



The Legal 500 Country Comparative Guides

United States: Public Procurement

This country-specific Q&A provides an overview to public procurement laws and regulations that may occur in United States.

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1. Please summarise briefly any relationship between the public procurement / government contracting laws in your jurisdiction and those of any supra-national body (such as WTO GPA, EU, UNCITRAL)

The United States is a party to the World Trade Organization (WTO) Government Procurement Agreement (GPA), permitting other GPA participants to compete for U.S. government contracts covered by the GPA on a level playing field with domestic companies. The objectives of the WTO GPA of non-discrimination, transparency, integrity, and predictability in public procurement are consistent with U.S. procurement policies. The WTO GPA is implemented in the United States by the Trade Agreements Act of 1979, the Federal Acquisition Regulation (FAR), and the Department of Defense FAR Supplement (DFARS).

While the UNCITRAL Model Law on Public Procurement (2011) is not legally binding in the United States, U.S. law is generally consistent with its aims of achieving efficient competition, transparency, and objectivity in the procurement process.

The United States is also a party to the UN Convention Against Corruption and implements Article 9 on preventing corruption in public procurement through various statutes and regulations. Examples include: 41 U.S.C. § 423 (procurement integrity), 5 U.S.C. § 7353 (gifts to federal employees), 5 U.S.C. § 701 *et seq.* (appeals of agency decisions), 31 U.S.C. §§ 3551-3556 (competition in contracting), 48 C.F.R. Part 33 (challenges by disappointed bidders), and 31 U.S.C. § 3730 (qui tam proceedings under the False Claims Act).

2. What types of public procurement / government contracts are regulated in your jurisdiction and what procurement regimes apply to these types of procurements?

Procurement is one of several types of contracting activities in which the federal government engages and is primarily regulated on a national level by the Federal Acquisition Regulation (FAR) codified in Title 48, Chapter 1 of the Code of Federal Regulations (C.F.R.). The FAR is jointly issued and maintained by the Department of Defense (DoD), General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA). In addition, contracts are subject to agency-specific supplements to the FAR issued by the agency administering the procurement. For example, contracts administered by the DoD are typically subject to provisions of the Defense Federal Acquisition Regulation Supplement (DFARS) in Chapter 2 of 48 C.F.R. Contracts governed by the FAR's general provisions may also be subject to particular subparts based on the types of goods or services being acquired, the applicable contracting method or contract type, and/or applicable socioeconomic program. For example, public utility services are specifically addressed in FAR Part 41, which lays out unique procedures for evaluation of a potential public utility contract. Contracts with state or municipal governments are regulated according to guidelines promulgated locally, often by a state legislature.

Non-procurement government contracts include grants and cooperative agreements and are governed by Title 2 of the C.F.R.

3. Are there specified financial thresholds at which public procurement regulation applies in your jurisdiction?

Several dollar thresholds set forth in the Federal Acquisition Regulation (FAR) apply to federal government procurements. As the dollar value of the procurement increases, so do the regulatory requirements and procedures. At a very summary level, the aggregate dollar value procurement thresholds are:

- Micro-purchase threshold (MPT): equal to or less than \$10,000
- Simplified acquisition threshold (SAT): equal to or less than \$250,000

See FAR 2.101. There are limited exceptions to the MPT and SAT for certain acquisitions. For example, with respect to the \$10,000 MPT, there are different dollar thresholds for acquisitions subject to certain labor statutes or that involve national defense, contingency, or disaster relief operations.

The MPT for services acquisitions is \$2,500 (Service Contract Labor Standards—formerly the Service Contract Act of 1965) and \$2,000 for construction services (Construction Wage Rate Requirements Statute—formerly the Davis-Bacon Act). Certain acquisitions for supplies or services, as determined by the applicable Agency Head, have a higher MPT, \$20,000 in the case of any contract to be awarded performed, or purchase to be made, inside the United States, and \$30,000 if outside the United States. These include acquisitions to support contingency operations; to facilitate defense against, or recovery from, cyber, nuclear, biological, chemical, or radiological attack; to support a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate provisions of international disaster assistance; or to support a response to an emergency or major disaster (except for construction).

There also are limited exceptions to the \$250,000 SAT. Specifically, the SAT for acquisitions of supplies or services, as determined by the applicable Agency Head, to be used to support contingency operations; to facilitate defense against, or recovery from, cyber, nuclear, biological, chemical, or radiological attack; to support a request from the Secretary of State or the Administrator U.S. AID to facilitate provisions of international disaster assistance or to support a response to an emergency or major disaster (except for construction) is \$750,000 in the case of any contract to be awarded performed, or purchase to be made, inside the United States, and \$1.5 million if outside the United States. The SAT for acquisitions for supplies or services, as determined by Agency Heads, to be used to support a humanitarian or peacekeeping operation is \$500,000.

In addition, an agency can use simplified acquisition procedures in procurements worth up to \$7 million (or \$13 million when the acquisition is for commercial items that are to be used in support of a contingency operation or to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack), provided that a contracting officer ‘reasonably expects,’ based on market research, that offers will include only commercial

items not worth more than the above amounts. See FAR 13.303.

4. Are procurement procedures below the value of the financial thresholds specified above subject to any regulation in your jurisdiction? If so, please summarise the position.

Acquisitions at or below both the \$10,000 micro-purchase threshold (MPT) and \$250,000 simplified acquisition threshold (SAT) are conducted under simplified acquisition procedures. Federal Acquisition Regulation (FAR) 2.101. As set forth in FAR Part 13, simplified acquisition is a contracting method that seeks to streamline and reduce the amount of work the government must undertake to award a contract. When choosing a vendor in a simplified acquisition procurement, agencies need not conduct formal evaluations, establish a competitive range, conduct discussions, or score offers. Also, a contracting officer, not necessarily a source selection team, can select the contract awardee. See FAR 13.002 and 13.106-2.

While acquisitions equal to or below the \$250,000 SAT also are conducted under simplified acquisition procedures, because of the higher dollar value, some additional regulatory scrutiny applies. FAR Part 13 sets forth the applicable simplified acquisition procedures. The contracting officer has broad discretion to establish the evaluation procedures to be used. FAR 13.106-2. The contracting officer is required to promote competition to the maximum extent practicable by synopsizing and posting a solicitation and making it available to a broad section of potential offerors. FAR 13.104-13.106. If price and other factors are used for evaluation, a contracting officer can use his/her knowledge and previous experience, customer surveys, past performance data in federal databases, or any other reasonable basis. FAR 13.106-2. Before making the award, the contracting officer must determine that the award price is fair and reasonable, which, if more than one quote is received, can be based upon competitive quotes or, if only one quote or offer is received, based upon market research, prices from previous procurements, commercially available pricing, personal knowledge, comparison to a government estimate, or any other reasonable method.

In addition, FAR 13.003 requires the acquisition of supplies and services with anticipated values between the \$10,000 MPT (and the exceptions noted above) and the \$250,000 SAT to be reserved for small business. See also FAR 19.203 and FAR 19.502-1.

5. For the procurement of complex contracts*, how are contracts publicised? What publication or journal is used for these purposes?

Except in limited circumstances, federal executive agency procurement actions must be publicised as required by Federal Acquisition Regulation (FAR) Part 5. FAR Part 5 implements statutory requirements intended to increase competition, broaden industry participation in meeting government requirements, and assist small businesses in obtaining contracts and subcontracts.

Most procurements exceeding \$25,000 must be publicised in a searchable, web-based Government-Wide Point of Entry (GPE) now known as Contract Opportunities (formerly known as Federal Business Opportunities). Contract Opportunities is available at <https://beta.sam.gov>. The limited exceptions to GPE publication are listed in FAR Subpart 5.202 (one example is procurements where publication would raise national security concerns).

Publication and response times are set by FAR Subpart 5.203. For a typical complex procurement—a non-commercial item acquisition that exceeds the simplified acquisition threshold of \$250,000—a procuring agency must allow a 30-day response time for receipt of bids or proposals after a solicitation is issued. However, shorter periods or longer periods may apply. For example, commercial item procurements may have shorter response times. On the other hand, procurements subject to the World Trade Organization Government Procurement Agreement or a Free Trade Agreement generally require a 40-day period between the solicitation posting and receipt of offers.

6. For the procurement of complex contracts, where there is an initial selection stage before invitation to tender documents are issued, what are typical grounds for the selection of bidders?

The typical basis for selection of bidders at the initial stage of a two-stage procurement varies widely between civilian and defense acquisitions, and between the buying agencies within those two verticals. But a recent federal trend for Stage 1 consideration is for agencies to require bidders to complete exhaustive pre-qualification questionnaires. Bidders are asked to describe their technical capabilities, experience on prior contracts, accounting systems, official certifications, past performance, and other elements. The answers to the questions are scored, and only those scored above a certain threshold will be awarded a Stage 1 contract. Once awarded a Stage 1 contract, the awardees then compete again between or among themselves for Task and Delivery Orders, usually based on a combination of factors, including their technical capability, and pricing. This Stage 2 award of Task and Delivery Orders is often called a ‘down select.’

There are vast differences in procurement methodologies between government agency procurements and quasi-government agency (e.g., utilities, educational institutions, transit authorities, etc.). Public sector procurements are generally subject to statutes and regulations including, but not limited to, the Federal Acquisition Regulation (FAR) and Competition in Contracting Act (CICA). These public laws and regulations dictate what the government can buy, who is authorised to purchase on behalf of the government, what firms or persons are authorised to sell to government, how purchases must be conducted, how funding is controlled, the required terms of the contract documents, and many other issues. In public contracting, certain contractors are also required to agree to comply with various social policies, such as equal opportunity laws, international trade and a host of others. In public contracting, there can be also be litigation over which firm should win the contract, called a protest. Once awarded a contract, the contractor’s performance then becomes

subject to another whole regime of regulations and documentation requirements.

The FAR does not apply to numerous quasi-government agencies (e.g., Tennessee Valley Authority (TVA), the National Railroad Passenger Corporation (AMTRAK), U.S. Postal Service, and Federal National Mortgage Association (Fannie Mae). Even though these entities receive government funding, in whole or in part, they are exempt from the FAR and other procurement statutes and regulations because they operate in the commercial sector. However, these quasi-government entities have their own procurement regulations, which generally are less comprehensive than the FAR.

7. Does your jurisdiction mandate that certain bidders are excluded from tendering procedures (e.g. those with convictions for bribery)? If so what are those grounds of mandatory exclusion?

In the United States, the primary regulatory authority governing the federal procurement system is the Federal Acquisition Regulation (FAR). Under the FAR, the exclusion of bidders from tendering procedures is largely a discretionary process. Accordingly, a bidder that is convicted of a bribery-related offense is *not* automatically or mandatorily excluded from bidding on future government contracts. Rather, the cognizant executive agency's Suspending or Debarring Official (SDO) will undertake a review of the circumstances, including any input from the bidding company itself, and determine whether the company should be excluded from competing for future government awards for a specified duration to protect the government's interests. As part of this process, the company would have the opportunity to make the case that, notwithstanding the alleged or proven misconduct, the company has implemented remedial measures and enhanced controls such that it should not be excluded.

In addition to discretionary exclusion under the FAR, certain statutes require the imposition of a mandatory exclusion in the case of certain convictions. For instance, certain convictions under the Clean Air Act and the Clean Water Act require the Environmental Protection Agency to impose a mandatory exclusion that applies to the company facility where the violation occurred and prevents that facility from being involved in the performance of future government awards while the exclusion remains in effect. In these cases, the exclusion goes into effect concurrently with the conviction, and the company is not afforded a prior opportunity to contest the exclusion.

There are numerous grounds for discretionary exclusion of individuals or companies. See generally FAR Part 9. These include:

- Commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract;
- Violation of federal or state antitrust statutes relating to the submission of offers;
- Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating federal criminal tax laws, or

receiving stolen property;

- Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a government contractor or subcontractor;
- A preponderance of the evidence indicating (i) a willful failure to perform in accordance with the terms of one or more contracts, or (ii) a history of failure to perform, or of unsatisfactory performance of, one or more contracts;
- Delinquent taxes in an amount that exceeds \$3,500;
- Knowing failure to timely disclose to the government credible evidence of a violation of federal criminal law involving fraud, conflict of interest, bribery or gratuity violations, or violations of the civil False Claims Act, or significant overpayments.

In addition to the grounds for exclusion that are specifically identified in the FAR, there also exists a broad catch-all provision, which provides that a contractor or subcontractor may be suspended or debarred based on any other cause the nature of which is so serious and compelling that it affects the present responsibility of the contractor or subcontractor. This provision does not require a conviction for a criminal offense but can include any ground that causes the Suspending or Debarring Official to conclude that an individual or a company is not presently responsible.

8. Please described a typical procurement procedure for a complex contract. Please summarise the rules that are applicable in such procedures.

Complex contracts are typically procured under the Contracting by Negotiation regime of Federal Acquisition Regulation (FAR) Part 15 for competitive and non-competitive open market acquisitions. Various types of negotiated contracts can be awarded under FAR Part 15 procedures, including firm fixed price (FFP) and cost reimbursement contracts and multiple variations of both. Where an FFP contract type is not used, indefinite delivery, indefinite quantity (IDIQ) contracts subject to FAR Part 16 can be used. These procedures can apply to purchases of all types of supplies and services, including construction, as well as defense business systems, solutions, and technologies; weapons systems; aircraft; ships; space systems; research and development (R&D); and IT systems.

Negotiated contracts usually follow a formal acquisition process that can include an agency public request for information (RFI) from the marketplace, followed by issuance of a formal public request for proposals (RFP). The length of time between the issuance of an RFP to the deadline for proposal submission can vary significantly based on the complexity of the item or service being procured. Similarly, once proposals are submitted by interested companies, the evaluation timeline can vary significantly from several months to over one year. The terms of the RFP outline whether the agency intends to hold discussions with offerors regarding their proposals, which can impact the evaluation time, and will typically result in a request for revised proposals during the evaluation process. Additionally, after the agency makes an award, there is the possibility that a disappointed offeror may protest the contract award. If this protest is filed with the Government Accountability Office (GAO), this can automatically trigger a stay of the contract for up to 100 calendar days.

Where time is of the essence and a typical procurement schedule is not possible, some agencies may utilise letter contracts, also known as Undefinitized Contract Actions (UCA). UCAs authorise immediate delivery of supplies or services before the terms and conditions of the contract are agreed. This strategy is used only when negotiating a definitive contract is not possible in sufficient time to meet the agency's requirement, and the government's interest demands that the contractor start immediately.

Beyond the procurement structures discussed above, the U.S. Department of Defense (DoD) can procure complex agreements through non-FAR procedures, such as Other Transaction Authority (OTA), Procurements for Experiments (pursuant to 10 U.S.C. § 2373), and R&D agreements. OTAs typically involve research (see 10 U.S.C. § 2371) or prototype materials (10 U.S.C. § 2371b). R&D agreements take the form of a Cooperative Research and Development Agreement (CRADA) (15 U.S.C. § 3710a), Partnership Intermediary Agreement (PIA) (15 U.S.C. § 3715), or Technology Investment Agreement (TIA) (32 C.F.R Part 37). These procurement methods are fluid and the timeline of the procurement process can vary depending on the specific aim of the project. However, particularly for OTAs, one of DoD's goals is to reduce the length of the procurement process.

9. If different from the approach for a complex contract, please describe how a relatively low value contract would be procured?

Low value contracts often (but not always) involve the acquisition of commercial items (see Federal Acquisition Regulation (FAR) Part 2.1). Commercial items are publicly available items that typically require no modification for government use, and their acquisition is governed by simplified procurement procedures under FAR Part 12. (Notably, high value contracts may also utilise commercial item acquisition procedures.) Non-Developmental Item (NDI) and Commercial Off-the-Shelf (COTS) are subsets of commercial items. For commercial items, FAR Part 12 offers streamlined procedures and terms and conditions that reduce procurement lead time allowing acquisition programs to satisfy requirements quickly. Commercial items contracts require a determination of commerciality, and the contract types are limited to firm-fixed-price (FFP), fixed-price with economic price adjustment (FPEPA), and time-and-materials (T&M).

Low value contracts typically involve utilization of small business concerns governed by FAR Part 19.

A low value contract also may involve the acquisition of services or products on a level that is recurring, but without a set amount. However, rather than utilizing indefinite delivery, indefinite quantity (IDIQ) contracts, agencies can place individual task orders of varying amounts for such services or products against Federal Supply Schedule (FSS) contracts governed by FAR Part 8.4 (also known as GSA Schedules). Agencies also can use Blanket Purchase Agreements (BPAs) based upon FSS contracts to acquire items on a repetitive basis. Acquiring products and services through purchase orders under a BPA reduces procurement lead time and administrative costs. Additionally, these options allow agencies to

use multiple vendors to maintain competition and reduce cost, schedule, and performance risk. Services and products acquired under BPA purchase orders typically cover commercial products and services, IT products and services, health IT services, cyber services, cloud services, software licenses, telecommunications and wireless services, and mobile solutions.

Additionally, FAR Part 13 includes a streamlined process for Simplified Acquisitions of supplies and services that do not exceed the simplified acquisition threshold (SAT), which is presently \$250,000 (See FAR 2.101). Simplified acquisition procedures can be used for a variety of products and services including construction, software licenses, research and development, and commercial items. Simplified acquisition BPAs can increase flexibility to meet various mission needs quickly when agency requirements cannot be met through FAR Part 8.

Simplified contracts may still be subject to delay if a protest of the contract award is filed by a disappointed bidder.

10. What is seen as current best practice in terms of the processes to be adopted over and above ensuring compliance with the relevant regime, taking into account the nature of the procurement concerned?

Successful contractors employ a number of best practices in their pursuit of federal and state procurements, including:

Targeting Risk-Appropriate Contracts: Companies should focus their efforts on contracts that can be performed at an acceptable risk and profit, taking into account sometimes lengthy delays in government payments (which can also be clawed back after post-performance audits), the possibility that a contractor may be forced to proceed at-risk before funding is fully authorised, and the increasing potential that congressional inaction may lead to government shutdowns halting payments on federal contracts.

Teaming Agreements and Joint Ventures: Companies should consider joining forces with other entities to bolster their bench strength or to gain access to federal and state contracting dollars set aside for small businesses or those covered under certain socioeconomic programs (e.g., socially or economically disadvantaged individuals, women, veterans and disabled veterans, Alaska natives, small businesses located in historically underutilised business zones, and other groups. Subsidiaries of foreign companies operating in the United States can be eligible for small business awards under certain circumstances.

Vetting Draft Proposals by a Company's 'Red Team': Companies should submit the near-final draft of any significant proposal for a constructive critique by experienced executives and managers who are not part of the procurement effort and are often referred to as a 'Red Team.' Their independent appraisal can be used to identify missing information, unsupported statements, or other potentially curable issues in a draft proposal.

Attend Government-Conducted Debriefings: Companies should request, attend, and actively participate in the post-award debriefings to which non-winning bidders are entitled for many federal and state procurements. Companies can learn vital information that will inform future procurement efforts and cultivate relationships with contracting officers that can prove to be beneficial.

11. Please explain any rules which are specifically applicable to the evaluation of bids.

The rules applicable to the evaluation of bids and proposals are prescribed in Federal Acquisition Regulation (FAR) Parts 13 through 15 and differ based upon to the type of procurement at issue.

FAR Part 13 applies to Simplified Acquisitions, including construction, research and development, and commercial items, the aggregate amount of which does not exceed the simplified acquisition threshold. See FAR 2.101. The purpose of these simplified procedures is to vest contracting officers with discretion and flexibility so that acquisitions in this dollar range may be solicited, offered, evaluated, and awarded in a simplified manner that maximises efficiency and economy and minimises burden and administrative costs. Generally, quotations or offers are required to be evaluated in an impartial manner and on the basis established in the solicitation. FAR 13.106-2.

FAR Part 14 applies to contracting for supplies and services, including construction, by sealed bidding, a method of contracting that employs competitive bids solicited using an Invitation to Bid and public opening of bids. See FAR 14.101. FAR 14.400 includes the procedures for the receipt, handling, opening, and disposition of bids; handling mistakes in bids; and subsequent award of contracts. Generally, the contracting officer is required to make a contract award to the 'responsible bidder whose bid, conforming to the invitation, will be most advantageous to the Government, considering only price and the price-related factors (see FAR 14.201-8) included in the invitation.' FAR 14.408-1.

FAR Part 15 applies to contracts awarded using other than sealed bidding procedures, referred to as negotiated contracts. See FAR 15.000. Negotiated contract opportunities are solicited using a Request for Proposal (RFP) and proposals are evaluated to assess the offeror's ability to perform the prospective contract successfully based on the factors and subfactors specified in the RFP. See FAR 15.305. FAR Part 15 procurements permit government exchanges with proposers for clarifications or discussions after submission of proposals, however government personnel are prohibited from engaging in conduct that favors one offeror over another or reveals another offeror's confidential and proprietary information (see FAR Part 15.306). Generally, the evaluation factors include: cost or price evaluation, past performance evaluation, and technical evaluation. Evaluations may be conducted using any rating method or combination of methods, but the relative strengths, deficiencies, significant weaknesses, and risks assessed in the proposal evaluation are required to be documented in the contract file. The source selection decision is generally based on a comparative assessment of proposals against all source selection criteria in the

RFP utilizing a best-value trade off process (FAR 15.101-1) or lowest-price technically acceptable source selection process (FAR 15.101-2).

12. Please describe any rights that unsuccessful bidders have that enable them to receive the reasons for their score and (where applicable in your jurisdiction) the reasons for the score of the winning bidder.

Unsuccessful bidders who participated in Federal Acquisition Regulation (FAR) Part 15 negotiated procurements, or in other procurements which employ negotiated procurement procedures, are entitled to receive a debriefing of the procurement. Debriefings can be conducted orally, in writing, or by any other means acceptable to the contracting officer.

If an offeror is eliminated from the competitive range prior to award, it can choose to be debriefed before or after award, though delaying a debriefing until after award in such circumstances may affect the timeliness of any subsequent protest grounds the offeror asserts. Pre-award debriefings must describe the agency's evaluation of significant elements of an offeror's proposal, and a summary of the rationale for eliminating the offeror from the competitive range. Agencies will not disclose the number, identity, ranking, or evaluation of other offerors, nor the content of their proposals.

Under FAR Part 15, where an offeror first learns of its elimination from the competition only upon contract award, it can obtain a post-award debriefing if requested in writing within three days of learning of the award decision. In addition to the information disclosed during pre-award debriefings, post-award debriefings must also reveal the overall price/cost of the offeror and the awardee, and the ranking of all offerors, if a ranking was developed during the source selection. Agencies will not make point-by-point comparisons between offerors' proposals. Recipients of either type of debriefing can obtain answers to relevant questions.

13. What remedies are available to unsuccessful bidders in your jurisdiction?

Protesters, who demonstrate that a procuring agency prejudicially violated the terms of the solicitation, or a procurement law or regulation, may obtain a variety of remedies. Protests can be filed at the agency conducting the procurement, the Government Accountability Office (GAO), or the U.S. Court of Federal Claims. The remedies available to a protester can vary depending upon the forum selected. The overwhelming majority of protests are filed at GAO. GAO's bid protest regulations (4 C.F.R. Part 21) permit it to recommend any combination of the following remedies:

- refrain from exercising options under the contract;
- terminate the contract;
- recompete the contract;
- issue a new solicitation;
- award a contract consistent with statute and regulation; or
- such other recommendation(s) as GAO determines necessary to promote compliance.

Protesters' remedies usually correspond to the nature of the agency's procurement error. If the agency erred in conducting discussions or its evaluation, the authority deciding the protest may recommend re-opening discussions and re-evaluating proposals in accordance with the solicitation. If the agency made an award to an ineligible offeror, the deciding authority may recommend a directed award to the offeror next in line for award, though this is a relatively rare remedy.

If contract performance has advanced to a degree that it would be economically wasteful to terminate the contract, protesters may be granted their bid and proposal costs. In some cases, GAO has permitted the initial awardee to perform the contract base year but has recommended that the agency recompete any option years. Agencies that voluntarily take corrective action—attempting to fix a problem raised in the protest or that the agency otherwise discovers before GAO decides the protest—enjoy broad discretion in deciding how to remedy their procurement errors.

14. Are public procurement law challenges common in your jurisdiction?

Public procurement law challenges are common. The Government Accountability Office (GAO) receives more than 2,000 protests each year, and the U.S. Court of Federal Claims (COFC) approximately 100 to 150. Although statistics are not published, protests also are filed with procuring agencies. While the number of filed protests is fairly high, they represent challenges to only a very small percentage of government procurements overall (less than 1 percent).

Many companies that contract with the U.S. government consider the risk that filing a protest will harm their business relationship with the agency in question. While there is no significant stigma associated with protests, companies with considerable ongoing (and potential future) business with an agency may be more hesitant to file a protest and do so only if the stakes are high and/or the merits of the protest are particularly strong. Generally, agencies accept that protests are part of the process and do not take protests personally. Any reputational harm is likely to be modest and largely confined to the specific individuals or program office that is the subject of the challenge, not the agency at large.

The cost of a bid protest varies dramatically depending on the forum, the size and complexity of the dispute, and the approach taken to litigating the dispute. Agency protests are brief, informal, and may not require outside counsel. GAO protests are less formal and less expensive than protests at the COFC. A typical GAO protest that is fully briefed by outside counsel may cost approximately \$50,000 to \$300,000. A fully-briefed COFC protest may cost approximately \$200,000 to \$1 million. Costs for protest intervenors—contract awardees who help the agency defend a GAO or COFC protest—may be lower, but not significantly so.

15. Typically, assuming a dispute concerns a complex contract, how long would it take for a procurement dispute to be resolved in your jurisdiction (assuming neither

(party is willing to settle its case).

The length of the dispute depends on the venue. Depending on the circumstances, an offeror may be able to challenge (or protest) a procurement action in any of three fora: at the agency, at the Government Accountability Office (GAO), or at the Court of Federal Claims (COFC).

For protests pursued through the procuring agency, agencies must ‘make their best efforts’ to resolve protests within 35 days of the protest filing. FAR 33.103(g). Procedural steps at the agency-level are significantly less complex than at GAO or the COFC. Agency regulations may permit discovery, but there is usually no briefing beyond the initial protest.

For protests pursued at the GAO, a decision must be issued within 100 days of the protest filing. Within 30 days of receiving notice of the protest from GAO, the agency submits its report containing the contracting officer’s statement of facts, memorandum of law, and all relevant documents in response to the protester’s request. The protester generally has 10 days to comment on the agency report. For non-complex protests, GAO may use an ‘express option’ schedule where a decision is issued within 65 days. As a practical matter, many protests are resolved around the time of the agency report—after 30 days—either because a protest is withdrawn, or an agency elects to take voluntary corrective action that moots the protest.

For protests at the COFC, there are no specific or statutory deadlines for issuing a decision (as at GAO), however, most protests are resolved within 130 days. Typically, within a week after the complaint is filed, the court holds an initial status conference and sets case deadlines. The agency usually files the administrative record within a few weeks of the status conference. The parties then spend the next one to two months submitting cross-motions for judgment on the administrative record. Within one to two weeks after briefing closes, the court holds oral argument. The timing for issuance of the final decision varies depending on the complexity of the case. The judge could rule from the bench during the oral argument, or the decision could take several weeks to be issued. At the COFC, agencies are represented by U.S. Department of Justice trial attorneys.

16. What rights/remedies are given to bidders that are based outside your jurisdiction?

Foreign-based or foreign-controlled companies generally have the same right to compete for U.S. government contracts as domestic companies, but there are some restrictions on the ability of certain foreign companies to compete for certain types of government contracts, particularly defense contracts. For example, the U.S. Department of Defense and Department of Energy are restricted by law in their ability to award contracts to companies controlled by foreign governments if performance would require access to highly sensitive information. Moreover, the Department of Defense recently enacted an interim rule that restricts the procurement of telecommunications equipment or services to carry out nuclear deterrence or homeland defense missions from certain Chinese entities, including their subsidiaries, and

from any other entities that the Secretary of Defense reasonably believes to be owned or controlled by the government of the People's Republic of China or the Russian Federation.

As another example, government contracts involving air carriers are generally restricted to U.S. citizens and corporations. Moreover, the Buy American Act (BAA) makes impractical through use of bid evaluation adjustments procurement of items that were not produced or manufactured in the United States (i.e., more than 50 percent of the components by cost were not of U.S. origin), although there are some exceptions, such as for commercial items that qualify as information technology. Recent executive orders seek to increase enforcement of the BAA and propose more stringent U.S.-origin requirements. In addition, the United States maintains sanctions against certain countries, and goods from these countries may not be lawfully imported into the United States.

An important complement to the BAA is the Trade Agreements Act (TAA), which places restrictions on the purchase of non-U.S. goods and services but provides exceptions for goods or services from a defined set of 'designated countries' that are party to the World Trade Organization Government Procurement Agreement (GPA), have a free trade agreement with the U.S., or are 'least developed' or 'Caribbean Basin' countries. FAR 25.003. The TAA applies to procurements that exceed prescribed dollar value thresholds. The most commonly applicable threshold applying to GPA parties, is currently \$180,000. FAR 25.402. When a procurement exceeds the applicable threshold, the TAA applies. (The BAA applies to procurements with a value below the threshold; thus, either the BAA or TAA will apply to a procurement—never both.) Generally, goods or services from a designated country are treated as though they were U.S. products if the purchase falls within the definitions prescribed by the TAA. Though they are disadvantaged by a price premium, non-U.S. products may be sold to the U.S. government under a procurement subject to the BAA. Under the TAA, only U.S. or designated country products may be supplied.

In addition, the GPA and certain other multilateral and bilateral trade agreements lift many of the (already limited) restrictions on the ability of companies from covered foreign countries to compete for U.S. government contracts, including by waiving some Buy American Act restrictions. Finally, foreign companies that protest their failure to win government contracts have the same rights and remedies with regard to bid protests as do domestic companies.

17. Where an overseas-based bidder has a subsidiary in your territory, what are the applicable rules which determine whether a bid from that bidder would be given guaranteed access to bid for the contract?

Foreign-controlled subsidiaries generally have the same right to compete for U.S. government contracts as domestic companies, but there are some restrictions on the ability of foreign-controlled subsidiaries to compete for certain types of government contracts, particularly defense contracts. The same restrictions on the ability of foreign companies to compete (see #16) generally also apply to foreign-controlled subsidiaries. For example, companies controlled by foreign governments may face the same restrictions with respect to

defense contracts regardless of whether they are subsidiaries/affiliates, and air carriers that are controlled by foreign citizens generally cannot compete for U.S. government contracts involving international air transportation even if they are U.S.-based subsidiaries. Likewise, the Buy American Act and Trade Agreements Act provisions that limit or prohibit the procurement of items that were not produced or manufactured in the United States (see #16) generally apply based on whether the article is deemed of U.S. origin, regardless of the identity of the entity submitting the proposal for the government contract. Finally, foreign-controlled subsidiaries that protest their failure to win government contracts have the same rights and remedies with regard to bid protests as do domestic companies.

18. In your jurisdiction is there a specialist court or tribunal with responsibility for dealing with public procurement issues?

Contractors can raise procurement-related issues through bid protests at the Government Accountability Office (GAO) and the Court of Federal Claims (COFC). Both GAO and the COFC are Article I entities, meaning they were created by the United States Congress, and are part of the legislative branch. GAO issues recommendations if it identifies procurement improprieties but does not have authority to enjoin the agency. In contrast, the COFC is vested with authority to enjoin the agency should the protest be sustained.

GAO's authority to adjudicate bid protests is rooted in the Competition in Contracting Act of 1984 (31 U.S.C. § 3552) and GAO's implementing regulations in Part 21 of Chapter 4 of the U.S. Code of Federal Regulations (4 C.F.R. Part 21). The COFC's authority to adjudicate bid protests is based on the Tucker Act as amended by the Administrative Dispute Resolution Act (28 U.S.C. § 1491). To establish jurisdiction at either GAO or the COFC, a company must be an 'interested party.' An interested party is an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract. To have a direct economic interest, the company must be eligible to compete for the contract if the protest is filed before the award is made. If the protest is filed after an award is made, the offeror is an interested party if there is a reasonable likelihood it would win the contract if the protest is sustained.

The COFC, in addition to its jurisdiction to decide bid protests, also has jurisdiction under the Contract Disputes Act of 1978 to decide contract performance disputes. Two boards of contract appeal—the Armed Services Board of Contract Appeals (ASBCA) and the Civilian Board of Contract Appeals (CBCA)—also have jurisdiction under the Contract Disputes Act (CDA) to decide contract disputes in connection with defense and non-defense government contracts, respectively. The Contract Disputes Act allows contractors who have disputes with the government regarding contract specifications, government insistence that the contractor perform work not perceived to be required under the contract, contract termination issues, and similar disagreements to seek relief. For these and other issues arising under or related to a government contract, a contractor can first seek resolution through preparation of a request for equitable adjustment (REA) to the contract and negotiation of the REA with the contracting officer. If this process does not resolve the matter, the contractor may file a claim with the contracting officer and request a contracting officer's final decision. Once the

contracting officer issues a final decision, the contractor may, if dissatisfied with the decision, file an appeal in one of two fora. The contractor has 90 days to file an appeal with the appropriate board of contract appeals, or, alternatively, one year to file a lawsuit at the COFC. Either party dissatisfied with a CDA decision issued by the CBCA, ASBCA, or COFC may appeal the decision to the United States Court of Appeals for the Federal Circuit.

19. Are post-award contract amendments/variations to publically procured, regulation contracts subject to regulation in your jurisdiction?

Post-award modifications to federal contracts are governed by Federal Acquisition Regulation (FAR) Part 43. FAR Part 43 and the Changes clause—the contract clause typically prescribed by the FAR to authorise contract modifications—allow post-award modifications within the general scope of the contract.

Different forms of the Changes clause are used for different types of federal contracts, and they authorise changes appropriate for the contract type. For example, the Changes clause for fixed-price supply contracts allows the following types of changes within the general scope of the contract: (1) drawings, designs, or specifications (if supplies are specially manufactured for the government); (2) method of shipment or packing; and (3) place of delivery.

If a contract modification results in an increase or decrease in the contractor's costs to perform, or time required to perform, the contract, the contracting officer must make an equitable adjustment to the contract price or delivery schedule, or both. Typically, the terms of an equitable adjustment will be negotiated by the parties. If an agreement cannot be reached, the terms of an equitable adjustment may ultimately be decided through the contract disputes process.

Changes outside the scope of the contract—known as 'cardinal changes'—are impermissible for two fundamental reasons. First, imposition of changes unlikely to have been anticipated by the contractor is inherently unfair. Second, such changes may constitute an attempt by the government to circumvent competition for work that neither the contractor nor its actual or potential competitors could have anticipated during the procurement leading to the original contract award.

FAR Subpart 42.12 governs changes to the identity of the contractor and does not allow such changes without express government approval. It is generally not difficult to obtain approval for a change to the contractor's name—assuming the name is the only change being made. But the government will not allow the contractor to transfer its contract rights and obligations to a third party—whether as part of corporate asset sale, spin-off, consolidation, or otherwise—absent a disclosure and review process leading to the transferor and transferee entering a novation agreement with government.

The government has broad discretion as to whether to execute a novation agreement facilitating a transfer and will do so only when deemed in the government's best interest. A novation agreement does not provide the original contractor a clean release—the original contractor guarantees the transferee's performance of all contract obligations.

20. How common are direct awards for complex contracts (contract awards without any prior publication or competition)?

The Competition in Contracting Act (CICA), which is implemented in the Federal Acquisition Regulation (FAR), generally requires full and open competition. CICA provides several exceptions to this general rule, some of which provide for limited competition—for example 'set-aside' procurements under which only small businesses are eligible to compete—and others which do not require competition.

Examples of CICA exceptions that can justify no competition—sole-source awards—include: (1) only one responsible source exists for the supplies or services needed to fulfill agency requirements; (2) a need to facilitate industrial mobilization—the contract award to a particular source is needed to maintain a facility, producer, manufacturer, or supplier in case of a national emergency or to achieve industrial mobilization; (3) an international agreement requires award to a particular source; and (4) unusual and compelling urgency such that the government would be seriously injured if full and open competition was required.

While the unusual and compelling urgency exception has been cited to support sole-source awards, this is sometimes inappropriate. The exception allows the government to avoid the lengthier timeline needed for a full and open competition, but also requires the government to seek offers from as many potential sources as possible under the circumstances.

The procuring agency's intent to make a sole-source award must be published when the exceptions (1) and (2) above are relied upon. Publication permits potential suppliers who disagree with the factual premises relied upon by the government to challenge the planned award by filing a protest. For example, a competitor of the contractor slated to receive an award under exception (1) could explain how it, too, can provide the needed supplies or services.

In addition, while a procuring agency need not publish its intent to make an award when exceptions (3) and (4) are relied upon, once the award has been made, the agency must publish an award notice contemporaneously in all but the most highly sensitive cases (i.e., where announcement of the contract award itself would compromise national security). Such publication may facilitate post-award protests. For example, when sole-source awards are based upon the unusual and compelling urgency exception, other potential sources frequently protest that the urgency was only due to the agency's failure to undertake adequate procurement planning.