

AN A.S. PRATT PUBLICATION

JUNE 2019

VOL. 5 • NO. 6

PRATT'S
**GOVERNMENT
CONTRACTING
LAW**
REPORT



EDITOR'S NOTE: POTPOURRI

Victoria Prussen Spears

**REVIEWING OFCCP DIRECTIVES:
POTENTIAL SIGNS OF GREATER
TRANSPARENCY AND COOPERATION
WITH FEDERAL CONTRACTORS?**

Patricia R. Ambrose, Michael D. McGill,
Ogechi A. Muotoh, George W. Ingham, and
Adilene Rosales

**SENATE ARMED SERVICES
SUBCOMMITTEE ON CYBERSECURITY
HOLDS HEARING TO DISCUSS THE
RESPONSIBILITIES OF THE DEFENSE
INDUSTRIAL BASE**

Susan B. Cassidy, Samantha L. Clark,
Zachary Mears, and Weiss Nusraty

**RENEWED FOCUS ON CONTRACTOR
BUSINESS SYSTEM REVIEWS**

Sara N. Gerber

**2019 NDAA ANALYSIS:
COMMERCIAL ITEM CONTRACTING**

Mitchell A. Bashur and Amy L. Fuentes

**NIH REVISES RULES GOVERNING
INVENTIONS DEVELOPED UNDER
BAYH-DOLE ACT**

Hilary S. Cairnie and N. Nicole Stakleff

**WHAT LIES AHEAD FOR THE
YATES MEMO?**

Patrick F. Linehan, Galen Kast, and
Elizabeth Pericak Ginsburg

PRATT'S GOVERNMENT CONTRACTING LAW REPORT

VOLUME 5

NUMBER 6

JUNE 2019

Editor's Note: Potpourri

Victoria Prussen Spears

173

**Reviewing OFCCP Directives: Potential Signs of Greater
Transparency and Cooperation with Federal Contractors?**

Patricia R. Ambrose, Michael D. McGill, Ogechi A. Muotoh,
George W. Ingham, and Adilene Rosales

175

**Senate Armed Services Subcommittee on Cybersecurity Holds
Hearing to Discuss the Responsibilities of the Defense Industrial
Base**

Susan B. Cassidy, Samantha L. Clark, Zachary Mears, and
Weiss Nusraty

186

Renewed Focus on Contractor Business System Reviews

Sara N. Gerber

189

2019 NDAA Analysis: Commercial Item Contracting

Mitchell A. Bashur and Amy L. Fuentes

192

**NIH Revises Rules Governing Inventions Developed Under
Bayh-Dole Act**

Hilary S. Cairnie and N. Nicole Stakleff

197

What Lies Ahead for the Yates Memo?

Patrick F. Linehan, Galen Kast, and Elizabeth Pericak Ginsburg

201

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Heidi A. Litman at 516-771-2169
Email: heidi.a.litman@lexisnexus.com
Outside the United States and Canada, please call (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844
Outside the United States and Canada, please call (518) 487-3385
Fax Number (800) 828-8341
Customer Service Website <http://www.lexisnexus.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or (800) 223-1940
Outside the United States and Canada, please call (937) 247-0293

Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)

Cite this publication as:

[author name], [article title], [vol. no.] PRATT’S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt);

Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT’S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2019 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. Originally published in: 2015

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexus.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

MARY BETH BOSCO

Partner, Holland & Knight LLP

DARWIN A. HINDMAN III

Shareholder, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

J. ANDREW HOWARD

Partner, Alston & Bird LLP

KYLE R. JEFCOAT

Counsel, Latham & Watkins LLP

JOHN E. JENSEN

Partner, Pillsbury Winthrop Shaw Pittman LLP

DISMAS LOCARIA

Partner, Venable LLP

MARCIA G. MADSEN

Partner, Mayer Brown LLP

KEVIN P. MULLEN

Partner, Morrison & Foerster LLP

VINCENT J. NAPOLEON

Partner, Nixon Peabody LLP

STUART W. TURNER

Counsel, Arnold & Porter

ERIC WHYTSELL

Partner, Stinson Leonard Street LLP

WALTER A.I. WILSON

Senior Partner, Polsinelli PC

PRATT'S GOVERNMENT CONTRACTING LAW REPORT is published twelve times a year by Matthew Bender & Company, Inc. Copyright 2019 Reed Elsevier Properties SA., used under license by Matthew Bender & Company, Inc. All rights reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For permission to photocopy or use material electronically from *Pratt's Government Contracting Law Report*, please access www.copyright.com or contact the Copyright Clearance Center, Inc. (CCC), 222 Rosewood Drive, Danvers, MA 01923, 978-750-8400. CCC is a not-for-profit organization that provides licenses and registration for a variety of users. For subscription information and customer service, call 1-800-833-9844. Direct any editorial inquires and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 646.539.8300. Material for publication is welcomed—articles, decisions, or other items of interest to government contractors, attorneys and law firms, in-house counsel, government lawyers, and senior business executives. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher. POSTMASTER: Send address changes to *Pratt's Government Contracting Law Report*, LexisNexis Matthew Bender, 630 Central Avenue, New Providence, NJ 07974.

Renewed Focus on Contractor Business System Reviews

*By Sara N. Gerber**

The Defense Contract Audit Agency and the Defense Contract Management Agency have taken certain steps to improve the contractor business system review process and are forecasting that reviews will increase significantly over the next four years. The author of this article discusses the reviews and recommends that contractors prepare for a new wave of audit activity.

According to a recent U.S. Government Accountability Office (“GAO”) report,¹ the Defense Contract Audit Agency (“DCAA”) and the Defense Contract Management Agency (“DCMA”) have taken certain steps to improve the contractor business system (“CBS”) review process and are forecasting that CBS reviews will increase significantly over the next four years. Contractor business systems include a contractor’s accounting, earned value management, estimating, purchasing, material management, and property management systems. These systems require contractors to maintain internal controls that, as GAO noted, “act as the first line of defense against fraud, waste and abuse of federal funding.” Given their importance, the renewed focus on ensuring CBS reviews are conducted in a timely and consistent manner is not surprising, and contractors should prepare for a new wave of audit activity.

PAST CHALLENGES TO COMPLETING CBS REVIEWS

In its report, GAO identified persistent challenges that have prevented DCAA and DCMA from performing consistent and timely CBS reviews. One key factor for DCAA is its focus on eliminating the backlog of incurred cost audits, which determine whether contractor costs are allowable prior to closing out the contract. GAO found that as a result of prioritizing incurred cost audits, Contracting Officers maintained CBS determinations as adequate even though the systems had not been audited in many years. GAO further found that lacking a mechanism to track CBS audits, DCMA and DCAA did not always comply with requirements to report CBS deficiencies or did not report the deficiencies within required timeframes.

* Sara N. Gerber is an associate at Blank Rome LLP concentrating her practice on government contracts and general litigation matters. She may be contacted at sgerber@blankrome.com.

¹ <https://www.gao.gov/assets/700/696801.pdf>.

Congress took notice. In an effort to improve the CBS review process, Congress enacted certain provisions in the National Defense Authorization Acts for fiscal years 2011, 2017, and 2018. Together, these provisions:

1. Require the Department of Defense (“DoD”) to establish criteria for each system, a process for identifying deficiencies within systems, and the significant deficiencies that would result in disapproval of a system;
2. Authorize DoD to withhold up to 10 percent of payment to contractors whose systems are disapproved;
3. Define a “covered contractor” to mean those with government contracts subject to the cost accounting standards accounting for more than one percent of the contractor’s total gross revenue; and
4. Direct DoD to use qualified public accounting firms to perform incurred cost audits to eliminate the backlog by October 1, 2020.

IMPROVEMENTS IN THE CBS REVIEW PROCESS

As GAO reported, DoD has made progress in implementing² the legislative changes enacted in the National Defense Authorization Acts. DCMA and DCAA issued revised instructions and guidance for CBS audits that clarified the procedures for conducting and reporting each system review. The revised processes divided review obligations evenly between DCMA and DCAA so that each is responsible for three systems, and assigned responsibility for making the final approval determination to the DCMA Administrative Contracting Officer (“ACO”). DCMA and DCAA further clarified that CBS reviews should generally be conducted on each system every three years, and DCMA established timeframes in which ACOs are required to make final approval determinations. DCMA reported that in fiscal year 2017, 80 percent of ACO final determination letters were issued within required timeframes.

DoD also revised the Defense Federal Acquisition Regulation Supplement (“DFARS”) to include individual clauses that define the criteria each system must meet and to implement mandatory payment withholds. DCMA and DCAA officials reported to GAO that mandatory payment withholds—of five percent for one or more significant deficiencies in any single business system and 10 percent for significant deficiencies in multiple business systems—have been an effective tool for motivating contractors to promptly respond to significant deficiencies. Although DoD does not retain historical data on withholds, GAO found that a snapshot of July 2018 showed that DoD was withholding payments from 11 contractors with a total value of \$238 million.

² <https://governmentcontractsnavigator.com/2012/03/06/dod-issues-final-rule-on-contractor-business-systems/>.

Despite DoD's progress, GAO noted that there are still issues to be addressed. For example, GAO found that the review and corrective action process can be lengthy, ranging in the reviews GAO sampled from 15 months to five years. The delays were attributable to different factors, including lack of contractor responsiveness and submission of inadequate corrective action plans, the identification of new deficiencies in follow-up reviews, and ACO departures or re-assignments. GAO also noted that DoD has not yet implemented recent legislative provisions to change the definition of a "covered contractor" or to enable the use of public accounting firms.

CONTRACTORS SHOULD PREPARE FOR BUSINESS SYSTEMS AUDITS

GAO recommended that DCMA and DCAA develop a mechanism to formally monitor CBS reviews so that they have accurate information on the number of reviews that are outstanding, the risk level assigned to systems, and the resources available to conduct reviews. This information should help DoD assess whether it is able to meet its goals to increase the number of CBS reviews in the near term and to conduct CBS reviews on a timely and consistent basis going forward.

While DoD's goals are ambitious, contractors should be prepared for CBS audits. Business system reviews have been the subject of ongoing and recent Congressional and DoD attention, which is not likely to abate. For the government, the reviews are an important means of managing billions of dollars in federal spending. For contractors, disapproved systems also have consequences, from precluding use of a particular contract type, to necessitating additional government oversight of subcontracts, to increasing the scope of review of individual proposals. To avoid a protracted audit, contractors should review and ensure compliance with system requirements in advance. In addition, DoD is using payment withholds aggressively when reviews result in system disapproval. Therefore, contractors should be highly engaged and responsive if significant system deficiencies are identified and should expeditiously develop corrective action plans that adequately address those deficiencies.