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# Silicon Valley Leveraging Government Resources

From Chaos, Unprecedented Opportunity



# Doing Business With The U.S. Government

Paul W. Bowen  
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## Regulatory Environment

- Government vs. Commercial Contracts: Principal Differences
  - UCC vs. Federal Acquisition Regulation (FAR) vs. Other Agreements
  - Competition and Pricing
  - Intellectual Property
  - Termination
  - Disputes
  - Enforcement

## Types of Contracting Instruments

- FAR-Based Commercial Item Contracts
- FAR-Based Noncommercial Item Contracts
- Grants and Cooperative Agreements
- Other Transactions
- Technology Investment Agreements

## Contracting Process

- Generally, full and open competition required (e.g., FAR Part 6)
  - May set aside contracts for small businesses
  - Sole source contracts very limited
- Solicitation (e.g., FAR Subpart 15.2)
  - Must strictly comply with instructions and law
  - Procurement integrity
- Proposals/Source Selection/Award
- Protest

## Subcontracting

- Subcontract must include some terms from the prime contract
  - All mandatory flowdowns
  - Discretionary flowdowns required to ensure compliance with prime contract obligations
- Prime contractor may have to comply in good faith with subcontracting plan that sets goals for subcontracting to various small business entities

## Intellectual Property - Inventions

- Contract/agreement should include a clause setting forth the parties' respective rights in "subject inventions"
- Subject invention is normally defined as any invention conceived or first reduced to practice in the performance of the work under the contract/agreement
- Standard patent rights will depend on type of contract/agreement
  - Generally, title is retained by contractor, subject to compliance with disclosure, election, and patent filing requirements. Compliance with such requirements is critical...can lose right to elect title.
  - Disclosure, election, filing and reporting obligations are different under various agreements/clauses

## Intellectual Property - Data

- Data is recorded information, regardless of form, and includes technical data and computer software
- For FAR-based commercial item contracts government generally receives the same rights as commercial customers
- For FAR-based non-commercial contracts government generally gets either:
  - Unlimited rights → use without restriction
  - Government purpose rights (this right generally used only in Defense contracts) → use for government purposes only (including for government procurement) for five years, then unlimited rights thereafter
  - Limited rights → generally may not be disclosed outside the government (restricted rights for computer software)

## Enforcement Risk

- Civil False Claims Act prohibits the submission of false or fraudulent claims to the government. 31 U.S.C. § 3729
  - E.g., knowingly presenting, or causing to be presented, a false or fraudulent claim for payment or approval
- Laws and Regulations
  - Bribery - 18 U.S.C. § 201(b)
  - Gratuities - 18 U.S.C. § 201(c); FAR 3.2, FAR 52.203-3
  - Kickbacks - 41 U.S.C. §§ 8701 - 8707; FAR 52.203-7
  - Standards of Conduct for Executive Branch –  
5 CFR § 2635 (OGE Guidance applies to government employees only, but wise for company to follow)

## Disclosure Rules

- Mandatory Disclosure Rule -- FAR 52.203-13 (also covered in FAR 9.4)
  - Disclosure to government of “credible evidence” of:
    - Certain violations of criminal law relating to government contracts/subcontracts (fraud, conflicts of interest, bribery, gratuities) in Title 18 of US Code
    - Violations of the Civil False Claims Act
    - Significant overpayments on a contract

## Guidance/Tips

- Get help in advance
- Clear and strong policies
  - Distribution to all relevant employees
  - Audit
  - Open door and hotline
- Closely follow the patent and data rights clauses
- Disclosure program