What is New?

Regulations were his year's biggest new in procurement with several significant final and proposed rules, *Loper Bright* overturning the *Chervon* doctrine, numerous challenges to the validity of regulations, and a change of administration. Also, the National Defense Authorization Act (NDAA) for FY 2025 contains a significant provision that may affect protests before the Comptroller General. And as always, this year saw noteworthy decisions from GAO, COFC, and the Federal Circuit.

- The National Defense Appropriations Act (NDAA) for 2025.
  - Section 885 requires GAO and DoD submit a proposal to Congress for a pilot program involving GAO protests that 1) requires unsuccessful protesters reimburse the federal government for costs incurred in processing the protests, 2) creates an enhanced pleading standard that protesters must meet before accessing administrative procurement records, 3) increases the protest threshold for orders issued under Indefinite Delivery/Indefinite Quantity contracts from $25M to $35M, and 4) requires unsuccessful protesters reimburse a DoD contract awardee for lost profits during a CICA stay. Section 885 may be a harbinger of future changes since pilot programs within DoD can lead to FAR changes. Next year will define the outline of the pilot program with succeeding years revealing how the pilot program affects DoD's experience with GAO protests. (§ 28:1)
  - Section 876 requires DoD develop a small business bill of rights that (1) authorizes resolution process for conflicts, (2) allows small business to request assistance, and (3) ensures small businesses know their rights under the laws, e.g., the Small Business Regulatory Enforcement Act, the Small Business Act. (§ 18:26)
  - Section 888 requires DoD establish a process to track the number and value of awards to small businesses and nontraditional defense contractors using Other Transaction Authority. (§ 25:14)
- Executive Orders.
  - Executive Order No. (EO) 14275 "Restoring Common Sense to Federal Procurement," mandates the Office of Federal Procurement Policy review and retain coverage in the FAR "necessary to support simplicity and usability, strengthen the efficacy of the procurement system, or protect economic or national security interests." The order requires non-statutory clauses build in sunset provisions, expiring after four years unless specifically renewed by the FAR Council. Like section 885 in the NDAA for 2025, EO 14275 highlights changes to come. Decades ago, DoD received mandates to reduce the size of the DFARS. Those earlier mandates produced today's streamlined DFARS as well resulted in the creation of Procedures, Guidance, and

Information (PGI) that accompany the DFARS. No one knows what will emerge from EO 14275. (§ 1:6.)

- EO 14271, "Ensuring Commercial, Cost-Effective Solutions in Federal Contracts," seeks to purchase commercially available products and services "to the maximum extent practicable." Ironically, FAR Part 12 adroitly avoided using the phrase to "the maximum extent practicable" at the prime contractor level since this phrase allowed DoD to evade the requirement to buy dual use technology. (§ 24:1)

- FAR Regulations.
  - Debarment: The FAR Council issued a final rule to clarify and to better align FAR with the suspension and debarment procedures in the Nonprocurement Common Rule. The rule adds new definitions to FAR 9.403 for "administrative agreement," "conviction," "pre-notice letter," and "voluntary exclusion"; adds seven new aggravating or mitigating factors; expands the definition of "conviction"; and confirms suspending and debarring official may issue pre-notice letters alerting the contractor to potential future action before initiating a proposed suspension or debarment. (18:52)
  - Green procurement: The FAR Council issued a final rule directing agencies to reduce emissions, promote environmental stewardship, support resilient supply chains, drive innovation, and incentivize markets for sustainable products and services by purchasing sustainable products and services. The final rule implements EO 14057, Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability Efficient Federal Operations. On January, 20 2025, President Trump issued EO 14148 revoking EO 14057.
  - Organizational Conflicts of Interest (OCI): The FAR Council issued a proposed rule on OCI which would: add definitions of OCI from caselaw to Part 2 of the FAR; make conflicts by former, government employees an OCI; allow agencies to accept risk, creating a new method to address OCIs based on impaired objectivity; and add OCI provisions and clauses. EO 14275 may sideline work on this proposed rule. Interestingly, too, the Federal Register only receive eleven public comments on the proposed change. (§ 18:35)
  - Reverse auctioning: The FAR Council issued a final rule to provide a Governmentwide policy on reverse auctions. Among other things, the policy explains when reverse auctioning may be appropriate, identifies when reverse auctions shall not be used, requires reverse auction services be competed amongst commercial reverse auction service providers; and specifies document requirements. Is the final rule on reverse auctioning the type of policy EO 14275 believes is burdensome? (§ 16:21)
- Small Business Regulations.
  - The Small Business Administration (SBA) proposed a rule to apply the Rule of Two to multiple-award contract task and delivery orders. The proposed rule does not apply to orders under the Federal Supply Schedule because "schedules are continually open to new entrants and highly accessible to small

businesses." The SBA states the proposed rule is consistent with the Court of Federal Claims decision in The Tolliver Grp, Inc. v. United States, 151 Fed. Cl. 70 (2020) and the rule eliminates lingering confusion with ITility, LLC, B-419167, Dec. 23, 2020, 2020 CPD ¶ 412 by requiring the "application of the Rule of Two to task and delivery orders under multiple-award contracts, with certain exceptions." (§ 18:31)

- The FAR Council issued an interim rule transferring the verification of small business concerns owned and controlled by veterans or service-disabled veterans from the Department of Veterans Affairs to the Small Business Administration as of Jan. 1, 2023. The interim rule also creates a certification requirement for service-disabled veteran-owned small business (SDVOSB) concerns seeking sole-source and set-aside awards under the Government-wide SDVOSB Program. (§ 18:14)
- The FAR Council proposed amending the FAR to implement a final rule from the SBA that standardizes the limitations on subcontracting and the nonmanufacturer rule across the small business socioeconomic programs and specifies that a similarly situated subcontractor must perform the work with its employees. (§ § 18:18 & 18:30)
- The SBA proposed a rule requiring contractors to notify a contracting officer regarding timely payments to a subcontractor and to cooperate with the contracting officer until the subcontractor receives full payment. The SBA also proposed changes to simplify the subcontracting reporting process. (§ 18:26)

- Overturn of *Chevron*.

Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024) was one of the biggest news stories in 2024, overturning the *Chervon doctrine* in Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). *Loper Bright* replaces the *Chervon* doctrine where the courts deferred to an agency's reasonable interpretation of ambiguous statute, with a doctrine giving deference to agency interpretations based on persuasiveness of the interpretation, e.g., thoroughness, validity of reasoning, consistency. Future litigation will define the differences between the *Chervon* doctrine and *Loper Bright*. (§ 1:6)

Still, disappointed offerors have challenged the validity of the FAR based on *Loper Bright.* The Federal Circuit rejected the argument that *Loper Bright* forbids judicial deference on how an agency treated violations of labor laws as part of selection process. See, Alisud - Gesac Handling - Servisair 2 Scarl v. United States, No. 2023-1087, 2024 WL 3452957 (Fed. Cir. July 18, 2024). GAO also rejected an argument based on *Loper Bright* saying even if the SBA's regulations were ambiguous, the agency's interpretation of its own ambiguous regulations are entitled to deference under Auer v. Robbins, 519 U.S. 452 (1997). See, Radiance Tech. Inc., Comp. Gen. Dec., B-422615, 2024 CPD ¶ 210. Finally, the court cited *Loper Bright* when finding the FAR failed to implement the second waiver in § 889 of the NDAA for FY 2019. However, did the

court need rely on *Loper Bright* to find the FAR Council's implementation of § 889 was incomplete? See, QED Grp. LLC v. United States, 175 Fed. Cl. 349 (2025). (§ 1:6)

- Challenges to Regulations.

Numerous cases challenged the regulation mandating Project Labor Agreements (PLA) required by EO 14063, the regulation raising the minimum wage for federal contractors required by EO 14026, and DOL's rule changing the classification of employees and independent contractors under the Fair Labor Standards Act (FLSA). These case asserted the regulations:

- Exceeded the scope of the Federal Property and Administrative Services Act, 40 U.S.C. § 101 et seq. ("the Procurement Act"),
- Violated non-delegation doctrine in the Constitution, which prohibits Congress from delegating its lawmaking powers to other entities, and/or
- Violated the APA by failing to provide reasoned explanations for the rule. (§ 1:6)

MVL USA, Inc. v. United States, 174 Fed. Cl. 437 (2025) ended the challenge about PLAs, holding PLAs violated the Competition in Contracting Act's requirement to promote "full and open competition." Then EO rescinded the EO requiring PLAs and the EO increasing the minimum wage to Government contractors. With regard to reclassifying employees and independent contractors, DOL filed a motion on April 16, 2025 requesting to hold the case in abeyance because agency plans to reconsider and possibly rescind the rule. So, although the Trump administration ended the current controversies, the underlying arguments to challenge regulations remain. (§ 1:6)

- The System for Award Management (SAM)

The FAR Council issued an interim rule clarifying SAM registration, stating "offerors are required to be registered at the time of proposal submission and at time of award, rather than continuously in between." Before this clarification, a lapse in SAM registration made an offeror ineligible for award. The book designated caselaw on those lapses as prior law. Current case law explains how GAO and COFC apply the clarification on SAM registration requirements to an offeror's eligibility for award. (§ 18:49)

- UNICA-BPA JV, LLC, Comp. Gen., Dec., B-422580.3, 2025 CPD ¶ 2, held the agency improperly eliminated an offeror for failure to have an active SAM registration at the time of its Final Proposal Revision (FPR) since an FPR meets the definition of SAM registration at time of offer. Although the agency could have eliminated the offeror at the time of initial proposal for lack of an active SAM registration, the agency elected to include the protester in the competitive range. (§ 18:49)
- Hanford Tank Disposition All., LLC v. United States, 173 Fed. Cl. 269 (2024), the Federal Circuit held the awardee complied with the SAM registration requirements because no lapse occurred be-

tween the time of the FPR submission and the time of award. (§ 18:49)

- Other Transactional Authority (OTA).

Protests of OTAs were homeless given a strict interpretation of GAO's and CFOC's protest jurisdiction. Recently, COFC expanded its jurisdictional to hear certain protests of OTAs while GAO showed a willing to hear certain protests on prizes. A decision from the Federal Circuit would solidify COFC's jurisdiction. Meanwhile, it is unclear whether GAO can extend its reasoning on prizes to OTAs given GAO's early decisions that CICA limits GAO's protest jurisdiction to contracts.

- Indep. Rough Terrain Ctr., LLC v. U.S., 172 Fed. Cl. 250 (2024) extended the court's protest jurisdiction to a solicitation for a OT follow-on production contract, finding the OTA agreement was "in connection with" a procurement because the agreement had the potential to lead to a follow-on procurement deal. *Indep. Rough Terrain* notes that nothing in the "OT statutes expressly removes OT follow-on contracts from the purview of this Court's jurisdiction" and holds the court "has jurisdiction to review a follow-on production contract that seeks to acquire property or services for the Government, whether the agency issued the follow-on solicitation under OT authority or under FAR authority." *Indep. Rough Terrain* at 260. (§ 25:14)
- Raytheon Co. v. United States, 175 Fed. Cl. 281 (2025) reviewed the spectrum opinions whether Tucker Act jurisdiction includes Other Transaction (OTs). *Raytheon* concluded SpaceX Corp. v. U.S., 144 Fed. Cl. 433 (2019) was at one end of the spectrum and opinions like MD Helicopters Inc. v. United States, 435 F. Supp. 3d 1003 (D. Ariz. 2020); Kinemetrics, Inc. v. United States, 155 Fed. Cl. 777 (2021); Hydraulics Int'l, Inc. v. United States, 161 Fed. Cl. 167 (2022); and Indep. Rough Terrain Ctr., LLC v. United States, 172 Fed. Cl. 250 (2024) were at the other end of the spectrum. According *Raytheon*, the decision in *SpaceX* involved the development of technology for both public and private sectors while the other decisions "charted a more direct and interlinked path from research, to development, to production, to government purchase." Based on its analysis of past decisions, *Raytheon* concluded the court was the *de facto* forum for bid protests involving OTs and "other transaction agreements" (OTAs) awarded under 10 U.S.C. § § 4021–22 when providing the government with a direct benefit in the form of products or services. The court said "this definition satisfies the jurisdictional hook of 'procurement solicitations and contracts' required under the Tucker Act." *Raytheon* at 11. (§ 25:14)
- ARiA, Comp. Gen. Dec., B-422365; B-422365.2; B-422365.3, 2024 CPD ¶ 104 took jurisdiction in a protest involving nonselection for a cash prize since the prize was the initial phase of a three-phase competition that was a prerequisite in a small business innovation research solicitation for phase II contract awards. Compare with David Frankel, Comp. Gen. Dec. B?408319, 2013 CPD ¶ 144 where GAO dismissed protest challenging an agency's selection of winners in a prize contest because the transaction did not involve the award or proposed award of a contract. (§ 28:3)

- Oak Grove Tech, LLC v. U.S., 116 F.4th 1364 (Fed. Cir. 2024) overturned the lower court's findings on discussions and conflicts by former employees; however, the Federal Circuit failed to resolve the split between GAO and COFC on whether "should" in the DFARS requires discussions.
  - Discussions: Until *Oak Grove*, COFC held that "should" in DFARS 215.306(c) requires discussions while GAO interpreted "should" in DFARS 215.306(c) as discretionary. Then, the Federal Circuit in *Oak Grove* sidestepped a challenge that DFARS 215.306(c) required discussions by applying *Blue & Gold* where the solicitation put the plaintiff on notice that the agency did not intend to conduct discussions. Therefore, *Oak Grove* prevents disappointed offerors from alleging DFARS 215.306(c) requires discussions since all solicitations are required to state whether the agency intends to conduct discussions. Nevertheless, *Oak Grove* does not resolve the split between COFC and GAO; offerors still can allege DFARS 215.306(c) requires discussions in pre-award protests at COFC. (§ 16:11)
  - Misconduct by Federal Employee: The lower court cited FAR 1.602-2 that "contracting officers shall ... ensure that contractors receive impartial, fair, and equitable treatment" and FAR 3.101-1 that "[t]he general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships" as authority to find a conflict by a Government employee. Oak Grove Techs., LLC v. United States, 155 Fed. Cl. 84, 115 (2021). The Federal Circuit overturned the trial court's holding, saying the trial court failed to acknowledge twin layers of deference: 1) the FAR provides a contracting officer with considerable discretion to conduct fact-specific inquiries of acquisition proposals to identify potential conflicts, and 2) the "strong presumption" that government officials actions are consistent with their duties. *Oak Grove* at 1380. (§ 3:79)

    Loyal Source Gov't Servs., LLC v. U.S., 175 Fed. Cl. 779 (2025) followed *Oak Grove* when the court found that an agency's failure to make the impact determination required Procurement Integrity Act (PIA), was harmless error. Instead, citing *Oak Grove's* twin layers of deference, the court found no basis to question the agency's action because after the agency's remedial actions, the plaintiff failed to show harm, and failed to show how other bidders received an unfair competitive advantage. (§ 3:83)
- Percipient. As reported last year, Percipient.ai, Inc. v. United States, 104 F.4th 839 (Fed. Cir. 2024), overturned the lower court, finding the FASA bar on protesting orders did not apply since the plaintiff asserted the agency violated 10 U.S.C. § 3453. The Federal Circuit explained challenges alleging the violations of statute or regulation fell within the third prong of the Tucker Act (28 U.S.C. § 1491(b)(1)), thus giving COFC jurisdiction to hear any "any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." The Federal Circuit declined to rely on the Competition in Contracting Act (CICA) to define "interested party" because the CICA definition does not

include the third prong of § 1491(b)(1) of COFC's jurisdiction.

Subsequently, the Federal Circuit agreed to rehear the case en banc. The order also vacated the Federal Circuit's earlier decision in *Percipient*, and reinstated the appeal. See, Percipient.ai, Inc. v. United States, CACI, Inc.-Fed., 104 F.4th 839 (Fed. Cir.), reh'g en banc granted, opinion vacated sub nom. Percipient.ai, Inc. v. United States, 121 F.4th 1311 (Fed. Cir. 2024). The issues before the court include:

- Do subcontractors have standing in post-award protests?
- Does CICA define interested party for purposes of COFC, .e.g., is an offeror required to submit a proposal to have standing in a post-award protest?
- How does the third prong of the Tucker Act affect COFC's jurisdiction particularly when the government does not dispute the violation of law?

The answers to these questions will define the extent to which COFC's protest jurisdiction differs from GAO's protest jurisdiction. (§ 1:16)

Revision to Protest Before COFC Particularly and Clarification of the Protest Fora.

This edition revises § 1:16 on protests before the Court of Federal Claims, breaking the coverage into:

I. General
- a. History.
- b. Rules, General Practices, APA Review.

II. Subject Matter Jurisdiction
- a. What is an Agency?
- b. "In Connection with a Procurement."
- c. Violations of Statute or Regulation.
- d. Implied Contracts.
  - i. Implied-in-fact.
  - ii. Implied-in-law.

III. Case or Controversy
- a. Pleadings.
- b. Standing/Interested Party.
- c. Intervenors.
- d. Ripeness.
- e. Mootness.
  - i. General.
  - ii. Effect of *Blue & Gold* on Pre-Award Protests.
- f. Laches.

IV. Scope of Review
- a. General.
- b. Burden of Proof.
- c. Prejudice to Prevail on Merits.
- d. Military Discretion.

Protests at the COFC started as an asterisk in protest statistics, but have reached near parity with GAO. While GAO decides more protests, the court ultimately decides important protests such as the JEDI litigation. Additionally the number of protests COFC increases yearly. The revisions to § 1:16 treat protests at COFC similar to, but not as extensive as § § 28 – 35 protests at GAO.