

## Regulatory and Government Affairs

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### Government Contracts

#### Contact

Richard D. Gluck | 202.298.1786 | rgluck@gsblaw.com

Doing business with federal agencies can be profitable. However, federal procurement is heavily regulated, which makes government contracting different from commercial contracting and gives rise to numerous unique legal issues. Our attorneys regularly work with the Federal Acquisition Regulation (the FAR), the Defense Acquisition Regulation Supplement (DFARs), and other agency regulatory supplements. Our government contracts lawyers provide the advice, documentation, and dispute resolution services needed to navigate the regulations and enable you to maximize the value of your contracts.

- ▶ Transportation (maritime, trucking and aviation)
- ▶ Aerospace and defense
- ▶ Biotechnology and medical research
- ▶ Engineering and construction
- ▶ Environmental remediation
- ▶ Professional services
- ▶ Information technology and communications

Operating from offices in Washington, D.C., Seattle, and Portland, our government contracts lawyers collectively have well over 100 years of government contracting experience. Many previously served in federal agencies or on congressional committees with agency oversight. We know how federal agencies think and how to work with them. Using this knowledge, we deliver cost-effective legal services that minimize your risk while helping achieve your business goals.

### Bid Protests

When the government awards a contract to a competitor, you may want to protest, especially if the government structured the procurement process in a way that prevented you from fairly competing. Conversely, you need to defend an award made to you if a competitor protests.

Whether you protest an award or defend one, Garvey Schubert Barer helps you achieve a favorable outcome. We regularly and successfully litigate or mediate both pre- and post-award contract disputes directly with the federal agency involved, at the U.S. Government Accountability Office or in the U.S. Court of Federal Claims. For example, we successfully defended the award of a contract by the U.S. Army Corps of Engineers to a Native American corporation for the construction and maintenance of fisheries-related projects on a Pacific Northwest river.

### Claims, REAs and Dispute Resolution

As a government contractor, there may be times you want to pursue a claim against the government or request an equitable adjustment (REA). Our government contracts lawyers are experienced in preparing the documentation for these procedures and helping you favorably resolve them — through negotiation, litigation and alternative dispute resolution.

We regularly appear before the boards of contract appeals and the U.S. Court of Federal Claims in matters involving the following:

- ▶ Claims under contract remedy provisions
- ▶ Challenges to contract terminations for default
- ▶ Disagreements about cost accounting principles and standards
- ▶ Disputes arising from termination for convenience proposals

Our lawyers also have substantial experience resolving disputes between prime contractors and subcontractors in such areas as

software development, transportation of goods by sea and information technology hardware. In one matter, we prepared and negotiated claims arising from construction of military family housing, resulting in recovery by our client of 90 percent of claimed amount.

## Construction Counseling and Litigation

Disagreements arise in nearly every major construction project. Our services include preparing claims and protests on your behalf as well as reviewing claims and protests filed by others.

Garvey Schubert Barer clients include owners, contractors, subcontractors, architects, engineers and sureties at every stage of construction projects. We routinely draft and negotiate teaming agreements and subcontracts on behalf of clients for projects both nationwide and overseas.

We use negotiation and litigation to resolve disagreements quickly, favorably and cost effectively. In one arbitration, we represented a subcontractor in a private arbitration of Miller Act claims on a military fuel transfer construction project, resulting in an award to our client of all amounts claimed, including attorneys' fees and costs.

## Country-of-Origin Requirements

The U.S. government prefers to purchase goods and services made in America. In addition, a variety of international trade agreements, including the Trade Agreements Act and NAFTA, designate other preferred countries, while at the same time restrict sales from non-designated countries. Government contracting can also be affected by federal agency preferences in procurement, such as those under the Berry Amendment. Violations of the country-of-origin requirements can give rise to civil and criminal penalties. Garvey Schubert Barer lawyers understand how country-of-origin requirements work and their effect on both domestic and foreign businesses contracting with the U.S. government.

## Data Rights and Intellectual Property

Protecting your intellectual property and proprietary information rights is an important element of working under a government procurement, as either a contractor or subcontractor. Our lawyers help you take the steps necessary to fully protect these rights under contracts, subcontracts, SBIR Agreements, Other Transactions, and Cooperative Research and Development Agreements.

We routinely advise and counsel clients on strategies that maximize the scope of their reserved intellectual property rights when selling technology products and services to the U.S. government. In a recent transaction on behalf of a transportation enterprise software developer, we negotiated special licenses of highly sensitive, proprietary data structures and other works with a military intelligence agency.

## Fraud, False Claims, Investigations and Audits

Businesses contracting with the U.S. government sometimes find themselves accused of fraud or violations of the False Claims Act. These accusations can trigger governmental audits, civil and criminal investigations, and criminal prosecutions. A business may even be suspended or debarred from obtaining additional government contracts.

To provide the best possible defense for clients that become subject to these proceedings, our government contracts lawyers work closely with our white-collar defense and investigations lawyers. The two groups include former assistant and special assistant U.S. attorneys as well as former in-house counsel for various federal agencies. Consequently, our lawyers who served in these positions have directed and defended criminal and civil investigations, prosecuted and defended False Claims Act and *qui tam* cases, and negotiated global settlements of fraud-related matters. We understand the government's perspective, and this understanding helps us to protect clients' interests and provide the best possible defense.

## Grants, Cooperative Agreements and Other Transactions

In addition to conventional FAR-based procurements, the U.S. government frequently purchases goods and services through different means. These include grants, Cooperative Research and Development Agreements (CRADA) and other lesser-known mechanisms, such as Department of Defense's Other Transactions (OT) and NASA's Space Act Agreements. Garvey Schubert Barer even helped a private company negotiate the first Space Systems Development Agreement with NASA.

Your rights, obligations and remedies under these nontraditional arrangements differ greatly from those under traditional FAR-based contracts. For one thing, CRADAs and OTs have no standard regulations. Instead, agencies interpret and use their statutory authority to negotiate these nontraditional contracts almost on a case-by-case basis. Our attorneys are experienced in assisting with the grant process, from grant submissions through post-award advice. We help clients deal successfully with the many legal issues posed by nontraditional agreements.

## High-Risk Government Projects

Some government contracts involve projects with significant risks to human health or the environment. These include military research and development projects involving chemical, biological and nuclear weapons; developing, testing and manufacturing human vaccines to protect against biological attack; and transporting radioactive wastes from U.S. nuclear facilities. Garvey Schubert Barer has helped clients negotiate numerous prime contracts and subcontracts for high-risk projects. We represented a biotechnology company in negotiating one of the first government contracts for private manufacture of biological weapon vaccine.

High-risk projects require a balance between legitimate national security needs and contractor concerns about safety, liability and operational control. We know how to achieve this balance in a way that fully protects a client's ability to perform a contract using cost-effective commercial approaches. We also ensure that a client's liability insurers fully understand the hazards associated with the project.

## International Contracting/Foreign Government Sales

International contracting, whether involving U.S. companies selling goods and services to foreign governments and buyers or foreign companies selling to government entities in the U.S., presents both risks and opportunities. Garvey Schubert Barer represents both types of companies. Our government contracts lawyers are experienced with the Buy American Act, the Trade Agreement Act, Foreign Owned, Controlled and Influenced (FOCI) Issues, as well as with issues under the International Traffic in Arms Regulations, the Office of Foreign Assets Controls and the Export Administration Regulations.

Garvey Schubert Barer also frequently represents U.S. and foreign companies whose international operations are funded by the U.S. government. We help these clients resolve the tension that often exists between U.S. federal contracting requirements, overseas commercial practices, and foreign government laws and regulations.

## Merges and Acquisitions/Government Contracting Due Diligence

Mergers and acquisitions of companies holding government contracts or subcontracts present unique challenges that do not arise in conventional commercial transactions. We help clients meet these challenges by combining our extensive experience in government contracting law with our in-depth understanding of corporate law and experience in foreign and domestic transactions. To help clients derive maximum value from these transactions, we can:

- ▶ Conduct government contracting due diligence

As an illustration, we helped a management team backed by a large investment bank acquire a defense contractor, as the first step in multi-target acquisition plan, by conducting in-depth due diligence on the target company and the performance of their government contracts.

- ▶ This helps identify and resolve as early as possible the government-contract related issues that may not be

evident to conventional business attorneys.

- ▶ Our due diligence typically includes identifying and explaining:
  - ▶ key government contracts, contract vehicles and contract values
  - ▶ regulatory eligibility and performance issues
  - ▶ intellectual property and government data rights issues
  - ▶ anti-assignment, notification, and contract novation issues
  - ▶ regulatory compliance and other issues
  - ▶ export controls, national security, and foreign owned, controlled and influenced (FOCI) issues
- ▶ Negotiate favorable terms with other parties
- ▶ Draft transaction documents to comply with applicable government law and regulations
- ▶ Ensure, to the fullest extent permitted by law, that government contracts and their benefits are available to the acquiring party following the transaction.

## Small and Disadvantaged Business Programs

Federal and state programs for small and disadvantaged business concerns can produce substantial benefits for eligible persons. However, to take advantage of those benefits, one must comply with often complicated eligibility and performance requirements. We help clients understand and meet those requirements and, if compliance issues arise, to mitigate those issues. We represent numerous small business concerns, including concerns that are in the 8(a) program, are women-owned, or service disabled veteran owned. We understand the needs of small businesses to raise financing and conduct their business within the restrictions of the SBA regulations, such as the affiliation rules.

As illustrations, in the last year, we have helped a manager of a preclinical research firm form a small business entity, acquire the assets of his employer, and obtain financing; a woman-and-minority owned business sell a majority stake to a service-disabled veteran, and advised a large international business on how to spin off a business subsidiary to allow it to qualify as a US small business.

Large businesses can participate in most federal small business programs through a variety of arrangements, including subcontracts, joint ventures, and mentor-protégé agreements. We help parties to these arrangements meet the eligibility and performance requirements, so that they can derive the greatest possible benefit from these programs.

## Teaming Agreements, Joint Ventures and Subcontracting

Parties can work together to pursue and perform government contracts in multiple ways. Parties typically execute a teaming agreement in order to work together to bid on a proposal. A teaming agreement sets forth the parties' relationship and responsibility in preparing the proposal and lays out the general provisions for proceeding if the team wins the bid.

The parties can pursue and perform contracts under a conventional prime-subcontractor relationship or can enter into a joint venture, such as by becoming co-owners of a limited liability company. Preparing each type of agreements requires a working knowledge of the FAR and its responsibilities and restrictions for contracting parties. This is especially true for arrangements involving large businesses and small business concerns.

Garvey Schubert Barer has a long history of representing both prime and subcontractors under US government procurements. We have drafted, negotiated, reviewed and helped enforce hundreds of teaming agreements, subcontracts, and joint venture agreements, from food services to high technology research and developments.

## Transportation Contracting

Garvey Schubert Barer is well-known — and well-regarded — for our decades-long representation of major transportation clients. This representation includes extensive experience with government contract issues involving land, ocean and air transportation.

We help clients respond to government solicitations and formulate unsolicited proposals to provide transportation services to the U.S. government, both within the United States and abroad. We can often suggest new approaches to government contracts that protect our clients' financial interests and enhance their existing commercial business.

Garvey Schubert Barer has participated as counsel in literally hundreds of transportation contract negotiations, disputes and settlements. When a dispute develops over the interpretation or performance of a government contract, we use our knowledge of transportation industry practice, federal regulatory requirements and past disputes to strengthen our client's position. Our record of success in these matters reflects our long-term focus on the transportation industry and transportation clients.