

How Defense Contractors Can Limit Civil and Criminal Liability

By

Major Paul W. Schwarz, USA

The 1986 Department of Defense Authorization Act significantly increased the business risks borne by defense and associated federal contractors.[1] These changes in law as well as in the philosophy of various government agencies call for preventive measures to avoid litigation. This article outlines the high-risk areas involving criminal and civil penalties and suggests how to cope with this increasingly litigation-prone area.

UNALLOWABLE INDIRECT COSTS

An important new feature of the act concerns contractors that submit bills for unallowable indirect costs. The best way to explain an "unallowable indirect cost" is to define its parts. An indirect cost is any cost not directly identified with a single final cost objective, but identified with two or more final cost objectives, or with at least one intermediate cost objective. An "unallowable cost" is any cost that, under the provisions of any pertinent law, regulation, or contract, may not be included in price, cost reimbursement, or settlements under a government contract to which it is allocable.[2]

The Secretary of Defense may assess a penalty if the costs are unallowable according to the Federal Acquisition Regulation (FAR) or the Department of Defense FAR Supplement.[3] This provision applies to cost reimbursement contracts for more than \$100,000. For the first offense, the Secretary is to impose a penalty equal to the amount disallowed, plus interest if the contractor has already received payment.

If the cost in question had already been determined to be unallowable, the offense of submitting an unallowable indirect cost is aggravated. This could occur if a cost was disallowed during a previous audit by the Defense Contract Audit Agency. For this offense, the Secretary assesses an additional penalty equal to twice the unallowable cost. The proof required to sustain this penalty is "clear and convincing evidence" that unallowable costs were submitted.

In the past, contractors have not vigorously opposed some disallowed costs. The new rules give greater reason to challenge such disallowances to avoid setting precedent for a penalty. The contractor may be penalized even if the Defense Department never paid the disallowed cost. The contractor merely has to submit a proposal for settlement to the government. Unfortunately, there is no indication as to how remote the preceding disallowance can be and still serve as a basis for a subsequent penalty. A contractor should challenge this ambiguity in any enforcement proceedings.

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REVIEWING COSTS

To minimize their risk, contractors should institute a continuing process for reviewing arguable indirect costs. For example, the cost of insurance and unemployment benefits paid to inactive employees who had been laid off prior to the inception of the contract was found to be allowable. This was because the fringe-benefit program had been necessary to the overall operation of the contractor's business for many years, and it benefited any contract requiring the services of that contractor's employees. This procedure is necessary to screen questionable costs and refer them to counsel for a legal opinion. Counsel must be careful to use the cost principles that were in effect at the date of the contract award.

Even if a cost is allowable, management may elect not to submit it for payment if it is likely to draw criticism. This sets no precedent, and the company retains the ability to submit the same class of expense for reimbursement at a more propitious time. Industry is increasingly recognizing that being conservative in billing certain corporate perquisites is necessary to discourage Congress from enacting even more detailed legislation.

The act lists 10 categories of costs as specifically unallowable:

1. Costs of entertainment, including amusement, diversion, and social activities, and any costs directly associated with such materials, transportation, and gratuities.
2. Costs incurred to influence (directly or indirectly) legislative action on any matter pending before Congress or a state legislature.
3. Costs incurred in defense of any civil or criminal fraud proceeding or similar proceeding (including filing of any false certification) brought by the United States where the contractor is found liable or has pleaded nolo contendere to a charge of fraud or similar proceeding (including filing of a false certification).
4. Payments of fines and penalties resulting from violations of, or failure to comply with, federal, state, local, or foreign laws and regulations, except when incurred through compliance with specific written instructions from the contracting officer authorizing the payments in advance in accordance with applicable regulations of the Secretary of Defense.
5. Costs of memberships in any social, dining, or country club or organization.
6. Costs of alcoholic beverages.
7. Contributions or donations, regardless of the recipient or its products.
8. Costs of advertising designed to promote the contractor or its products.
9. Costs of promotional items and memorabilia, including models, gifts, and souvenirs.
10. Costs for travel by commercial aircraft in excess of the amount of the standard commercial fare.

If these rules sound familiar, that is because substantially the same restrictions were already contained in Part 31 of the FAR.

Not only are there financial penalties for the corporation, but the act also requires that a corporate official assume personal responsibility for the propriety of the indirect cost submission. This official must certify that the costs are accurate and allowable.[4] If the corporate official's

opinion differs from the government's, he or she may be subject to civil and criminal sanctions. If prosecutors pursue a false-claims theory, the act has raised the criminal penalty for such a violation to \$1 million. The corresponding civil penalty is \$2,000, plus treble damages for the overcharge to the government, plus court costs.

Before admitting liability to a civil false claim, however, the official must consider whether this amounts to a conviction for fraud. A fraud conviction will put the individual out of a defense industry job for at least a year. Counsel must exercise extreme caution to ensure that the official understands all consequences of a plea bargain. Submission of a false claim probably does equate to fraud. If it can be proved that the contractor submitted costs that the official knew were unallowable, the official is subject to double damages plus a \$2,000 penalty for each false claim.[5]

CONTRACTS OVER \$100,000

For contracts that are expected to exceed \$100,000 and that employ other than sealed-bid procedures, the contractor must submit certified cost or pricing data before the award. If the data are incorrect and result in an overpayment, the contractor is liable for interest on the overpayment. If the data were known to be defective, the contractor is liable for an additional amount equal to the amount of the overpayment.[6]

Anyone who doubts the serious risk of prosecutions for defense contract fraud is discounting the newest and hottest area of white-collar criminal activity. Knowledge or intent is not necessarily difficult to prove. *Scienter* (guilty knowledge) may be proved either by showing a reckless disregard or through inference from all relevant circumstances. These elements and risks involve complex legal questions that management, no matter how experienced, should not evaluate without the assistance of qualified legal counsel. Considerable precedent indicates that good-faith reliance on legal advice may defeat certain key elements of a charge.[7]

The act prohibits defense contractors from employing in management or on any defense contract any individual who has been convicted of fraud or other felony in connection with a Department of Defense (DOD) contract within a year from the date of conviction. Contractors that knowingly employ such a person are subject to a \$500,000 maximum fine.[8] To protect against inadvertently hiring debarred persons, corporate personnel departments should consider adding a specific question about fraud/felony convictions to job applicants' questionnaires.

A new and intricate penalty is a civil fine of up to \$250,000 that applies to individuals who, within two years of leaving employment with the Department of Defense, accept compensation for services pertaining to procurement functions in which they were previously involved.[9] The penalty goes up to \$500,000 for knowingly offering or providing any compensation to such a former employee. To determine the penalty's applicability, the law must be consulted for various role and grade thresholds.

The act subjects contractors to a penalty for defective pricing that results in an overpayment.[10] The penalty disallows the defective amount and charges an amount equal to the disallowed amount plus interest computed from the date of original payment. This penalty does not appear to extend to subcontractors, but it probably does extend to "associate contractors." Unfortunately, no one seems to be comfortable with the term *associate contractors*. The act does not define it, and the legislative history is not illuminating. Because criminal prosecutions must be based on laws that are clear enough to place the public on notice, enforcement against associate contractors might be difficult. This ambiguity will probably be clarified through a regulation or law, but until then, prudent subcontractors should consider themselves covered until they are clearly excluded from the definition.

The most recent certification requirement applies to commercial pricing for spare or repair parts. The contractor must certify that the price of these parts is not higher than the lowest commercial price charged by the contractor within the most recent regular month, quarter, or other period, or else submit a written justification of the difference.[11] Civil and criminal penalties that apply to certification probably also apply to specific certification requirements such as this one.

INTERNAL COMPLIANCE REVIEWS

In conducting internal compliance reviews, the first issue is who should hire the auditors. A record created is a record subject to discovery. Contractors must be mindful of creating records that others may read and misinterpret. A contractor who assigns the costs of an internal compliance review to a cost-type contract may subject the audit report to examination by the government. Contractors who wish to protect such records may argue that only a summary of the time spent on the audit is subject to review, and not the substance of the report. Even if the audit expense is not claimed, the report may be subject to administrative discovery through DOD Inspector General subpoena and now also by subpoena of the Defense Contract and Audit Agency.

If house counsel hires the outside auditors to assist in preparing legal measures and for advice on how to remedy problems, the report may be protected by the attorney work-product privilege.[12] If this possibility seems worth the effort--and it probably is--house counsel should hire the auditors and issue all instructions concerning the audit. The report should be rendered confidentially and exclusively to legal counsel, who will then incorporate as much of it as he or she sees fit in a legal memorandum recommending appropriate corrective measures.

WHO PERFORMS AUDIT?

The next issues are who should perform the audit and how far back it should go. The "who" is easy to answer if the organization lacks the staff required to maintain current operations while going back over previous years' accounts. In such a case, outside accounting counsel will be mandatory, at least if the contractor decides to review the books for the total period of vulnerability. Even if the organization's comptroller and accounting group can handle the work, it still may be advisable to obtain independent accounting counsel just to ensure audit objectivity.

This should be a special-purpose audit. The objective is to develop information from the accounts that falls within the specific audit objectives defined by the contractor or by the attorney. At a minimum, such an audit should focus on potential labor mischarging and illegal or improper cost allocations. These are currently the two biggest areas leading to prosecution.[13] The major issues concerning labor are double allocation of cost between separate contracts, or total misallocation to a project under a more favorable contract type. An example of the latter instance is inflating general and administrative expense by assigning a disproportionate amount of home-office expense to a cost reimbursement contract. The correct method would be to distribute the home-office expenses proportionally among all the contracts serviced. For an understanding of what constitutes illegal cost allocations, refer to the standards of the Federal Acquisition Regulation and Cost Accounting Standards Board.

The audit generally need not extend beyond six years, as this is the outer limit of the felony statute of limitations of the criminal False Claims Act.[14] If the audit reveals that the company wrongly collected funds from the government, everyone should be cautioned to avoid doing anything that might be construed as an attempt to cover up such a fact. Be mindful of all potential acts to which the applicable statute of limitations applies and whether any event may have tolled the running of the statute. Next, seriously consider negotiating a refund plus interest on the overpayment in conjunction with grants of immunity for all civil and criminal aspects of the questionable account.

A collateral but important aspect of each problem is liability for false claims,[15] false statements,[16] and conspiracy.[17] The conspiracy charge is the prosecutor's legal flypaper. Conspiracy frequently ensnares all who come in contact with the operative facts and so is a favorite of prosecutors. Imprisonment likely awaits corporate executives who, having discovered some prior wrongdoing by the company, agree not to report the problem. Instead they instruct an employee to destroy the documents.

Conspiracy makes felons out of those who discuss and try to hide an offense that in itself may have been only a misdemeanor. For instance, if any unallowable cost is discovered and the billing occurred five years and eleven months ago, only one more month need pass for the false claims statute of limitations to run out. If instructions are issued to destroy the applicable records, and someone agrees to do that, a conspiracy has just been committed. The statute of limitations for that crime begins to run from the date of the last act implementing the conspiracy. Moreover, once established, a conspiracy is presumed to continue until the contrary is proved.[18]

Several certifications are a part of many solicitations. Based on recent requirements, an incorrect certification may lead to a criminal prosecution for making a false statement. Some of the most common certifications are the following:

- Certificate of Independent Price Determination.[19]
- Contingent Fee Representation and Agreement.[20]
- Small Business Concern Representation.[21]
- Small Disadvantaged Business Representation.[22]
- Women-Owned Small Business Representation.[23]
- Walsh-Healey Public Contracts Act Representation.[24]

A false certification of the Certificate of Independent Price Determination or the Contingent Fee Representation will probably also involve a conspiracy charge because of the scenarios that lead to such certifications.

Several other laws are likely to result in criminal prosecution when violated:

- Truth-in-Negotiations Act.[25]
- Anti-Kickback Act.[26]
- Sherman Act.[27]

The Truth-in-Negotiations Act and the Anti-Kickback Act will not be discussed because they are comparatively straightforward. In contrast, application of the Sherman Act can be complex. Section 1 of the Sherman Act prohibits certain joint actions among competitors, stating, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states is . . . declared illegal." A firmly established rule is that a "conspiracy to submit collusive, noncompetitive, rigged bids is a per se violation" of Section 1.[28]

The per se rule is a substantive rule of law, not merely an evidentiary presumption, that governs the restraints the courts have determined are inherently unreasonable and anti-competitive. Thus, the prosecution need not prove that the conspiracy had an anti-competitive effect on the market.[29] Penalties for violating Section 1 range up to three years' imprisonment or a \$100,000 fine (or both) in the case of individuals, or a \$1 million fine in the case of a corporation. Violations are also subject to enhanced penalties under 18 U.S.C. Section 3632. In addition, prosecutions frequently cover violations of other, related criminal statutes:

- Mail fraud.[30]
- Wire fraud.[31]

- Perjury and false declarations.[32]
- False statements or entries.[33]
- Conspiracy in connection with false claims.[34]
- Obstruction of justice.[35]

In addition to criminal liability for false claims, a civil False Claims Act may be invoked.[36] It provides for double damages plus a \$2,000 forfeiture for each false claim submitted. It is easier to prove than a criminal false claim, as proof generally does not require a showing of specific intent.[37] There is a six-year statute of limitations, which begins to run from submission of the claim rather than from discovery of the fraud.[38] A quasi-criminal aspect of this act is that it provides for the arrest of the accused, although this provision has apparently been used only rarely.[39] The False Claims Act has been found not to apply to a fraudulent but unsuccessful attempt to obtain a government contract.[40] Nor is it violated by a fraudulent attempt to reduce the amount payable by the government under a contract.[41]

International government contracting involves some highly specialized laws and regulations. Sales commissions and contingent fees are permitted under Foreign Military Sales (FMS) contracts if the contractor pays them to a bona fide employee or to a bona fide established commercial or selling agency maintained by the prospective contractor for the purpose of securing business.[42]

Another per se rule states that any fee over \$50,000 is unallowable regardless of the circumstances.[43] If expenses are expected to exceed \$50,000, the contractor should hire a consultant rather than pay someone a sales commission or contingent fee. The consultant should be paid regularly, i.e., monthly, before, during, and after the sale. This distinguishes the "consultant employee" from a mere procurer or business. Moreover, the consulting fees should be included in the FMS price or included in the price charged to the foreign country if the sale is financed by FMS credit. For legitimate consulting, the contractor can pay over the \$50,000 ceiling and recover the expense fully as a direct cost under the contract.

Under no circumstances should a contractor attempt to make a sale through the use of "improper influence." The Arms Export Control Act (AECA)[44] defines improper influence as:

Influence, direct or indirect, which induces or attempts to induce consideration or action by any employee or officer of a purchasing foreign government or international organization with respect to such purchase on any basis other than such considerations of merit as are involved in comparable United States procurement.[45]

FOREIGN CORRUPT PRACTICES ACT

In addition to the AECA, the Foreign Corrupt Practices Act (FCPA) carries several criminal and civil penalties for making direct or indirect corrupt payments to foreign officials in order to improperly influence any action of a foreign government.[46] Section 103 applies to Securities and Exchange Commission (SEC) reporting companies, their officers, directors, employees, agents, and stockholders.[47] Section 104 applies to "domestic concerns," their officers, directors, employees, agents, and stockholders.[48]

Five elements must be proved to demonstrate a violation of the FCPA. SEC reporting companies and domestic concerns, and officers, directors, employees, agents, and stockholders of each are prohibited from:

1. using the mails or other forms of interstate commerce;

2. corruptly to make an offer, payment, promise to pay, or authorization of payment of anything of value;
3. to any foreign official or to a foreign political party, party official, or candidate of the party; or to any person, while knowing or having reason to know, that some or all of the payment will be offered or paid to any of the foregoing persons;
4. for the purpose of influencing any official act or decision of the foreign official, party, or candidate (including a decision not to perform or use influence);
5. in order to help the contractor obtain or retain business or direct business to any person.

Section 21(d) of the Exchange Act authorizes the SEC to refer evidence of criminal violations of the Exchange Act to the Attorney General for criminal prosecution. The SEC and the Justice Department both can seek injunctive remedies for FCPA violations. The SEC's jurisdiction stems from Section 12(d) of the Exchange Act, and the Justice Department's authority from FCPA section 104(c). Corporations and individuals who violate the FCPA are subject to substantial criminal penalties. Issuers of securities and corporate domestic concerns that willfully violate the FCPA may be fined up to \$10,000 and/or imprisoned for not more than five years.

The other major law that pervades all international defense contracting and affects virtually all manufacturers of defense-related articles is the Arms Export Control Act (AECA).[49] Under the AECA, any person engaged in either manufacturing or exporting items on the U.S. Munitions List must register with the State Department. A manufacturer must register even if it only manufactures and does not export any of its products.[50] Moreover, a private business that imports or exports any item on the Munitions List must get a license from the State Department.[51]

ITAR COVERAGE

Probably the most important regulations authorized by the AECA are the International Traffic in Arms Regulations (ITAR).[52] The ITAR covers four broad areas:

1. The U.S. Munitions List.
2. Procedures for obtaining export/import licenses.
3. Procedures for enforcing provisions of the AECA or the ITAR.
4. Disclosure rules on agents' fees and political contributions.

Violating a provision of the AECA or ITAR may give rise to criminal and civil liability, including fines and/or imprisonment. Conviction for violating the AECA or regulations issued pursuant to it may result in a fine of up to \$1,000,000 or imprisonment. The basic civil sanction imposed for violations of the ITAR is debarment. Violating any export requirement may also lead to a criminal prosecution by the Department of Justice. Conviction for violating the AECA or a related regulation may result in a fine of up to \$1,000,000 for each violation, imprisonment for up to two years, or both.[53]

For contracts of \$100,000 or more, bids and proposals must disclose any significant interest in the firm or subsidiary that is owned or controlled (directly or indirectly) by certain foreign governments or an agent or instrumentality of one of these governments. The provision applies to the foreign government of any country that the Secretary of State determines under Section

6(j)(1)(A) of the Export Administration Act of 1979 [50 U.S.C. Section 2405 (j)(1)(A)] has repeatedly supported acts of international terrorism.[54] Although no penalty is specified for violating this provision, the applicable penalties apparently are termination for default and the previously discussed general sanctions for false certification.

Why should a contractor wait for government accusations of wrongdoing before acting? It shouldn't; there is truth to the old adage that the best defense is a good offense. An internal compliance review will uncover the facts so that counsel will know the contractor's vulnerabilities and strengths. Contractors should act, not react, to these new laws. Ensuring a sound legal position allows counsel and client to rest easier. Basic business and legal tactics directly apply to the new challenge posed to industry.

This proactive approach can take many forms. The contractor should promptly file a claim for disallowed costs to the Armed Services Board of Contract Appeals (ASBCA).[55] Mandamus is also possible. Although mandamus actions to compel payment rarely succeed, they may work if the timing and facts are carefully orchestrated. If mandamus is to be pursued, it should precede the ASBCA claim to avoid the result in *Warner v. Cox*, in which the court held that a judicial remedy was inappropriate so long as an administrative action was pending before the board.[56] Another avenue of attack is the Claims Court.[57] Contractors may bring suit directly in the Claims Court for any disputes relating to a government contract.[58] This is true only for civil matters, as there is no criminal jurisdiction in the Claims Court.

Criminal cases place the contractor in an almost completely defensive posture. Therefore, contrary to the customary business practice of talking through a problem to reach a compromise, any case that risks criminal prosecution must be evaluated for that risk at the inception. Although contractors must produce most records in response to subpoena, civil or criminal proceedings generally give no authority to compel additional explanation of business documents completed properly and regularly.

The Fifth Amendment right to silence, which in the past has seldom been used in contract cases, may be needed in response to efforts to compel statements from officers and employees who may be subjected to criminal prosecution, no matter how slight that possibility appears at the time. If the government really wants answers, it will attempt to compel them through grand jury proceedings in exchange for a grant of testimonial or "use" immunity.[59] If contractor personnel are being subpoenaed to testify before a grand jury, anticipate big trouble. If the contractor does not already have independent qualified criminal defense counsel for the corporation, it should retain such an attorney immediately. The Fifth Amendment privilege against self-incrimination is personal and generally may not be asserted on behalf of a collective group.[60]

Immunity offered under 18 U.S.C. Section 6002 is insufficient to overcome the threat of foreign prosecution if the circumstances raise a substantial threat of such an action by a foreign government.[61]

As Federal Rule of Criminal Procedure 6e will typically cloak the testimony of witnesses called before the grand jury, it may be difficult (but not impossible) to discover the direction of the investigation. A general fishing expedition will be marked by issuance of subpoenas to a broad spectrum of functionally unrelated personnel. On the other hand, a short chain of witnesses bearing a distinct operational relationship to each other will provide some clue about the area under inquiry.

Another clue to the direction of the investigation is the timing of the subpoenas in relation to documents previously provided in response to DCAA or IG subpoenas and the witnesses' knowledge about the information contained in those documents. Auditing the documents and

analyzing the witnesses' knowledge of the documents will usually identify the subject of the inquiry. This is an important matter and should be developed before any indictment.

Although the corporate witnesses subject to Rule 6e may not discuss their testimony directly with the corporation counsel, they may discuss their testimony with their own counsel. Then, in a legitimate joint defense effort, that testimony may be discussed with corporate defense counsel. Counsel should research local federal case law, as there may be some disagreement on this point. The joint defense effort must be legitimate, that is, formed for tactical legal reasons and not construed as obstruction of justice.

Concerning issuance of a subpoena by the grand jury, counsel for the potential witness may wish to call the U.S. attorney handling the matter and ask expressly whether the client is a "target" of the investigation or merely a witness. If the answer is "as a witness," then confirm the conversation in writing. If the answer is "as a target," then move to quash the subpoena as violating the policy against subpoenaing a target.[62]

Mastery of this highly complex area requires combining the skills of auditors, accountants, corporate and criminal attorneys, and business executives. The client should have a well-thought-out management plan to reduce the possibility of committing accidental offenses and a contingency plan for dealing with any actual problems that arise.

NOTES

1. P.L. No. 99-145, Nov. 8, 1985, hereafter referred to as the act. Note that changes contained in the Department of Defense Authorization Act of 1987, P.L. No. 99-500, Oct. 18, 1986, have been included.
2. 4 C.F.R. pt. 400.
3. Defense Procurement Improvement Act of 1985, 10 U.S.C. Section 2324, 99 Stat. 911.
4. 10 U.S.C. Section 2324(h)(1).
5. False Claims Act, 18 U.S.C. Section 287.
6. 10 U.S.C. Section 2306(a)(1986).
7. *United States v. Johnson*, 577 F.2d 1304 (5th Cir. 1978); *United States v. Stern*, 519 F.2d 521 (9th Cir. 1975), *cert. denied*, 423 U.S. 1033, 96 S. Ct. 565, 46 L. Ed. 2d 407; *Richter v. United States*, 440 F. Supp. 921 (D.C. Minn. 1977).
8. 10 U.S.C. Section 2408 (1986).
9. 10 U.S.C. Section 2397(b) (1986).
10. *Supra* note at .4, Section 2324.
11. 10 U.S.C. Section 2323 (1986).
12. Federal Rules of Criminal Procedure, Rule 16(c) indicates, "This subdivision does not authorize the discovery or inspection of reports, memorandum, or other internal defense documents made by the defendant, or his attorney or agents in connection with the investigation or defense of the case."
13. The "work-product doctrine" is broader than the "attorney-client privilege" in that the communication may be immune from disclosure as work product even though it was not made to the attorney by his or her client. *In re Grand Jury Proceedings*, 473 F.2d 840 (8th Cir. 1973).
14. Office of the Inspector General, Indicators of Fraud in Department of Defense Procurement (June 1985)[a pamphlet issued by the DOD].
15. 18 U.S.C. Section 287.
16. *Id.*
17. 18 U.S.C. Section 1001.
18. 18 U.S.C. Section 371.
19. *Poliafico v. United States*, 237 F.2d 97 (6th Cir. 1956), *cert. denied*, 352 U.S. 1025, 1 L. Ed. 2d 597, 77 S. Ct. 590, *reh'g denied*, 353 U.S. 931, 1 L. Ed. 2d 725, 77 S. Ct. 718; *United States v. Perlstein*, 126 F.2d 789 (3d Cir. 1942); *United States v. Rollnick*, 91 F.2d 911 (2d Cir. 1937); *Coates v. United States*, 59 F.2d 173 (9th Cir. 1932); *People v. Chart*, 69 Cal. App. 2d 503, 159 P.2d 445; *United States v. Baxa*, 340 F.2d 259 (7th Cir. 1965), *vacated, remanded for new trial*, 381 U.S. 353, 14 L. Ed. 2d 681, 85 S. Ct. 1556 (1965).
20. F.A.R. 52.203-2, Apr. 1985 [Chapter I, Title 48, Code of Federal Regulations]
21. F.A.R. 52.203-4, Apr. 1984.

21. F.A.R. 52.219-1, Apr. 1984.
22. F.A.R. 52.219-2, Apr. 1984.
23. F.A.R. 52.219-3, Apr. 1984.
24. F.A.R. 52.222-19, Apr. 1984.
25. 10 U.S.C. Section 2306 (P.L. No. 870-753).
26. 41 U.S.C. Sections 51-56 (1946).
27. 15 U.S.C. Section 1.
28. *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 317 (4th Cir. 1982); *United States v. Brighton Bldg. & Maintenance Co.*, 598 F.2d 1101, 1106 (7th Cir. 1979), *cert. denied*, 444 U.S. 840 (1979); *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078 (5th Cir. 1978), *cert. denied*, 437 U.S. 903 (1978); *United States v. Flom*, 558 F.2d 1179, 1183 (5th Cir. 1977).
29. *United States v. Cargo Serv. Stations, Inc.*, 657 F.2d 767 683-84 (5th Cir.-Unit B 1981), *cert. denied*, 455 U.S. 1017.
30. 18 U.S.C. Section 1341.
31. 18 U.S.C. Section 1343.
32. 18 U.S.C. Sections 1621, 1623.
33. 18 U.S.C. Section 1001.
34. 18 U.S.C. Sections 286-287.
35. 18 U.S.C. Section 1503.
36. 31 U.S.C. Sections 3729-3731 (1983); *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).
37. *United States v. Cooperative Grain & Supply Co.*, 476 F.2d 47 (8th Cir. 1973); *L. McCarthy v. United States*, 670 F.2d 996, 1006 (Ct. Cl. 1982).
38. 31 U.S.C. Section 235; *United States v. Borin*, 209 F.2d 145, 147-48 (5th Cir. 1954), *cert. denied*, 348 U.S. 821 (1954).
39. 31 U.S.C. Section 233; *United States v. Griswold*, 11 F. 807 (D. Ore. 1880).
40. *United States v. Farina*, 153 F. Supp. 819 (D.N.J. 1957).
41. *United States v. Howell*, 318 F.2d 162 (9th Cir. 1963); *contra Smith v. United States*, 287 F.2d 299 (5th Cir. 1961).
42. DOD F.A.R. Supp. 25.7305(b).
43. DOD F.A.R. Supp. 25.7305(d). Note that commercial contracts not funded by FMS credits are not subject to this rule. Munitions Control Newsletter, no. 84 (July 1980), revised, no. 89 (Mar. 1981).
44. P.L. No. 94-329, 90 Stat. 734 (1976), 22 U.S.C. Sections 2751-2794 (1982).
45. 22 U.S.C. Section 2279(c) (1982).
46. P.L. No. 95-213, 91 Stat. 1494 (1977), 15 U.S.C. Section 78 *et seq.* (1982).
47. Sections 103 and 104 are incorporated as section 30A of the Securities Exchange Act of 1934.
48. *Id.*
49. P.L. No. 94-329, 90 Stat. 734 (1976), 22 U.S.C. Sections 2751-2794 (1982) (AECA).
50. 22 U.S.C. Section 2778(b)(1) (1982).
51. 22 U.S.C. Section 2778(b)(2) (1982).
52. 22 C.F.R. pts. 120-130 (1985).
53. 22 U.S.C. Section 2778(c) (1985).
54. 10 U.S.C. Section 2327 (1986).
55. The Contract Disputes Act of 1978 (41 U.S.C. Section 601 *et seq.*); Defense Acquisition Regulation Section 7-103.12 Disputes.
56. 487 F.2d 1301 (5th Cir. 1974); *see also Nagle, Role of Certifying and Disbursing Officers in Government Contracts*, 95 Mil. L. Rev 1, 90 (Winter 1982).
57. The Claims Court succeeded the former Court of Claims with enactment of the Federal Courts Improvement Act of 1982, P.L. No. 97.164, 96 Stat. 25.
58. *See* the Contract Disputes Act of 1978 for this grant of jurisdiction, as well as the Tucker Act, 28 U.S.C. Section 1491 (1976) for the general grant of jurisdiction.
59. 18 U.S.C. Sections 6002-3 provides for a grant of "use" as opposed to "transactional" immunity, thereby compelling the witness's testimony over any claim of Fifth Amendment privilege.
60. *Hale v. Henkel*, 201 U.S. 43 (1906). Likewise, non-testimonial evidence is not protected by the Fifth Amendment. *South Dakota v. Neville*, 103 S. Ct. 916, 923 (1983). *But see supra* note 9 concerning the attorney work-product privilege.
61. 30 Cr.L. 1094 (E.D.N.Y. 1982). *See also Zicarelo v. New Jersey State Commission of Investigation*, 406 U.S. 472, 480-1 (1972), which expressly left the issue open.

62. U.S. Attorney Manual, Section 9-11.251; United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, at 267-8 (1975). The argument under the *Accardi* Doctrine is that the government, having prescribed a valid regulation for the benefit of the individual, must follow its own regulations. *See also* School Bd. of Broward County v. HEW, 525 F.2d 900, 908 (5th Cir. 1976). For an excellent overview of grand jury practice, see Gerald H. Goldstein, *Inside Drug Law*, 2 Grand Jury Prac., Oct. 85.