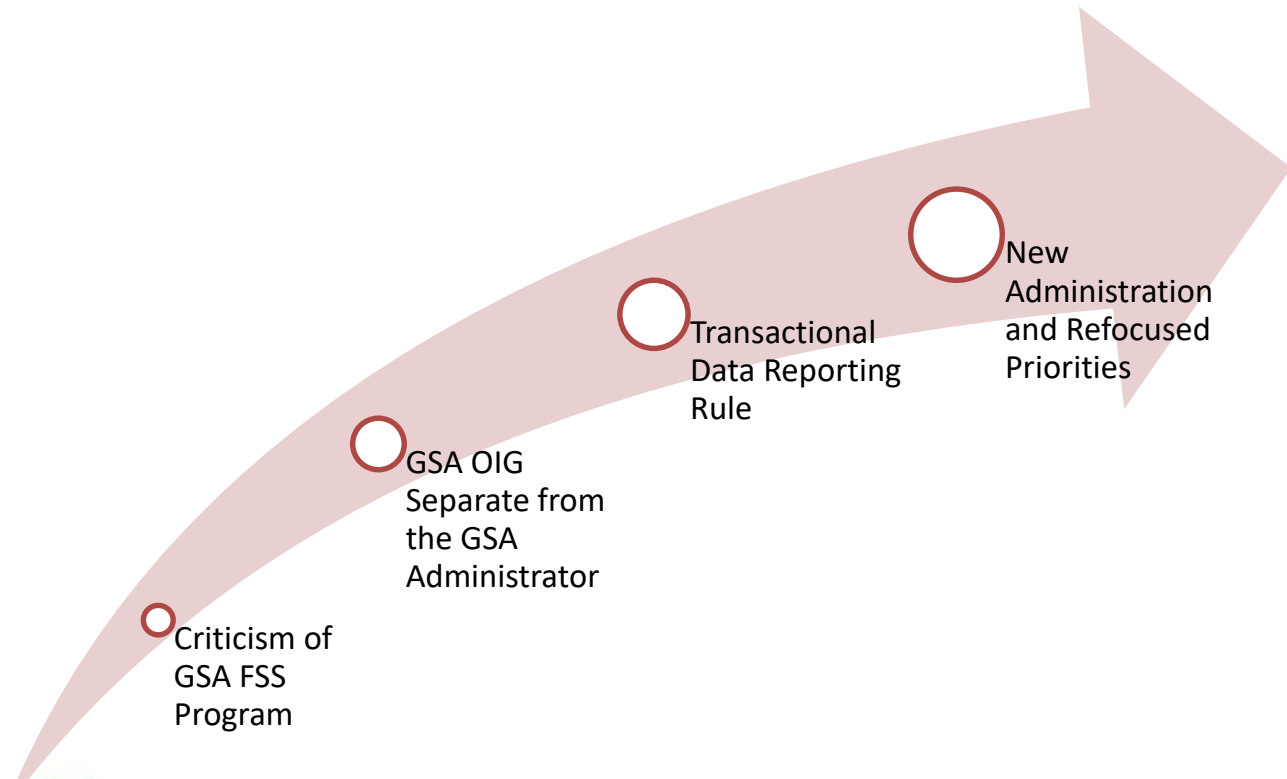
Price Reductions Clause

- Develop a reasonable Basis of Award
- Document original Basis of Award calculation
- Monitor carefully and continually all discounting provided to Basis of Award customers
- Develop a reporting mechanism for deviations from the Basis of Award
- Require approval for any deviations from standard pricing policies

Industrial Funding Fee

- GSAR § 552.238-74, “Industrial Funding Fee and Sales Reporting”
 - Requires that contractors remit to GSA 0.75% of sales on a quarterly basis
 - During negotiations, identify whether prices include IFF
 - Have a Policy and POC who is trained on, understands, and is responsible for collecting and accurately reporting schedule sales

GSA Audits - A bit about the current landscape



GSA Audits Today

- GSA struggles with Contract Administration
- TDR Program
 - CSP eliminated
 - PRC eliminated
 - Questions surrounding audits under the program
- Increased focused by whistleblowers
- Budget Constraints
- Audits results in recent years have been staggering
 - Large recovery
 - Big headlines

Recent GSA IG Activity

- FY 2018 Highlights
- OIG Report Criticizing TDR Pilot Program (*Report No. A140143/Q/T/P18004 – July 25, 2018*)
 - No clear measurement of success
 - 7 of 8 Evaluation Plan metrics lack quantitative “performance targets”
 - Data challenges – large amount of data collected is not available to be used to assess the pilot’s progress
- Civil and Criminal Settlements

GSA and VA Common Audits (Assessments/Review)

- Types of audits and reviews
 - Pre-award audits
 - Post-award audits
 - IFF audits
 - Contractor Assistance Visits (CAVs)



Pre Award Audit

- Pre award audit clause is a GSA variation of Alternate IV of FAR § 52.215-20
 - Note that this audit right does not extend to the contractor's cost and profit information
- Focus of the audit:
 - Confirm commercial sales practices info, submitted before award/renewal is current, accurate, and complete
 - Ensure adequate sales monitoring and billing systems to support compliance with the price reduction clause and payment of the industrial funding fee

Pre Award Audit (continued)

- What it is - An extensive examination of your commercial and government transactions
- Intended to assist the Contracting Officer in formulating the Government's negotiation objectives
- The results - can significantly impact contract prices, terms and the responsibility of a schedule contractor to monitor both its federal and commercial business

Post Award Audit

- General Services Administration Manual (“GSAM”) § 552.215-71
- Focus of the audit is to confirm:
 - Proper prices were charged
 - Compliance with the Price Reduction clause
 - Accurate reporting of all GSA schedule sales
 - Payment of required IFFs

Post Award Audit

- What it is – Extensive examination of transactions under the contract
- Possible Results – Clean Audit, Price reductions, possibly defective pricing, false claims

Audit or Review Request Should be in Writing

- Type of audit
- Government team
- Timeline for response
- Preliminary request for files
 - Correspond with the auditor immediately
 - Confirm receipt
 - Set up call if there are questions, request extension early, confirm method of transmission and file size limit of their systems



Audit Risks

- Current MAS Program
 - Proposal pricing disclosures/defective pricing
 - PRC monitoring
 - TAA compliance
 - Labor qualifications
 - IFF payments
- Under TDR Program
 - 11 data elements including:
 - Price Per Unit
 - Manufacture Part Number
 - Universal Product Code

Contractor Assistance Visits vs Audits

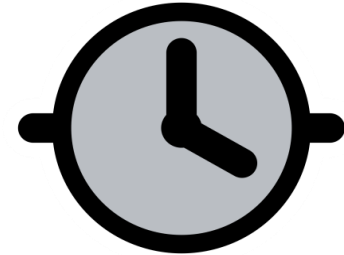
CAVs	Audits
IOAs do not have subpoena power	IG auditors have subpoena power
Short visit, quick turnaround of report	Usually involves lengthy data collection and analysis
IOAs review various compliance areas	IG auditors focus on pricing issues
IOAs review process and procedures and conduct data sampling	IG auditors undertake complete review of sales transactions
Occurs near middle and end of five-year contract	Conducted pre-award and/or post-award

Goal of Audit or Review

- Clarify the type of audit or review
- Be responsive, in writing, and clear
- Create record
- Actively engage with auditors
- Understand auditor's written findings
- Respond to findings with factual support

Audit Timeline

- Audit request
- Auditors' questions
- Exit interview
- Draft audit report
- Response to draft audit response
- Final audit report
- Audit results
 - Contracting officer's final decision; or
 - Referral to DOJ or OIG for investigation



Preparing for Audits

- In advance of audit:
 - Take a proactive approach to developing and implementing a compliance program
 - Perform periodic internal reviews
- Upon notification of audit:
 - Identify audit trigger:
 - Is it a standard audit triggered by submission of proposal (pre-award) or completion of contract (post-award)?
 - Was the audit triggered by contracting officer request, whistleblower, underlying *qui tam* action?
 - Assess scope and schedule
 - Locate and organize transaction files
 - Potentially conduct internal interviews

When do you start preparing for an audit?

During the Audit

- During audit:
 - Designate single point of contact
 - Identify a work area, preferably a conference room so conversations cannot be overheard
 - Clarify and maintain scope of audit
 - Document conversations in writing
 - Supply documents and information in advance of meetings (mark as confidential and proprietary)
 - Maintain copies of all materials provided both in advance and while on site
 - Ensure documents and information are correct and responsive to audit requests

Audit power is broad and auditors will pull every “loose thread”

At end of the on-site visit – Exit Conference

- Request a debriefing
- Confirm process for requesting additional information
- Confirm next steps and timing
- Request draft findings or draft audit report and, if provided, use the opportunity to address issues in writing
- Request final copy of the auditor report and respond to findings – typically to the contracting officer

Benefits

A Platform for Selling

- Commercial services and products
- Access to Government, world-wide market
- Customer Preference
- State and Local governments
- Reduced Bid and Proposal Cost
- Lowest cost entry into the Federal Market

Enhancing Benefit, Minimizing Risks

Summary

- The Schedules Program offers significant business opportunities – \$17 Billion annual revenue
- 15,000 contracts are managed successfully each year
- There are 35 - 50 audits a year; few given the number of contracts in the program
- There are risks which can be managed

Strategies for Risk Mitigation

- Educate yourself on significant GSA Schedule provisions
- Train your business leaders
- Establish procedures to ensure compliance
- Automate procedures to the extent possible
- Maintain constructive relationships with GSA contracting
- Utilize the Coalition for Government Procurement to remain current on key issues

Jason N. Workmaster
Member
Miller & Chevalier Chartered

jworkmaster@milchev.com
202-626-5893

Audits and Investigations

A faint, light blue illustration of a domed building, possibly a government or institutional structure, is visible in the background. The building features a central dome with a spire on top and several arched windows or openings along its base. The entire scene is set against a solid blue background.

The Minefield of Potential Harm

Criminal Violations:

- False Claims Act
- False Statements Act
- Obstruction of a Federal Audit, 18 U.S.C. § 1516
- Conspiracy

Civil Sanctions:

- Civil False Claims Act

Administrative:

- Administrative Fraud
- Unnecessary Costs, Adverse Findings, and Penalties
- Bad Relationship and Spillover

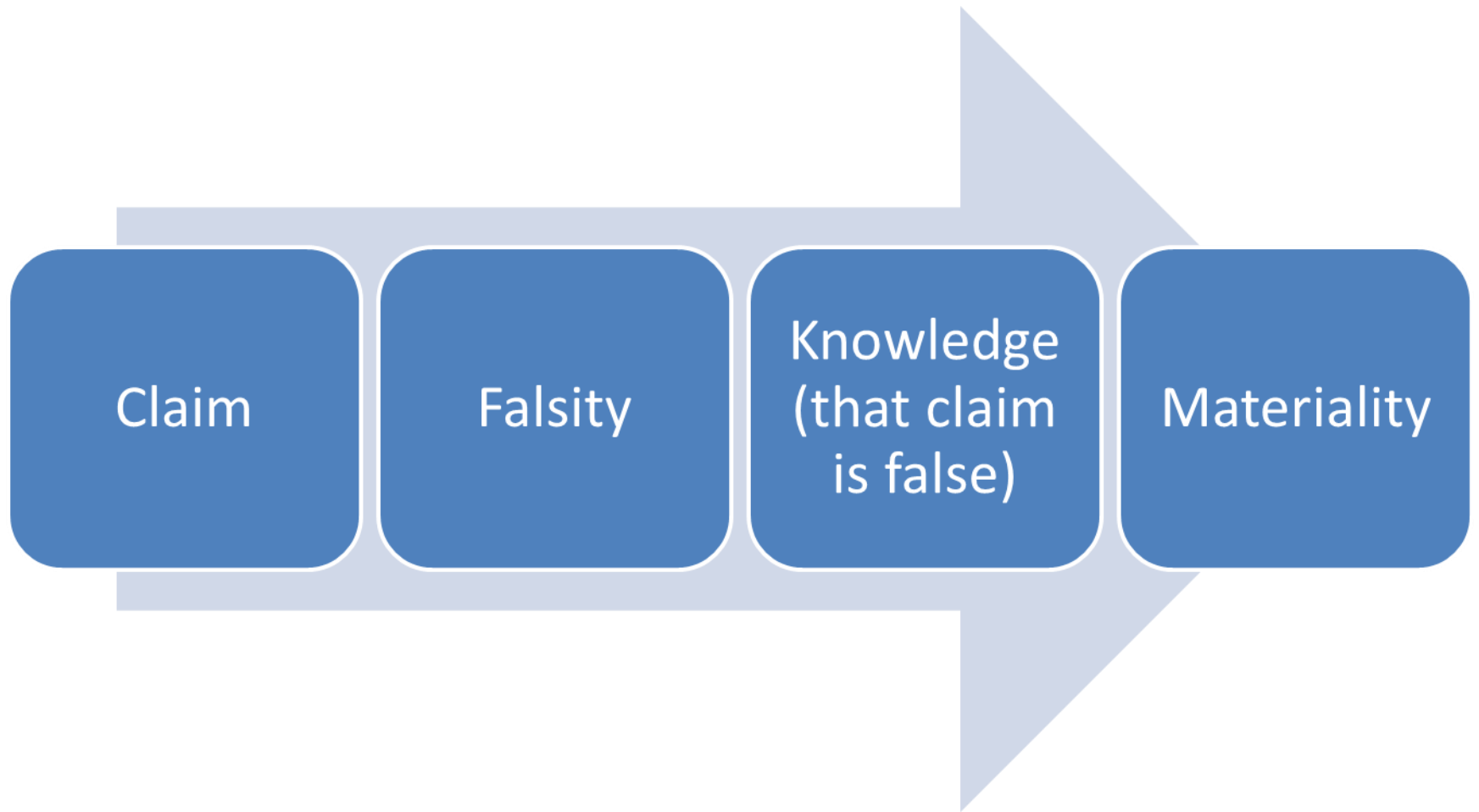
FCA Liability

FCA, 31 U.S.C. § 3729, imposes liability on anyone who:

- Knowingly submits, or causes another to submit, a false claim for payment to the Government
- Knowingly makes a false statement in support of a false claim
- Knowingly avoids or decreases an obligation to pay the Government, or retains an overpayment (“reverse false claim”)

Can be brought by Government or “*qui tam* relator” – relator suits can be barred by “public disclosure” or “first-to-file” bars

Elements of Cause of Action



Treble Damages and Penalties

Treble Damages: Government recovers treble damages that it sustained due to false claim(s)

Double Damages: In voluntary disclosure cases, Government may agree to settle for double the damages sustained by Government

Civil penalties assessed on any person who violates Section 3729(a)(1) of the FCA

- Current Minimum of \$5,500 – to be increased to \$10,781.40 effective August 1
- Current Maximum: \$11,000 – to be increased to \$21,562.80 effective August 1

FCA Statute of Limitations

Six (6) years from date of violation

OR

- Three (3) years from date the government knew or should have known of violation (whichever occurs last)

BUT

- In no event more than ten (10) years from the date of violation.

FCA Case Developments



The Supreme Court Speaks - *Universal Health Services Inc. v. U.S. ex rel. Escobar*

- Decided by Supreme Court June 16, 2016
- Implied Certification Theory of FCA Liability (but contours remain unclear)
 - For first time, Court recognizes the viability of the “implied false certification” theory of False Claims Act liability, at least in certain circumstances (*i.e.*, where “half-true” claims for payment)
 - But no clear standard as to the outer limits of theory; lower courts will continue to assess implied certification claims on a case-by-case basis.
- Renewed Focus on “Materiality” Prong
 - Materiality established where contractor violates a requirement that contractor knew (or should have known) was material to the government’s decision to pay an invoice
 - Materiality standard meant to be “rigorous” and “demanding”
 - Significant focus on course of dealing (*i.e.*, has the gov’t refused payment in the past for previous instances of noncompliance)
- Full implications of *Escobar* remain to be seen; critical for contractors to track developments.

Common Sense Prevails – Reasonable Reliance and Government Knowledge

Reasonable reliance on vendor certifications defeats FCA allegations of non-compliance with the Trade Agreements Act (*United States ex rel. Folliard v. Gov't Acquisitions, Inc.*, No. 13-7049 (D.C. Cir. Aug. 29, 2014))

Government Knowledge of alleged fraud is a defense

GSA Audits



Principal Audit Areas for GSA and VA IG

Commercial Sales Practices Disclosures

- Extent of Commercial Sales
- Pricing, discounts, rebates, concessions

Price Reductions Clause Compliance

Industrial Funding Fee Payment Compliance

Internal Procedures and Processes

Common GSA and VA IG Audit Requests

Commercial and Government sales data

- Information stored in electronic sales/accounting databases
- Invoices
- Contract documents

Identification of Basis of Award

Pricing Policies and Sales Procedures

Summary of Procedures and Systems to assure compliance with the Price Reductions Clause

Contractor Goals

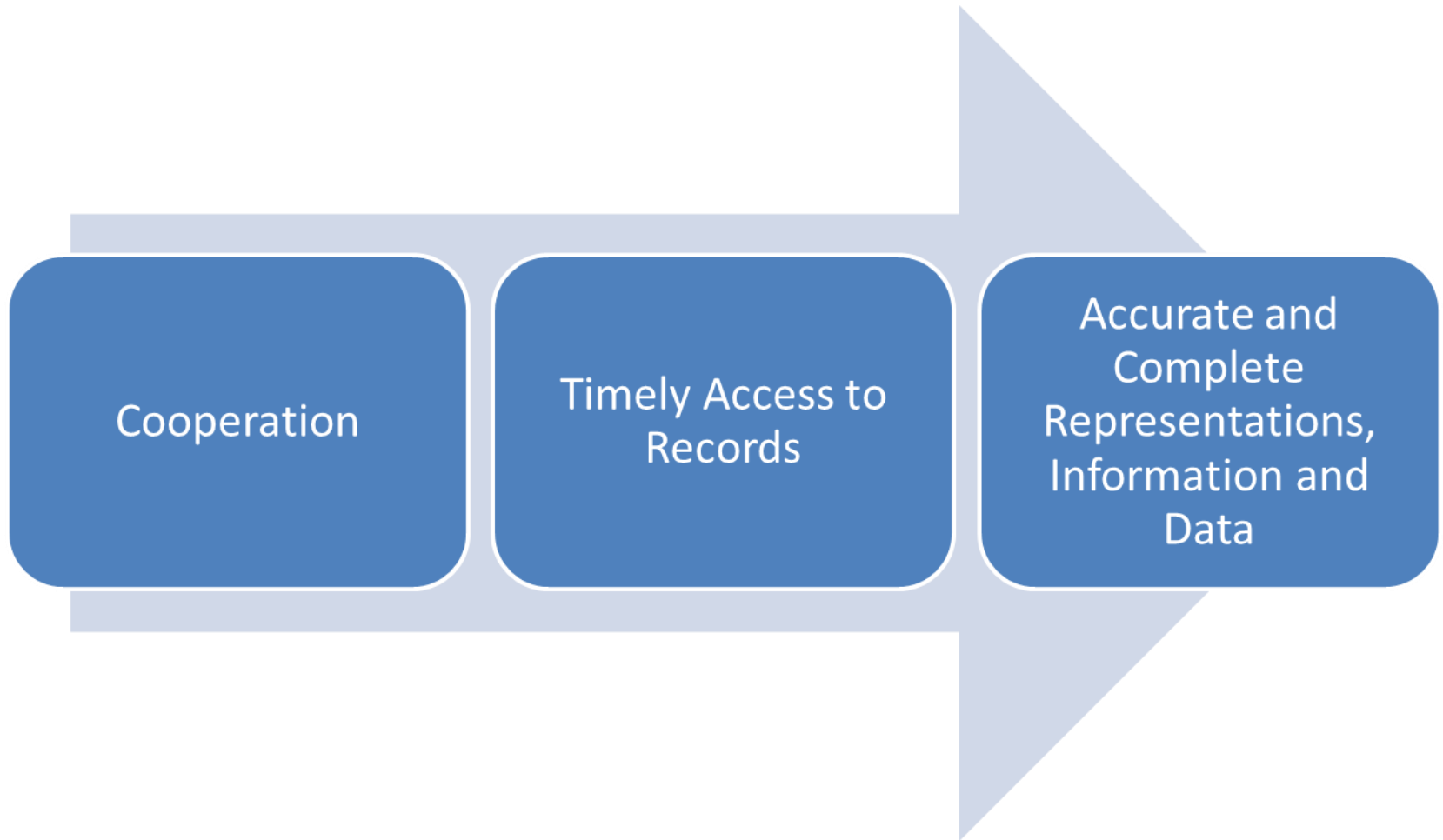
First, ***do not cause harm*** when responding to the audit

Second, create an ***accurate record*** of the audit

Third, identify any ***potential pricing issues or fraud concerns*** and findings

Fourth, ***begin organizing a response*** to the potential pricing issues or fraud concerns

Avoiding Harm



Cooperation

Knowing the Auditor's Rights and Remedies

Knowing your Rights and Remedies

Deciding when to Challenge the Auditor's Interpretation or Understanding

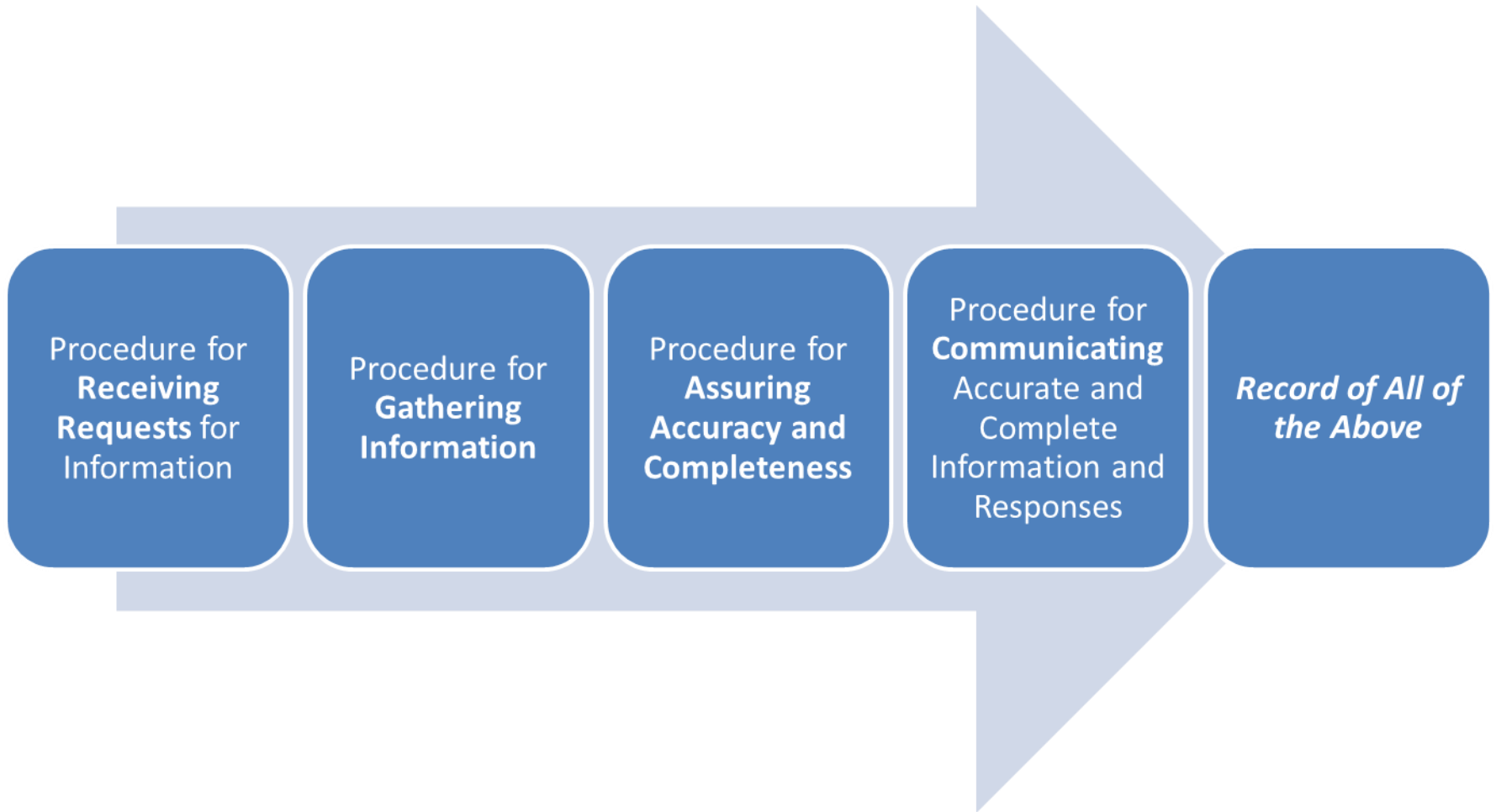
- Basis for Request
- Reasonableness of your Objection
- Importance of Request and Objection

Timely Access to Records

“Reasonable” Requirement

- Do not have to Shut Down Business
- The Auditor will Consider if There is an Unreasonable Delay, and if so, How Often and How Long

Accurate and Complete Responses

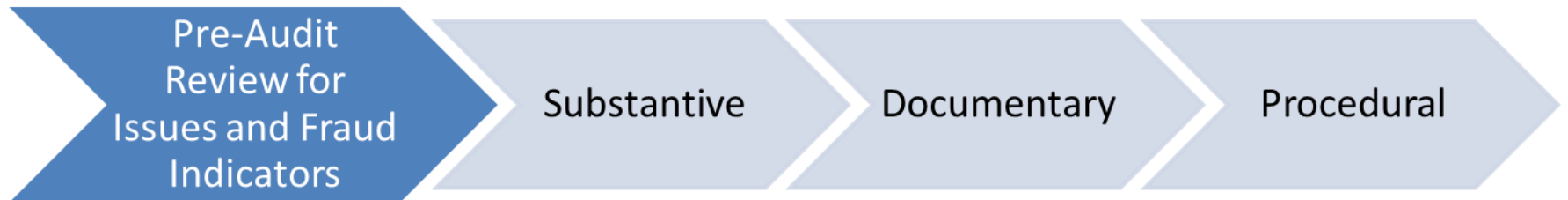


Preparation for the Audit

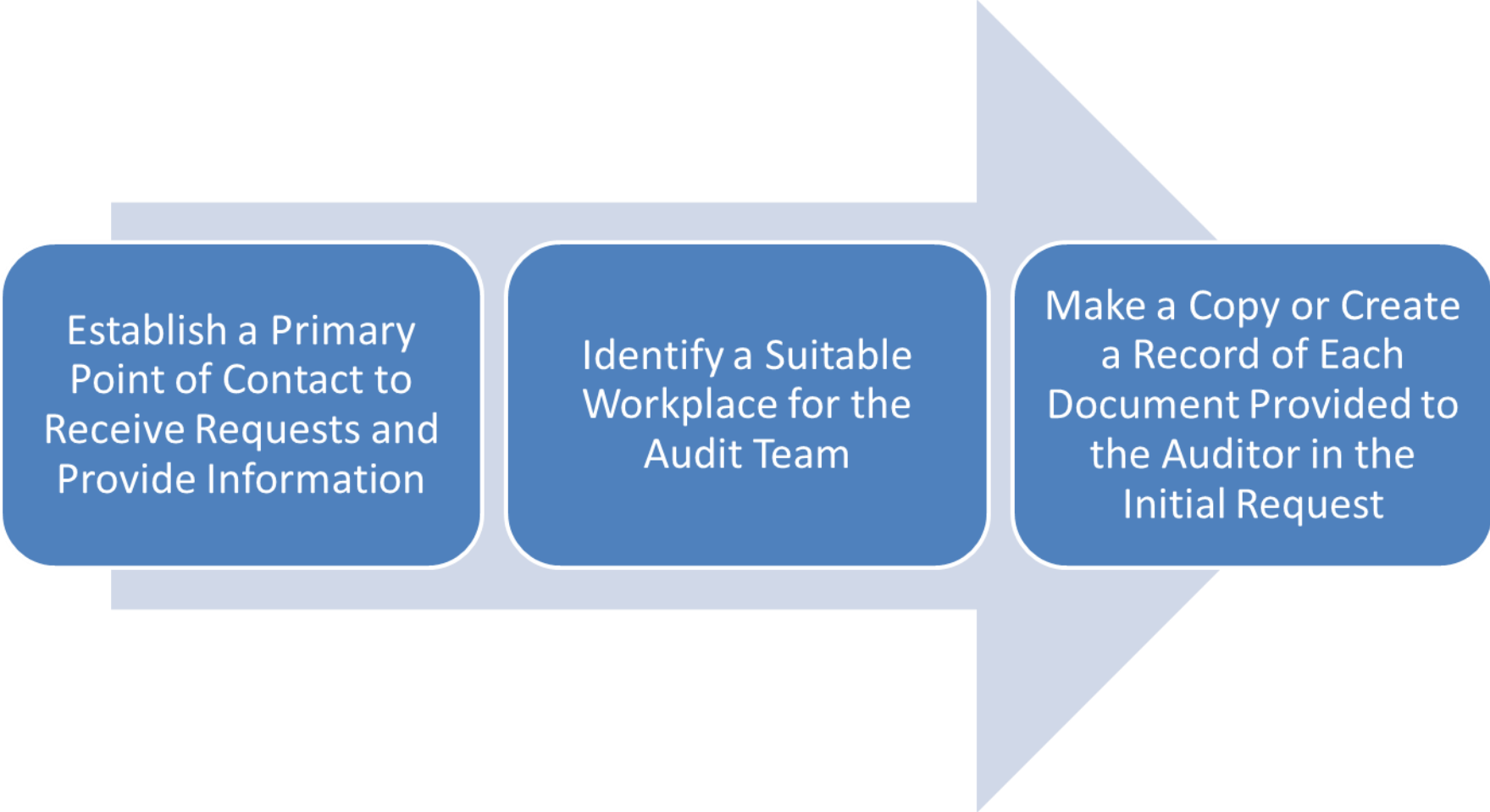
Audit
Request
Should
be in
Writing

- Should State the Type of Audit
- Should Identify the Government Audit Team
- Should Provide an Estimate of the Time
- Likely will Include a Preliminary Request for Files or Information

Preparation for the Audit



Preparation for the Audit



Establish a Primary Point of Contact to Receive Requests and Provide Information

Identify a Suitable Workplace for the Audit Team

Make a Copy or Create a Record of Each Document Provided to the Auditor in the Initial Request

Procedures During the Audit

Initial Conference with the Auditors

- Identify the Point of Contact to the Auditors
- Discuss Procedures for Requests for Information
- Discuss Procedures for Copies
- Request an Debriefing and a Copy of the Draft Audit Report

Procedures During the Audit

Responding to Requests by the Auditors

- Use Point of Contact Procedures
- Respond within Reasonable Time to Requests
- Assure that Requests are within Scope of the Type of Audit
- Negotiate the Request if Unreasonable, Burdensome, or Outside the Scope
- Identify Potential Issues and Begin Preparation of Response

Procedures During the Audit

Exit Conference

- Request that Auditors Summarize Findings and Next Steps
- Contractor Should Express its Position on Issues
- Contractor Should Request a Copy of Draft Report
- Contractor Should Request an Opportunity to Respond in Writing

Response to Audit Findings

Prepare a Written Response

- As Accurate and Complete as Possible
- Should be Made Part of the Audit Report
- First Opportunity to Present Your Position in Your Words
- Will be Reviewed by CO, Investigators, Prosecutor, and Judge or Jurors

Recognizing When an Audit Has Become an Investigation

Shift in Focus of the Audit

Unusual Focus on a Particular Aspect of the Audit

Refusal to Discuss an Aspect of the Audit

Refusal to Provide an Exit Conference

Refusal to Discuss Findings on a Particular Issue

Failure to Include an Aspect of the Audit in an Audit Report

Failure to Issue an Audit Report

Response to Fraud Allegations

Include Counsel

Conduct an Internal Investigation

- Can Start with Audit Records

Carefully Consider and Include Counsel on any Further Response to Auditors

Reasons for Periodic Internal Audits

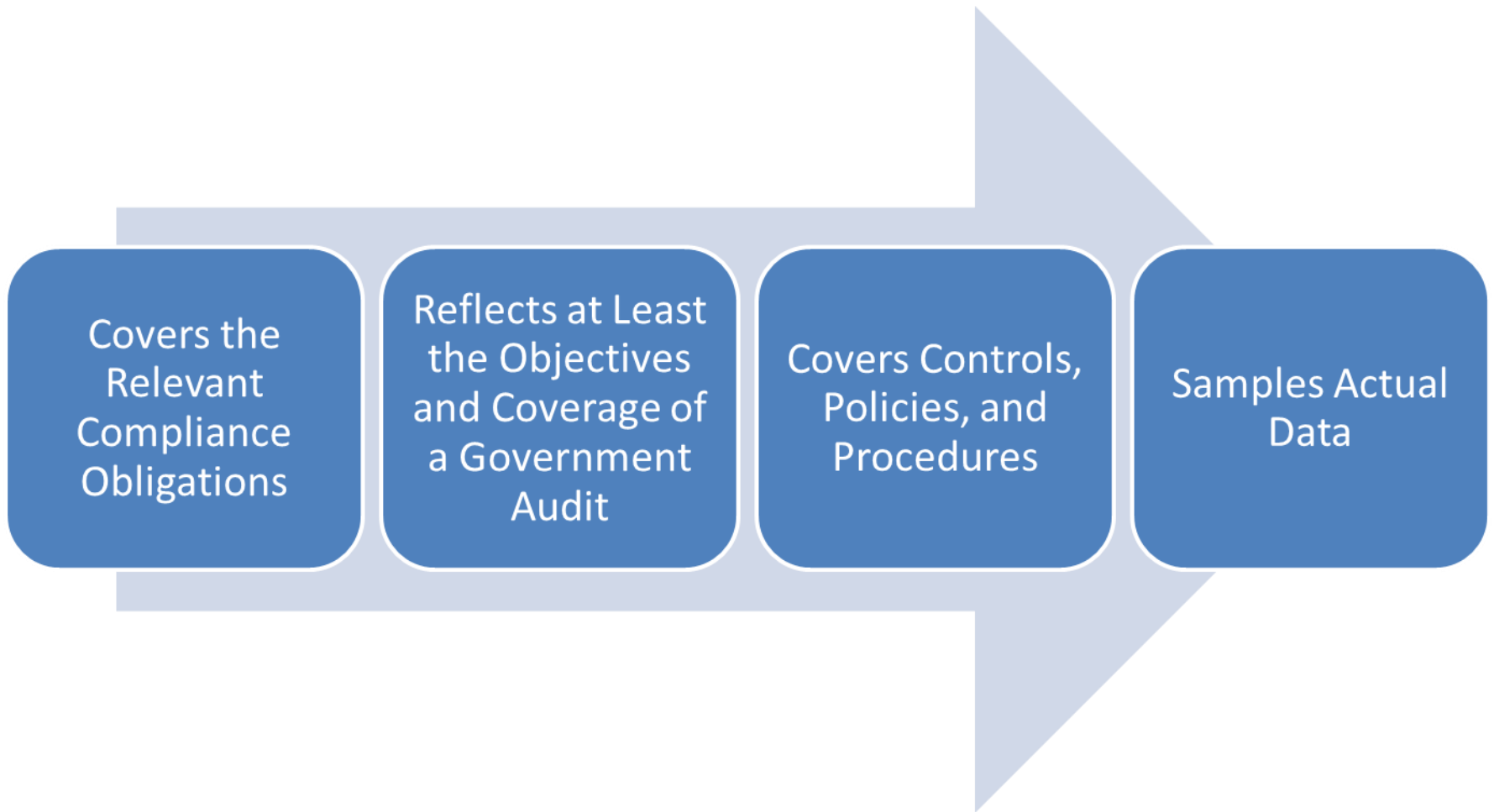
Political environment

FAR Ethics Rule

Respond to Issues Prior to Government Audits

Disclose Issues for Benefits of Disclosure

Principles of a Successful Internal Audit



Domestic Preferences

- Long-standing U.S. preference to buy domestic products
 - E.g., Buy American Act of 1933, as amended
- Partially waived by treaty obligations
 - WTO Agreement on Government Procurement (GPA)
 - NAFTA and other Free Trade Agreements

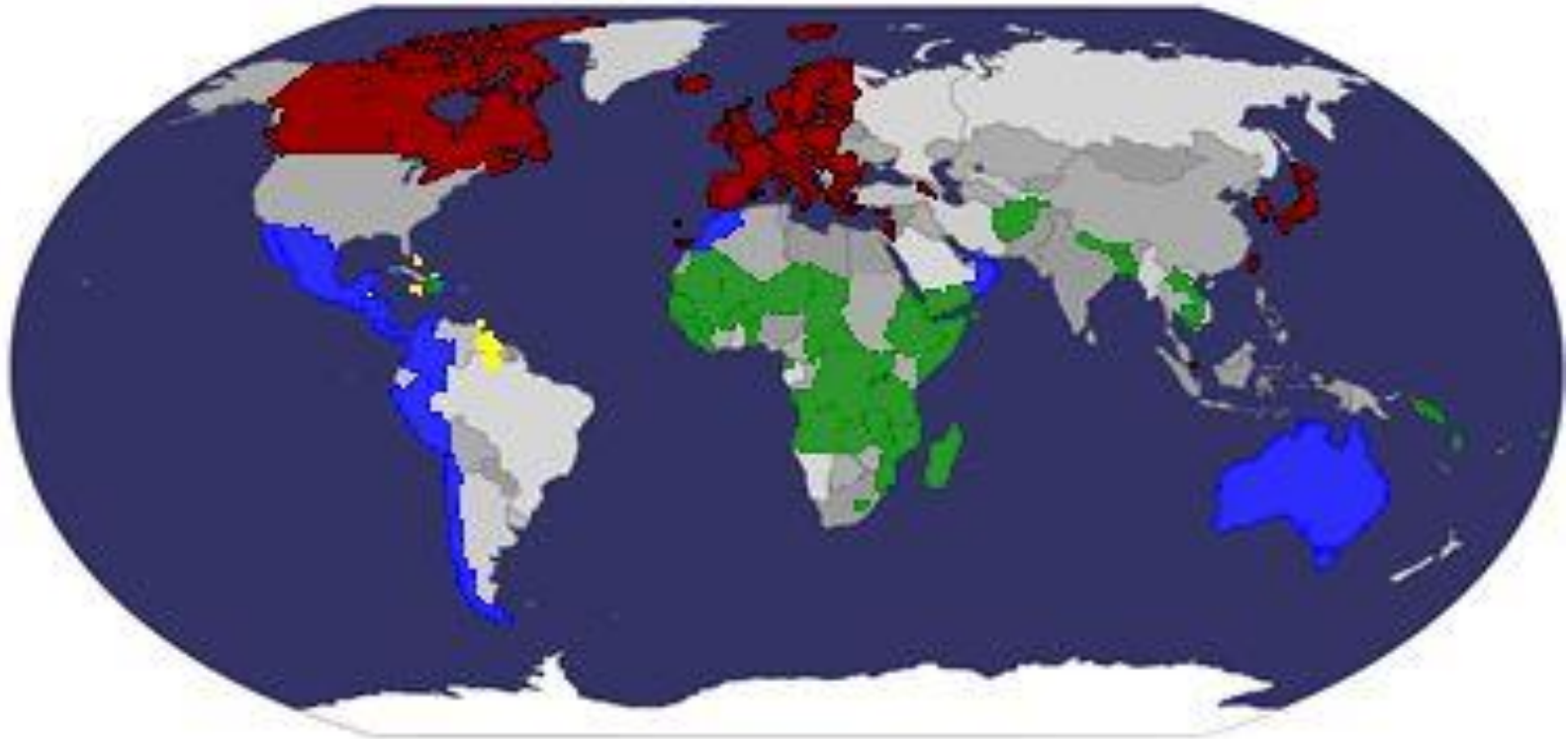
Trade Agreements Act (TAA)

- The Trade Agreements Act (19 U.S.C. 2501, et seq.) is the enabling statute that implements the WTO GPA as well as other multilateral and bilateral international trade agreements and other trade initiatives.
- Opens up procurements to “designated countries”
 - For acquisitions to listed agencies (including DoD), to specified product categories (FSCs), and above specified thresholds set by USTR every two years
- Prohibits procurement of end products from non-designated countries (e.g., China, India, Malaysia)
 - Unlike the BAA, there is no unreasonable cost exception!

Trade Agreements Act (TAA)

- Application to Federal Supply Schedules
 - GSA takes the position that the threshold applies to estimated 5-year value of sales under GSA Schedule contract
 - Requires certification of country of origin of all end products offered on a GSA Schedule contract
 - Prohibition against furnishing products from other than the U.S. or “designated countries”

“Designated Countries”



WTO GPA



Least Developed



FTA



Caribbean Basin

“Designated Countries”

- WTO GPA countries

- Armenia, Aruba, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan, UK

- FTA countries

- Australia, Bahrain, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Morocco, Nicaragua, Oman, Panama, Peru

- Least Developed countries

- Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, South Sudan, Tanzania, Timor-Leste, Togo, Tuvalu, Uganda, Vanuatu, Yemen, Zambia

- Caribbean Basin countries

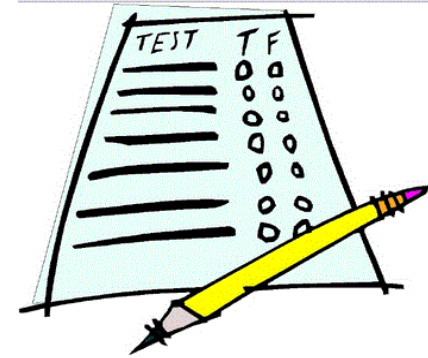
- Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bonaire, British Virgin Islands, Curacao, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saba, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, St Eustatius, St Maarten, Trinidad and Tobago

See FAR § 25.003 (2015)

TAA procurement ban currently applies, inter alia, to:

- China
- India
- Indonesia
- Malaysia
- Philippines
- Thailand
- Vietnam

Trade Agreements Act (TAA)



- Rule of origin
 - Country in which article was “substantially transformed” into a new and different article
 - Yes = manufacturing processes complex and meaningful
 - No = assembly minimal or simple
- U.S. Customs And Border Protection (CBP) has authority to make advisory opinions and binding country of origin determinations for purposes of the TAA

TAA and the VA

- April 2016 VA Announced a Policy Shift
- All Covered Drug, regardless of country of origin must be available under VA FSS Contract 65IB
- VA Contracting Officers have authority to make “non-availability determinations”
 - Not available in “designated country”
 - Covered drug under VHCA

Selected Ethics Issues In Government Procurement



Introduction

Federal contracts and subcontracts governed by laws and regulations

Non-compliance leads to serious consequences for contractors and employees

Select Areas We Will Discuss Today

Mandatory Disclosure Rule Obligations

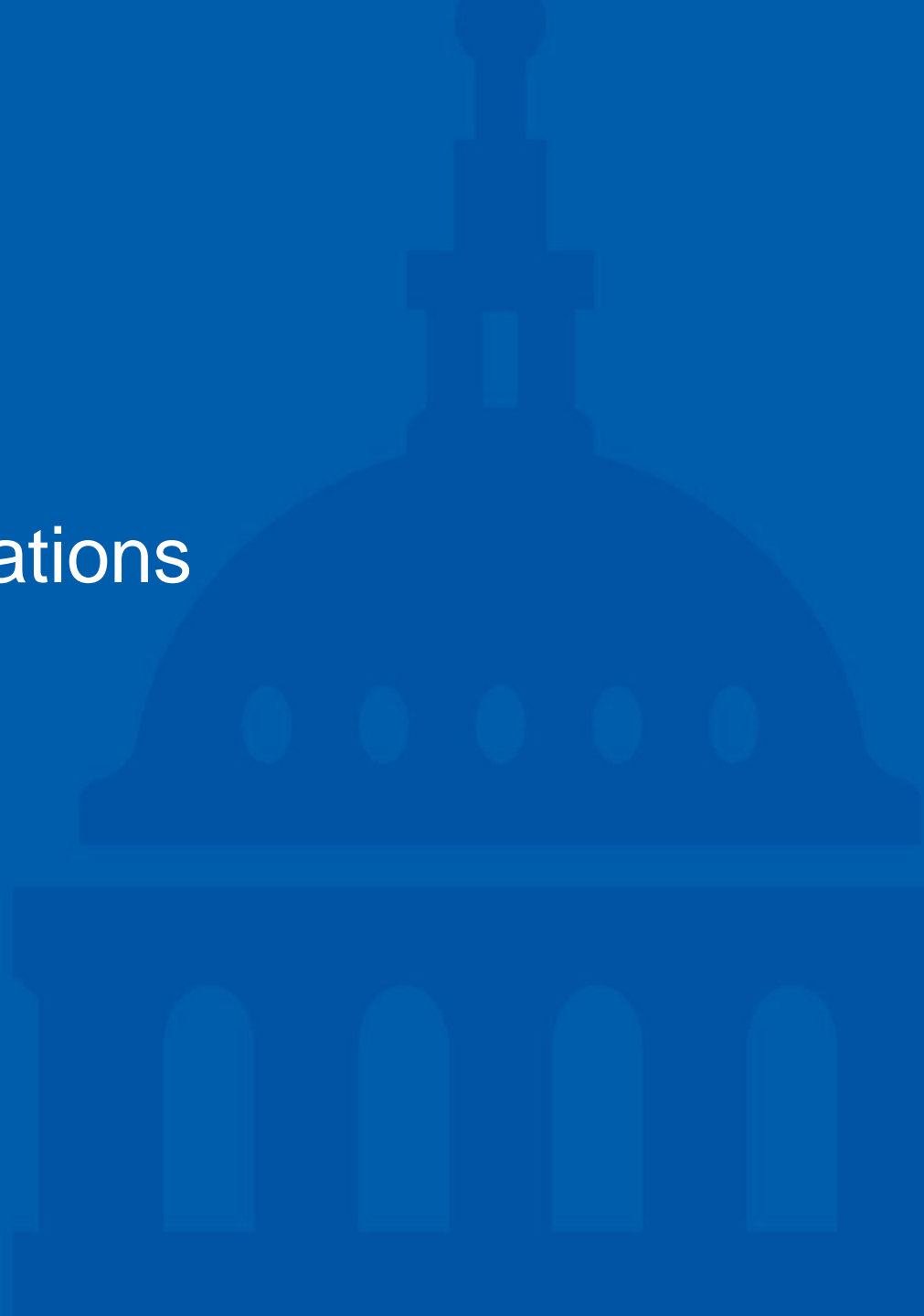
Requirement for Accurate Reps and Certs

Restrictions on Receipt of Information

Restrictions on Payments and Gifts

Restrictions on Employment of Former Government Employees

Accurate Representations and Certifications



Typical Representations and Certifications

Sales and pricing data

Requests for payment

Installation completion certificates

CCR

ORCA

Eligibility

Qualifications

Capabilities

Trade Agreements Act/domestic sourcing/place of manufacture

Restrictions on Receipt of Information



Procurement Integrity

FAR 3.104

- A contractor may not knowingly obtain
 - Another contractor's *bid or proposal information*
 - *Source selection information*
- prior to award of a competitive contract
- *Bid or Proposal Information* is information submitted to a Federal agency by a contractor in connection with a bid or proposal if not disclosed publicly, including:
 - Cost or pricing data (e.g., prices/discounts in response to RFQs in schedule contracts)
 - Product solutions

Procurement Integrity

Source selection information is information prepared for use by an agency for the purpose of evaluating a bid or proposal if not previously disclosed publicly, including:

- bid prices prior to public bid opening
- proposed cost or price information
- source selection plans
- technical evaluation plans
- technical/cost/price evaluations of proposals
- competitive range determinations and rankings of proposals
- reports and evaluations of source selection panels, boards or advisory councils
- Other information marked as such by the head of the agency or the contracting officer

Other Data Integrity Restrictions

Prohibition on *disclosure* of bid or proposal or source selection information to unauthorized persons at any time (FAR § 3.104-4)

Prohibition on use of non-public information to further a government employee's private interest or the interests of another
(18 U.S.C. § 208; 5 C.F.R. § 2635.703)

Trade Secrets Act requires protection of trade secrets disclosed to the government (18 U.S.C. § 1905) (Also state law trade secrets protection)

Privacy Act requires protection of personal information
(5 U.S.C. § 552a)

State law protection of trade secrets

Federal law – industrial espionage laws

Obtaining Information Unlawfully May Result In:

Imprisonment and criminal fines

Civil fines

Exclusion from Competition/Rescission of any related contract

Suspension or debarment from further government business

Laws Do Not Prohibit:

Unsolicited proposals

Requesting information about a procurement

Technical discussions regarding company's products or services when not related to a specific procurement

Restrictions on Payments and Gifts

The background of the slide is a solid blue color. In the lower right quadrant, there is a faint, light blue illustration of a classical building. The building features a large central dome with a decorative finial on top. Below the dome, there is a row of five arched windows. The overall style is minimalist and architectural.

The Following Are Prohibited Under The Law:

Kickbacks

Bribes

Gratuities

Definitions

KICKBACK: Anything of value provided to a contractor or employee for purpose of improperly obtaining favorable treatment in connection with a prime contract or a subcontract

BRIBE: To directly or indirectly corruptly give, offer, or promise anything of value to a public official to influence any official act, influence the official to commit, aid in, or collude in committing fraud, or influence testimony

GRATUITY: To directly or indirectly give, offer, or promise anything of value to a public official for or because of any official act performed or to be performed or for or because of testimony given or to be given

Not All Gifts Are Illegal Gratuities – But How Can You Tell?

Gift rules are complex, and can vary by agency

Agency employees generally may not accept, directly or indirectly, gifts:

- From a *prohibited source*; or
- Given because of the employee's official position

“Prohibited Source”

A person
who:

- Is seeking any action by the employee’s agency
- Does business or seeks to do business with the employee’s agency
- Conducts activities regulated by the employee’s agency
- Has interests that may be substantially affected by performance or nonperformance of the employee’s official duties

An
organization:

- The majority of whose members fall into any of the four categories above

“Because of the Employee’s Official Position”

A gift is improper if it would not have been solicited, offered, or given had the employee not held his position as a federal employee

“But we’re really good friends!”

“Gift” Includes:

Any gratuity

Favor

Discount

Entertainment

Hospitality suite

Loan

Forbearance

Item of monetary value

Services

Training

Transportation

Local travel

Lodgings and meals

Game tickets

Indirect Gifts, Too

Given with employee's knowledge and acquiescence to parent, sibling, spouse, child, or dependent relative because of that person's relationship to the employee

Given to any other person, including any charitable organization, on the basis of designation, recommendation or other specification by the employee

Exceptions to Gift Rules:

Obama Ethics Pledge for appointees – most of these exceptions DO NOT APPLY!

Gifts of \$20 or less per occasion, with \$50 aggregate per donor per year

Gift based on personal relationship, motivated by other than employee's position

Certain widely available discounts and similar benefits

Certain awards and honorary degrees

Gifts based on outside business or employment relationships of e.g. spouse

Free attendance at certain speaking engagements and widely attended gatherings

Gifts: Common Contractor Practice

Follow government's ethics rules, as promulgated by the Office of Government Ethics:

- Gifts of \$20 or less per occasion, with \$50 aggregate per donor (company) per year are not illegal gratuities (except Obama Ethics Pledge – does not apply)

Post-Employment Restrictions on Former Government Employees

A faint, light blue illustration of a government building's dome and arches is visible in the background on the right side of the slide. The dome is at the top, with a central spire, and below it are several arched windows or doorways.

Limits on Employment Discussions

A bidder or offeror may not engage in discussions with an official participating personally and substantially in a procurement in excess of simplified acquisition threshold if official has not:

- (1) reported contact, and
- (2) disqualified himself from the procurement (procurement integrity)

See also 18 USC 208 (conflict of interest rules)

Hiring Bans

A former government official may not accept any compensation from a contractor within one year of serving or taking action as PCO, SSA, member of source evaluation board, program manager, ACO, or official making the award decision, on a contract of \$10M or greater (procurement integrity)

New requirement last year – DOD only – all of these same officials, plus other senior officials, for 2 years after leaving government must also request an ethics letter from their agency at least 30 days *before* contractors may compensate

Representational Bars

18 USC § 207

- Former government employees may not:
 - Represent a company against the government in matter as to which they had personal and substantial involvement as a government employee [forever]
 - Represent a company against the government for two years after leaving government in a matter that was pending under their official responsibility during the last full year of government employment

Other:

- Former **senior** government employee may not:
 - One year agency-wide restriction
(Obama pledge: 2 years)
- Former **very senior** government employees
 - Government-wide restriction
- Obama Ethics Pledge

What is “representation”? Behind the scenes is OK.

- Still have to protect government sensitive information

Mandatory Disclosure Rule



Mandatory Disclosure Rule

Incorporated in FAR
Business Practices (Part
3) and
Debarment/Suspension
(Part 9.4) Provisions

- A contractor may be debarred or suspended for
 - *Knowing* failure by a *principal*, until 3 years after final payment on any Government contract or subcontract awarded to the contractor, to *timely* disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, *credible evidence* of—
 - *Violation of Federal criminal law* involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code
 - Violation of the *civil False Claims Act* (31 U.S.C. § 3729-3733) or
 - *Significant overpayment(s)* on the contract, other than overpayments resulting from contract financing payments as defined in FAR 32.001

Mandatory Disclosure Rule

Revised Ethics Clause

The
Mandatory
Disclosure
clause,
FAR
52.203-13,
provides:

- The Contractor shall timely disclose, in writing, to the agency Office of the Inspector General (OIG), with a copy to the CO, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed—
 - A *violation of Federal criminal law* involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or
 - A violation of the *civil False Claims Act* (31 U.S.C. § 3729-3733)
- Applies to prime and subcontracts exceeding \$5 million and more than 120 days

Mandatory Disclosure Rule *(cont'd)*

Significant points:

- Disclosure obligation continues for 3 years after final payment (applies to contracts closed out on or after 12/12/05)
- Disclosure obligation relates to any prime contract or subcontract thereunder regardless of amount
- Although disclosure of violations of criminal law limited to fraud, conflict of interest, bribery or gratuity, reach is potentially very broad
- Enforces existing obligation to notify contracting officer (CO) of overpayments under Prompt Payment clauses
- Disclosure obligation extends to actions of agents and subcontractors
- Subcontractors
 - Obligations to report co-extensive with those of prime contractors
 - Subcontractors subject to debarment/suspension if fail to report own violations or those of agents or lower tier subcontractors
 - 3 year retroactivity date likely based upon close of prime contract

Mandatory Disclosure Rule

Key Terms

"Knowing"

- Not defined, but under the civil False Claims Act, "knowing" means that a person
 - Has actual knowledge of the information;
 - Acts in deliberate ignorance of the truth or falsity of the information; or
 - Acts in reckless disregard of the truth or falsity of the information
- Also requires no proof of specific intent to defraud

"Principal"

- Defined as "an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a subsidiary, division, or business segment; and similar positions)"
- Term should be interpreted broadly, and could include compliance officers, directors of internal audit, functional area heads, program managers as well as other positions of responsibility

Mandatory Disclosure Rule

Key Terms (cont'd)

"Credible
Evidence"

- Not defined, and standard only used minimally in case law
 - Higher standard than "reasonable grounds to believe"
 - A conclusion that a violation occurred not required
 - Reporting of suspicious activity not required when there is a "remote possibility of a crime"
- Consider applying "preponderance" type standard based on elements of violation and defenses
- Consider disclosing if in doubt, but realize disclosure may trigger government review

Mandatory Disclosure Rule

Key Terms (cont'd)

"Significant Overpayment"

- Preamble indicates significance determined by the circumstances as well as the dollar value of the payment
 - Does not apply to contract payments subject to reconciliation or adjustments over time

"Timely"

- Preamble indicates contractor is allowed "time for preliminary examination of the evidence to determine its credibility before deciding to disclose"
 - Credible evidence disclosure trigger may be reached before investigation complete
 - Contractor not expected to conduct "complex investigation," but only to take "reasonable steps" to determine whether evidence credible
- Note that FAR prompt payment clauses require contractor to remit overpayment

Mandatory Disclosure Rule

Subcontractor Issues

Contractor has duty to disclose subcontractor violations

Rule does not impose obligation on or authorize contractor to investigate subcontractor

Document findings and decisions regarding subcontractor activities

Mandatory Disclosure Rule

Submission of Disclosure

Disclosures
go to:

- Agency OIG
 - Certain OIGs have set up web sites for disclosure under the new Rule; and some require certification
- With a copy to CO
 - If several contracts, CO of contract with highest dollar impact
 - If multiple-award contracts, each agency CO
- Overpayments submitted only to CO

Business Ethics and Compliance Requirements

A faint, light blue illustration of a classical building with a large dome and several arched windows or columns, serving as a background for the text.

FAR Business Ethics and Compliance Requirements

FAR 52.203-13 - Contractor Code of Business Ethics and Conduct

- Applicable to contracts greater than \$5M with performance period greater than 120 days
- Requires contractor to exercise due diligence to prevent and detect criminal conduct and otherwise promote ethical and compliant conduct

Three elements are:

- Requires a code of business conduct
- Proper business ethics and compliance program
- Requires internal control system
 - Ethics and compliance program and internal control system not required for small businesses or commercial item contracts

FAR Business Ethics and Compliance Requirements *(cont'd)*

FAR 52.203-13 – Contractor Code of Business Ethics and Conduct

- Within 30 days of award contractor must:
 - Have a written code of ethics and conduct
 - Make copy available to each employee involved in the contract

FAR 52.203-13 – Business Ethics Awareness and Compliance Program

- Requires periodic training of all employees and principals on contractor's standards and procedures, and on ethics and compliance requirements
 - Can include other forms of disseminating information
- If appropriate, training to be provided to agents and subcontractors
- Specialized training also to be provided based on employee responsibilities

FAR Business Ethics and Compliance Requirements *(cont'd)*

FAR 52.203-13 – Internal Control System

- The system should:
 - Establish standards and procedures for timely discovery of improper conduct; and
 - Ensure corrective measures promptly implemented
- The FAR establishes and identifies minimum requirements for the system

FAR Business Ethics and Compliance Requirements *(cont'd)*

FAR 52.203-13 – Internal Control System shall include:

- Assignment of responsibility for program at high level to ensure compliance
- Efforts not to hire "principals" who are in conflict with the code of business conduct
- Periodic reviews of practices and internal controls for compliance, **and the special requirements of government contracting**, including:
 - Auditing to detect criminal conduct
 - Evaluation of effectiveness of controls
 - Assessment of the risk of criminal conduct and modifying the system to reduce such risk
- An internal reporting mechanism and instructions to encourage reporting
- Disciplinary action for failure to **prevent or detect** violations
- Timely disclosure of violations under new mandatory disclosure rules
- Full cooperation with government audits, investigation or corrective actions after disclosure