
Current Issues Affecting Government Contractors
By Alston & Bird's Government Contracts Group
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# The GovCon Files

## "ORCA" Is a Killer (Whale) but (Uncle) "SAM" Is Bigger and Meaner

If you thought as a government contractor that there was too much of your confidential information made accessible to the public before, get ready. Virtually every different repository of data about you will be centralized into one government website. Information government contractors supply, as well as information from government agencies, will be collected on a one-stop-shopping site called "SAM" (www.sam.gov), short for the System for Award Management. Here is what GSA promises about SAM:

> SAM will reduce the burden on those seeking to do business with the government. Vendors will be able to log into one system to manage their entity information in one record, with one expiration date, through one streamlined business process. Federal agencies will be able to look in one place for entity pre-award information. Everyone will have fewer passwords to remember and see the benefits of data reuse as information is entered into SAM once and reused throughout the system. [https://www.sam.gov/sam/announce1.htm]

The transparency afforded by SAM will have a dark side, however, if the data is wrong, or is subjective and potentially unfair. Consequently, contractors are at their own peril if they do not increase their vigilance to the information stored about them in SAM.

It was not that long ago that the government first mandated that every contractor register itself online in "CCR," the Central Contractor Registry, and certify contractor compliance with thirty pages of government contract clauses in "ORCA," the Online Representations and Certifications Application. The government also mandated that contracting officers send procurement action reports to a central public repository now called "FPDS-NG," the Federal Procurement Data System-Next Generation, and made that system more user-friendly (though not necessarily more reliable) at usaspending.gov. A few years back we wrote an article in *Contract Management* magazine advising companies to be vigilant about their information in CCR, ORCA and FPDS-NG, particularly since that data was being used against government contractors by competitors, whistleblowers, qui tam relators, offices of inspectors general, and the Department of Justice in the search for False Claims Act violations. [Jeffrey Belkin and Trinh Huynh, "ORCA for Government Contractors—Not Your Ordinary Killer Whale," *Contract Management,* Sept. 2007), at 32.] Now is the time to prepare for SAM and upgrade your auditing of the published data about you.

In the name of transparency, the government in SAM will also link all past-performance databases together to make them more readily available to government officials making procurement decisions, including FAPIIS, PPIRS and CPARS among other independent databases of contractor evaluations. (Acronym salad, to be sure.) Thus, opposition research has never been easier once SAM "goes live" this month. Eventually, eight different federal database systems will be combined into SAM, beginning right away with CCR, ORCA and the central debarment repository, EPLS (the Excluded Parties List System). In Phase 2, FPDS-NG data will be added in along with eSRS (the Electronic Subcontracting Reporting System) and PPIRS (the Past Performance Information Retrieval System, which itself links to CPARS and FAPIIS). FSRS, the system for reporting subawards and executive compensation information on federally-assisted and procurement projects, will also be linked into SAM.

Yes, you will now only have to remember one login and password. And yes, contracting officers will have an easier time obtaining relevant information in order to make more informed judgments about offerors' responsibility. On the other hand, your certifications about your business size, executive compensation, amount of federal government revenue, place of performance and Buy American Act compliance — just a handful of available areas of data — will be linked through the same login as records of all of the awards you have received since 2000. Plus, more detailed past performance information will be publicly available, too. [*See* Jacquelyn L. Stanley, "Make Transparency Your Business, *The Federal Awardee Performance and Integrity Information System and Its Implications for Contractors*, 41 Pub. Cont. L.J. 685 (Spring 2012) (though noting that most but not all performance report data will remain hidden from the public).]

If all of the information was assured to be accurate, that would be one thing; transparency is a good thing. But that information is definitely not guaranteed to be accurate. In fact, the opposite is true. While you will control your own representations (ORCA) and registration (CCR) information, you will have no control over the contract reports that are accessible. Recent reports continue to find that records in FPDS-NG contain significant gaps and inaccuracies. [*See*, e.g., GAO Report 09-1032T (available at http://www.gao.gov/assets/130/123445.html ) (reporting that data from 2009 and earlier continued to be inaccurate).] New data may be more accurate, but there's no effort that we know of to go back and correct earlier data. So that errant data still sits there, available to everyone as before.

Because of the link to performance data, you will not have the ability to control or dictate in SAM every word about your company in past performance evaluations. Yes, recent decisions in the Court of Federal Claims (but not the Civilian Board of Contract Appeals) have supported a right to challenge a negative performance evaluation. But who really has the time, not to mention the funds, to file litigation over a stray disagreeable sentence in an otherwise-neutral (or even positive) evaluation? Very few companies possess that wherewithal, so most will be stuck with the risk that a contracting officer will hinge its award decision on that stray sentence.

What to do? We said it before and we will say it again: Be vigilant! Do not have a low-level administrative assistant be in charge of your SAM records. Treat those records like your Sarbanes-Oxley certifications, and ensure they are routinely audited for accuracy. And if you have the resources, challenge (either by posting contradicting statements or by a legal challenge) both unfair ratings and the subjective, negative narratives in performance evaluations.

Ben Franklin, one of our founding fathers, wrote that an ounce of prevention is worth a pound of cure. His warning is particularly apt in your dealings with (Uncle) SAM, both the government he helped create, and the data system that government has now mandated you use.

Jeffrey A. Belkin, July 2012

# Decisions Affecting the Marketplace

## PROTEST DECISIONS: Bid Bond Found Defective Where Surety's Support Was Conditional and Therefore "Uncertain"

Many federal government RFPs require bidders to submit bid guarantees/bonds. The failure to furnish a proper bid bond can result in rejection of a bid. The Government Accountability Office recently addressed the adequacy of a bid bond when a bid protestor challenged the rejection of its proposal due to a defective bid bond.

In the matter before the GAO, the Department of Veteran Affairs issued an RFP for the expansion of a parking garage. Among other things, the RFP required bidders to submit a bid guarantee for 20 percent of the bid price or $3 million, whichever was less. The VA warned bidders that the failure to furnish the required bid guarantee in the proper form and amount would result in the rejection of the bid.

One contractor submitted a proposal to the VA that included an executed bid bond. Attached to the bid bond was a letter stating that the surety had agreed to support the protestor "based upon certain conditions, including third party indemnity." The VA determined that the contractor's bid bond was defective because the surety placed conditions on the bond potentially limiting the government's rights.

The contractor argued before the GAO that it had submitted a valid and enforceable bid bond that merely disclosed a third-party indemnification arrangement. However, the GAO found that the VA properly rejected the proposal. The GAO stated that a bid bond must clearly establish the liability of the surety and that when the liability is not clear, the bond is defective. The GAO found that since the VA did not know what conditions had been placed upon the surety's obligation or whether the surety would be liable on the bond in the event of a default, the attached letter created uncertainty as to the obligation of the surety to the government. That uncertainty led the GAO to conclude that the VA properly rejected the proposal.

*U.S. Gov. Accountability Office, B-406284, Capture, LLC* (March 23, 2012).

## CHANGES TO THE MARKETPLACE: A New Procurement Vehicle – O.A.S.I.S.

The federal government is one expensive operation and has a multitude of demands. In a recent effort to reduce expense, to increase efficiencies through economy of scale, and to allow greater flexibility to contracting agencies, the GSA is developing a new contract vehicle for complex professional services. This new vehicle, creatively titled, "One Acquisition Solution for Integrated Services" (or "OASIS" for short), is designed to address agencies' needs for professional services that span multiple professional disciplines, involve significant IT components, require flexibility, and are difficult to specify or quantify prior to an award.

A draft request for proposal, expected to be released late this summer, will attempt to define the covered professional services and the scope of the contract. OASIS is expected to fill the gap between traditional procurement vehicles, those which allow for competitive bidding and time to nail down the exact scope of work, and those agency demands that are more fluid, less predictable and require more flexibility at the task order level.

One area where OASIS will likely come in handy concerns situations where the government must provide an immediate response, but has limited time to determine the scope or areas of need. In these instances, there are often demands concerning IT compatibility issues, logistical dilemmas, and business management matters that must be addressed, but on extremely short notice. OASIS will provide agencies a method to team professional services for all of these areas on a task order level, while avoiding the difficulty of having to seek out these professional services individually. The contracting officer will have access to standardized labor categories from a master contract, but can select specific categories of professionals at the task order level. This would allow an agency to obtain IT, logistical and business consulting services under the same task order. GSA's OASIS program manager, Jim Ghiloni, has estimated the total value of OASIS will be about $12 billion over an estimated 10-year lifespan.

GSA is currently seeking input from industry as it prepares to draft the RFP. Companies can respond to questions posed by GSA by submitting a white paper in response to the questions and receive a chance to meet one-on-one with GSA. While still in its infancy, OASIS is a promising business opportunity for many professional service companies, which will help meet the government's need for professional services.

## GOVERNMENT CONTRACTOR LITIGATION: Court of Appeals Decision Overrules Circuit Precedent on the Public Disclosure Bar in Certain Qui Tam Cases

In *U.S. ex rel. Davis v. District of Columbia*, 679 F.3d 832 (D.C. Cir. 2012), the United States Court of Appeals for the D.C. Circuit overruled established circuit precedent that held, in a False Claims Act case, a qui tam relator qualifies as an original source for purposes of the public disclosure bar only if he or she discloses all material evidence underlying his or her claims not just prior to filing suit, but prior to the date of the public disclosure in issue.

In *Davis*, the relator filed a qui tam action under the 1986 amendments of the False Claims Act (FCA), alleging that the District of Columbia and the District of Columbia Public Schools (DCPS) violated the FCA by submitting a Medicaid reimbursement claim to the government without adequate supporting documentation. The defendants moved for dismissal of the case, in part, on grounds the relator's claims were based upon a "public disclosure" and that he was not an "original source." Relying on *Findley v. FPC-Boron Employees' Club*, 105 F.3d 675 (D.C. Cir. 1997), the district court agreed, concluding the relator had not preserved his status as an original source because he failed to disclose all material evidence supporting his claims prior to the public disclosure.

On appeal, the District conceded that the relator had the requisite direct and independent knowledge of the alleged fraud to qualify as an original source, so the only issue was the timing of relator's disclosure to the government. The court of appeals reversed the district court, overruling *Findley*, based upon the Supreme Court's decision in *Rockwell International Corp. v. United States*, 549 U.S. 457, 127 S.Ct. 1397, 167 L.Ed.2d 190 (2007), in which the Court concluded that the "information" a relator must provide to the government is the information on which the relator's allegations are based, not the information on which the publically disclosed allegations are based, which was the conclusion reached by the D.C. Circuit in *Findley* when it held that the relator's submission of all material evidence must predate the public disclosure. Therefore, according to the D.C. Circuit, under the 1986 FCA amendments, to be an "original source," the relator is required only to provide to the government all material evidence on which the relator's allegations are based before filing an action — not before the public disclosure.

Importantly, the court of appeals observed that the 2009 amendments to the FCA embrace both the *Findley* pre-public disclosure notice and the *Rockwell* pre-filing notice requirement, but adds the further requirement that the relator's information materially add to the public disclosure. Now, an individual qualifies as an "original source" where he or she either: (1) prior to a public disclosure, voluntarily discloses to the government the information on which allegations in a claim are based, or (2) has knowledge that is independent of and materially adds to the publicly disclosed allegations, and who has voluntarily provided the information to the government before filing an action.

# Pros In The Press

- In October, Jeff Belkin and two colleagues, including regulatory counsel for UPS and an assistant United States attorney, are speaking at the Society for Corporate Compliance and Ethics' (SCCE) 11th Annual Compliance & Ethics Institute in Las Vegas on the anatomy of a government investigation, from inside counsel, outside counsel, and government attorneys. Compliance professionals and lawyers are encouraged to attend this premier compliance organization's convention. Registration is available at http://dev.complianceethicsinstitute.org/.

- On June 21, 2012, Andy Howard was interviewed by *Government Product News* for an article that discussed ways to control and monitor spending at GSA and other government agencies.

- On May 15, 2012, Andy Howard was quoted in a *Law360* article discussing the Whistleblower Protection Enhancement Act bill recently passed by the Senate, and how — if signed into law — it would greatly expand government whistleblowers' chances in retaliation lawsuits by removing several barriers to claiming protected status, including eliminating exclusive jurisdiction for such claims in the U.S. Court of Federal Claims.

- On July 11, 2012, Jessica Sharron's article, "The Changing Conflict-Of-Interest Regs For Contractors," was published by *Law360*.

- Andy Howard is speaking on the topic of conducting business across state lines at the ABA Forum on the Construction Industry's fall meeting, scheduled for October 18 and 19 in Boston.

- On March 13, 2012, Andy Howard's article, "Past Performance Evaluations: New Rules, Same Challenges," was published by *Law360*.

- Jeff Belkin authors a blog on government contracts for *The Huffington Post*. Read his most recent entry here: http://www.huffingtonpost.com/jeff-belkin/the-cop-act-arming-small-_b_1382183.html.

# Alston & Bird Government Contracts Group

http://www.alston.com/services/litigation/government-contracts/

**Group Leader**

| | | |
|---|---|---|
| Jeff Belkin | jeff.belkin@alston.com | 404-881-7388 / 202-756-3065 |

**Group Members**

| | | |
|---|---|---|
| Chris Roux | chris.roux@alston.com | 202-239-3113 / 213-576-1103 |
| John Spangler | john.spangler@alston.com | 404-881-7146 |
| Mark T. Calloway | mark.calloway@alston.com | 704-444-1089 |
| Steven Campbell | steven.campbell@alston.com | 404-881-7869 |
| Debbie Cazan | debbie.cazan@alston.com | 404-881-7667 |
| Kevin Collins | kevin.collins@alston.com | 213-576-1184 |
| Dan Diffley | dan.diffley@alston.com | 404-881-4703 |
| Peter K. Floyd | peter.floyd@alston.com | 404-881-4510 |
| Andy Howard | andy.howard@alston.com | 213-576-1057 |
| Bill Hughes | bill.hughes@alston.com | 404-881-7273 |
| Scott Jarvis | scott.jarvis@alston.com | 404-881-7438 |
| Stephanie A. Jones | stephanie.jones@alston.com | 213-576-1136 |
| Kate Miller | kate.miller@alston.com | 404-881-7947 |
| Kyle Ostergard | kyle.ostergard@alston.com | 213-576-1036 |
| Elizabeth Willoughby Riley | liz.riley@alston.com | 704-444-1031 |
| Jeffrey Schwartz | jeff.schwartz@alston.com | 202-239-3486 |
| Eileen M.G. Scofield | eileen.scofield@alston.com | 404-881-7375 |
| Mike Shanlever | mike.shanlever@alston.com | 404-881-7619 |
| Jessica Sharron | jessica.sharron@alston.com | 213-576-1164 |
| Nathan Sinning | nathan.sinning@alston.com | 213-576-1134 |
| Jason M. Waite | jason.waite@alston.com | 202-239-3455 |