

The Pivot to Commercial Contracting

What Does It Mean for Cost and Pricing in Federal Procurement?

Chris Griesedieck, Jr.

Partner | +1 202.344.4771 | cgriesedieck@Venable.com

Tom Reynolds

Partner | +1 202.556.2965 | tomreynolds@hka.com

Allison Siegel

Associate | +1 703.760.1656 | amsiegel@Venable.com

John Polcari

Director | +1 202.420.7680 | johnpolcari@hka.com

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Agenda

- Fiscal Year 2026 National Defense Authorization Act
 - CAS & TINA Coverage, Other Threshold Adjustments
 - Non-Traditional Defense Contractors, Flowdowns, CSOs, and OTAs
- Executive Orders and Agency Communications
- Cost Accounting Standards Board Activity
- Multiple Award Schedule Program Changes
 - “Revolutionary FAR Overhaul” of FAR Parts 8 and 12
 - Transactional Data Reporting Replaces Price Reduction Clause
- Remaining Barriers and Risks for Commercial Vendors
 - Lack of Enforcement Mechanisms for Commercial Item Preferences and Rules
 - Confusion Over CAS Disclosure Statement Requirements
 - The “Who Qualifies as a Subcontractor?” Question

FY26 NDAA

Cost Accounting Standards (CAS) Coverage

Section 1806 – Matters Related to Cost Accounting Standards (CAS)

- Increases full CAS applicability threshold from \$50 million to \$100 million (no reference to Disclosure Statement threshold change)
- Increases CAS applicability threshold from \$2.5 million to \$35 million
 - Decoupling from Truthful Cost or Pricing Data Act (aka TINA)
 - Elimination of trigger contract
- Cost recovered by the government for cost accounting practice (CAP) changes shall:
 - Exclude firm fixed-price and other contracts not based on costs
 - Implications to October 2023 DCAA Memorandum for Regional Directors
 - Preamble M appeared to equate CAP changes with defective pricing
 - Limited to net increased costs paid for all changes implemented within the same fiscal year
 - Will allow more flexibility to make organizational and/or accounting changes
 - Impact on *The Boeing Company v. United States*, No. 2023-1018 (Fed. Cir. Oct. 4, 2024)?

FY26 NDAA (cont.)

Cost Accounting Standards (CAS) Coverage

Section 1806 – Matters Related to Cost Accounting Standards (CAS)

- Changes in CAS Board composition (including DCAA ineligible effective January 1, 2028)
- Hybrid contracts – Exemption for commercial products/services or firm fixed-price components based on adequate price competition without submission of certified cost or pricing data
- Advance notice of proposed rulemaking eliminated
- Review standards for conformance or elimination within 180 days and biennially thereafter
 - Department of War Acquisition Strategy: Reduce burden on contractors
 - September 2025 White House Briefing: Accelerate efforts to conform CAS to GAAP
- Timing of new rules will be subject to CAS Board determination
 - New threshold and price adjustment rules required by mid-June 2026
 - Applicability likely for contractors' 2027 fiscal years

FY26 NDAA (cont.)

Truthful Costing or Pricing Data Statutes (TINA) Coverage

Section 1804: Adjustments to Certain Acquisition Thresholds

- TINA threshold increased from \$2 million to \$2.5 million on October 1, 2025 to account for impact of inflation
- Section 1804 will increase the TINA threshold to \$10 million, in alignment with Department of War Acquisition Strategy:
 - Maximizing competition will allow for reductions in application of TINA
 - Expanded use of TINA Lite (made permanent by Section 812 of the FY 2026 NDAA)

FY26 NDAA (cont.)

Other Adjustments to Acquisition Thresholds

Section 1804: Adjustments to Certain Acquisition Thresholds

- DoD Major System Definition:
 - Total expenditures for research, development, test, and evaluation for the system are estimated to be more than \$275M (previously \$115M)
 - The eventual total expenditure for procurement for the system is estimated to be more than \$1.3B (previously \$540M)
- Civilian Major System Definition:
 - Total expenditures for the system are estimated to exceed the greater of—
 - \$2M (previously \$750,000) or
 - The dollar threshold for a “major system” established by the agency pursuant to OMB Circular
- Justification thresholds for use of procedures other than competitive procedures have changed
- Major Defense Acquisition Programs – Exceptions:
 - An eventual total expenditure for research, development, test, and evaluation of more than \$1B (previously \$300M)
 - An eventual total expenditure for procurement, including all planned increments or spirals, of more than \$4.5B (previously \$1.8B)

FY26 NDAA (cont.)

Nontraditional Defense Contractors (NTDCs)

Section 1826: Exemptions for Nontraditional Defense Contractors

- DoD to exempt nontraditional defense contractors (NDCs) from the following:
 - FAR Part 31
 - Section 3702 of title 10, United States Code (Truthful Cost or Pricing Data Act)
 - DFARS business systems requirements
- Head of contracting activity or delegee can waive, modify, or partially apply the exemptions with a written justification
- Within 60 days of issuing the waiver, secretary of defense must provide a notice of the waiver to the congressional defense committees
- Key questions:
 - Cost-type contracts without FAR Part 31?
 - Is there potential for agency-wide waivers?
 - How will USG and prime contractors evaluate prices when NDCs and traditional defense contractors are subject to different compliance requirements?
 - What is the definition of an “entity”?

FY26 NDAA (cont.)

Commercial Flowdowns and Commercial-First Measure

Sections 1821 and 1822: Commercial Flowdowns List and Commercial-First Measures

- Section 1821: Modifications to Relationship of Other Provisions of Law to Procurement of Commercial Products and Services
 - DFARS shall include a list of defense unique contract clause requirements that may be applied to subcontracts for the procurement of commercial products and services
 - DFARS will also include lists of clauses for commercial prime contracts and subcontracts for commercially available off-the-shelf (COTS) items
- Section 1822: Modifications to Commercial Products and Commercial Services
 - Head of agency must determine that market research concluded that “no commercial product, commercial service, or nondevelopment item exists that is suitable to meet the needs of the agency”
 - Prior to acquiring a non-commercial product or service, the relevant program manager must submit a written memo confirming the results of the determination

FY26 NDAA (cont.)

Commercial Solutions Openings (CSOs) and Other Transaction Authority (OTA)

Section 1823: Commercial Solutions Openings Expansion

- Commercial Solutions Openings (CSOs) can be used as a general commercial acquisition tool (i.e., for all commercial products and commercial services), rather than only for innovative solutions
- Government can award follow-on production contracts from CSOs on a sole-source basis, which will enhance flexibility for government contractors
- Enables commercial companies / NDCs to more effectively compete in the defense market

Other Commercial Contracting Developments

Executive Orders and Agency Communications

- April 9, 2025 Executive Order – Modernizing Defense Acquisitions and Spurring Innovation in the Defense Industrial base
 - First preference: Commercial solutions
 - Second preference: Other Transactions Authority (OTA)
- Department of Defense Memo: Directing Modern Software Acquisition to Maximize Lethality
 - DoD must maximize existing authorities and contracting strategy to evolve and keep pace with commercial technology advancements
 - Software Acquisition Pathway (SWP) established as the preferred pathway
 - CSOs and OTAs designated as the default solicitation and award approaches under the SWP
 - Applies to software pathway programs in the planning phase prior to execution

Cost Accounting Standards Board (CASB) Activity

CAS Coverage for Indefinite Delivery Vehicles (IDVs) and Task Orders

Indefinite Delivery Vehicles (IDVs)

- CAS Board elicited public comments for addressing CAS coverage on IDV contracts
- Referenced case 2021-01, which identified the following six possible approaches:
 - Order-by-order
 - Maximum award value
 - Minimum award value
 - Cumulative threshold
 - Order-by-order for multiple-award IDVs and maximum award value for single-award IDVs
 - Order-by-order for multiple-award IDVs and cumulative threshold for single-award IDVs
- July 2, 2025: CAS Board meeting agenda indicates the Board is reviewing options for clarifying CAS applicability to IDV contracts

Cost Accounting Standards Board (CASB) Activity (cont.)

CAS Coverage for Indefinite Delivery Vehicles (IDVs) and Task Orders

Indefinite Delivery Vehicles (IDVs) (cont.)

- Section 809 Panel recommended applying CAS at the task order level
- *Future Forest, LLC v. Sec'y of Agriculture*, 2020-2039 (Fed. Cir. Apr 15, 2021) found that IDIQ contract value = minimum contract award value (not a CAS dispute)
- Either order-by-order or minimum award value appears to be the most likely outcome
- Anticipate proposed rule to be released in the relatively near future

Cost Accounting Standards Board (CASB) Activity (cont.)

Conformance of CAS to GAAP

- FY 2017 NDAA Section 820
- September 11, 2025 Notice of Final Rule to address operating revenue and lease accounting
 - Operating revenue
 - Rely on GAAP
 - Deleted CAS 403 operating revenue definition
 - Required change and exempt from the cost impact process
 - Lease accounting
 - Exclude right-of-use assets acquired in an operating lease from facilities capital cost of money calculations
 - Limits definition of intangible assets
 - Makes conforming change related to the CAS 403 three-factor formula

Cost Accounting Standards Board (CASB) Activity (cont.)

Conformance of CAS to GAAP (cont.)

- Proposed rule recommending partial or complete elimination of CAS 404, 408, 409, and 411
 - No CAS practice changes expected for CAS 404, 409, and 411
 - CAS 408 – changes are immaterial and are exempt from cost impact process
- Currently evaluating elimination of CAS 407, 415, and 416
- Open CAS issues / topics
 - Common CAS disputes
 - Pension harmonization for extraordinary events

Multiple Award Schedule (MAS) Program Changes

“Revolutionary FAR Overhaul” of FAR Parts 8 and 12

- MAS is the most accessible – and largest – method for commercial contractors to get involved in government contracting.
 - According to GSA, “the largest government commercial acquisition program in the world, with sales exceeding \$51.5 billion in FY 2024”
- The administration’s efforts to overhaul the FAR and streamline federal purchasing may well drive even more federal business to the MAS program. Why?
 - The MAS program already requires fewer hurdles than negotiated procurements – the government only needs to provide RFQs to three offerors (and in some instances fewer), no debriefings, fewer opportunities for bid protests, among other benefits to the federal customer.
 - The FAR overhaul seeks to remove even more barriers from federal ordering, including emphasis on mandatory sources, required use or best-in-class contracts (although none have been designated best-in-class yet), and removal of the \$100M ceiling for single-award blanket purchase agreements.

Multiple Award Schedule (MAS) Program Changes (cont.)

Transactional Data Reporting (TDR) Replaces Price Reduction Clause (PRC)

- GSA announced last year that TDR would become mandatory for all MAS contractors.
- What is TDR?
 - GSA's new(er) method for collecting cost and pricing data for products and services sold through the MAS program.
 - Initially released as a pilot program to replace the PRC, which was not only burdensome, but also easily led to defective pricing issues and more significant violations (including Federal False Claims Act).
 - Process: Rather than identifying a most favored customer, basis of award customer, and ensuring the government always receives its discount, the TDR program requires contractors to submit monthly reports of sales data for federal customers to GSA. GSA will then use this data to ensure that the government is receiving the "best value" (changed from "lowest overall cost alternative" in 10 USC 3012).

Multiple Award Schedule (MAS) Program Changes (cont.)

Transactional Data Reporting (TDR) Replaces Price Reduction Clause (PRC) (cont.)

- Are we better off with TDR? Hopefully! There are still concerns:
 - The F26 NDAA changed only 10 USC 3012 to include “best value” language, but did not make a similar change to title 41, which deals with civilian agencies. This means that civilian agencies must still obtain the “lowest cost alternative” – which could be difficult with TDR.
 - Despite pilot programs, TDR is still largely untested. Whether the government will be able to compare like with like remains a question.
 - Many contractors enrolled in TDR have not regularly submitted monthly data reports. So far, there have been no significant consequences, but that could and likely would change with wider use.
 - No one is certain how GSA OIG will conduct audits of the data. To that end, no one is certain what the result of adverse findings would be if contractors fail to provide monthly data or inadvertently provide incorrect data.
 - Any time you provide data to the government (as with any party), there is a risk that the data will be breached.
- Overall, there is optimism that the MAS program will grow, and TDR will provide an easier basis for ensuring fair pricing without the headaches caused by PRC.

Remaining Barriers & Risks for Commercial Vendors

Lack of Enforcement Mechanisms for Commercial Item Preferences and Rules

- 10 U.S.C. § 3453(b) (pre-FY26 NDAA): “The head of an agency shall ensure that procurement officials in that agency, to the maximum extent practicable ... require prime contractors and subcontractors at all levels under the agency contracts to incorporate” commercial solutions.
- *Percipient.AI, Inc. v. United States*, 153 F.4th 1226 (Fed. Cir. 2025) (en banc) (cert. denied)
 - Holding: Commercial vendor lacked standing to protest federal agency’s failure to force its prime contractor to purchase commercial solution from vendor.
 - Reason: Vendor did not submit a proposal for the prime contract (it could not meet all the requirements), so it was not an “interested party” to protest.
 - Workaround(?): “[T]here are other mechanisms for enforcing the statute as to subcontractors, such as through protests by prime contractors or joint bids with other subcontractors so that one would be the prime contractor.”
- 10 U.S.C. § 3453(b) (post-FY26 NDAA): “The head of an agency shall ensure that acquisition officials in such agency and prime contractors and subcontractors (at any tier) performing contracts with such agency ... to the maximum extent practicable” acquire commercial solutions.
 - No express enforcement mechanism.

Remaining Barriers & Risks for Commercial Vendors (cont.)

Lack of Enforcement Mechanisms for Commercial Item Preferences and Rules (cont.)

- 41 U.S.C. § 3307: Requires that, “to the maximum extent practicable,” agency “requirements are defined” so that commercial [solutions]... may be procured,” “offerors of commercial [solutions] are provided an opportunity to compete,” and that market research be used “to determine whether commercial” solutions “are available” to meet (or “could be modified to meet”) requirements.
- *IntelliBridge, LLC v. United States*, 174 Fed. Cl. 793, 810 (2025), *recon. denied*, No. 24-1204, 2025 WL 2231985 (Fed. Cl. Apr. 16, 2025)
 - Holding: Protest that agency violated the Section 3307 requirements was denied.
 - Reason: Agency was “not seeking to replicate the batCAVE platform’s functionality,” but instead, “a much broader IT- and cloud-management-services contract.” Also, plaintiff “cannot show prejudice because the batCAVE platform cannot meet all the requirements CMS is seeking to procure.”
 - Workaround(?): Plaintiff “has not argued that CMS illegally bundled the various elements of the procurement to evade its obligations under section 3307 or any other provision of law.”

Remaining Barriers & Risks for Commercial Vendors (cont.)

Lack of Enforcement Mechanisms for Commercial Item Preferences and Rules (cont.)

- Agencies have been permitted to seek cost data (including data relating to indirect rates and profit) in commercial-type procurements.
 - *BCG Fed. Corp. v. United States*, 172 Fed. Cl. 543 (2024)
 - Holding: Denied protest of requirement in OASIS+ solicitation to provide indirect cost data as a violation of FASA's commercial items preference, FAR Part 10, and FAR 15.404-1.
 - Reason: FAR 15.404-1 permitted agencies to seek indirect cost data from commercial vendors when there is not adequate price competition.
 - *Loyal Source Gov't Servs., LLC v. United States*, 176 Fed. Cl. 170 (2025)
 - Holding: Denied protest of solicitation's requirement to submit Service Contract Act (SCA) wage and health & welfare rates as inconsistent with customary commercial practice.
 - Reason: Agency did violate FAR 12.302(c) by tailoring the SCA clause (FAR 52.222-43) and/or adding terms to the solicitation that were inconsistent with commercial practice, without obtaining the needed waiver. But protest was denied for lack of prejudice or harm (found any injury speculative and unrelated to competition).

Remaining Barriers & Risks for Commercial Vendors (cont.)

Confusion over CAS Disclosure Statement Requirements

- As noted, FY26 NDAA's new CAS coverage provisions did not change the current submission requirements for CAS disclosure statements:
 - 48 C.F.R. § 9903.202-1(b)(1): “Any business unit that is selected to receive a CAS-covered contract or subcontract of \$50 million or more[.]”
 - 48 C.F.R. § 9903.202-1(b)(2): “Any company which, together with its segments, received net awards of negotiated prime contracts and subcontracts subject to CAS totaling \$50 million or more in its most recent cost accounting period[.]”
 - CASB may raise this \$50M threshold in future rulemaking.
- Current discrepancy also underscores the importance of avoiding common misconceptions on disclosure statement submission requirements:
 - Checkbox at FAR 52.230-1(c)(3), can avoid the second disclosure statement requirement above (based on prior awards), not the first (based on the value of the new award). *See Delphinus Eng'g, Inc.*, B-421574, July 5, 2023, 2023 CPD ¶ 168 at 14-17.
 - Until CASB makes a change (which it is actively considering), the \$50M threshold can be applied at the IDIQ level (a “CAS-covered contract” is “any negotiated contract or subcontract in which a CAS clause is required to be included,” 48 C.F.R. § 9903.301(a), and a “contract” includes IDIQ contracts, not just orders, *see* FAR 2.101, FAR Subpart 16.5).

Remaining Barriers & Risks for Commercial Vendors (cont.)

The “Who Qualifies as a Subcontractor?” Question

- While “[s]ubcontract’ and ‘subcontractor’ are terms so frequently used in the FAR as to lurk on nearly every page,” they “are only infrequently defined, and where definitions occur, they are often incomplete or obscure.” Richard C. Johnson, *Identifying ‘Subcontractors’ Under TINA and Access-to-Records Statutes: Filling an Annoying Gap in Government Contracts Jurisprudence*, 32 Pub. Cont. L.J. 739, 740 (2003).
- “The law is well settled that the word ‘subcontractor’ is given a broad rather than restrictive definition.” *Quality Controlled Stamping, Inc.*, ASBCA No. 19074, 74-2 BCA ¶ 10,757. But definition must be “within the purposes of the Executive Order and the statutory grant of authority.” *Liberty Mut. Ins. Co. v. Friedman*, 639 F.2d 164, 168 (4th Cir. 1981).
- Examples:
 - FAR 12.001: “[I]ncludes, **but is not limited to**, a transfer of commercial products or commercial services **between divisions**, subsidiaries, or affiliates of a contractor or subcontractor.”
 - FAR 44.101: “Subcontractor means any supplier, distributor, vendor, or firm that **furnishes supplies or services to or for** a prime contractor or another subcontractor.”

Remaining Barriers & Risks for Commercial Vendors (cont.)

The “Who Qualifies As a Subcontractor?” Question (cont.)

- More examples:
 - FAR 19.701: “Subcontract means any agreement (other than one involving an employer-employee relationship) entered into by a Government prime contractor or subcontractor calling for supplies and/or services **required for** performance of the contract, contract modification, or subcontract.”
 - 41 C.F.R. § 60-1.3: “Subcontract means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee): (i) For the purchase, sale or use of personal property or nonpersonal services which, **in whole or in part**, is necessary to the performance of any one or more contracts; **or** (ii) **Under which any portion** of the contractor's obligation under any one or more contracts is performed, undertaken, or assumed; and” is not a healthcare provider agreement for TRICARE.
 - 29 C.F.R. § 5.2: “[S]ubcontractor’ means any contractor that **agrees to perform or be responsible for the performance of any part of** a contract that is subject wholly or in part to the labor standards provisions of any of the laws referenced in § 5.1,” but excludes a “material supplier,” the current definition of which is currently in litigation.

Remaining Barriers & Risks for Commercial Vendors (cont.)

The “Who Qualifies As a Subcontractor?” Question (cont.)

- Department of Labor’s (DOL) refusal to define the term for purposes of a common mandatory flow-down—the Service Contract Labor Standards (Service Contract Act)—shows the problem.
- DOL outlined the easy cases, without addressing the hard ones:
 - “The Department does not believe it is necessary or appropriate to develop a definition for the first time here. In this context as under those statutes, **it is generally clear when a contract is a subcontract, such as** when a contractor who enters into a covered contract to build a Federal office building also enters into a contract with a separate company to install the windows in that building. **It is also generally clear when a contract is not a subcontract, such as** when a contractor who enters into a covered contract with the Federal Government to build a Federal office building also enters into a contract with a separate company to repair the contractor’s electronic time system or provide cleaning services at the contractor’s corporate headquarters.”
- 81 Fed. Reg. 67598, 67616 (Sept. 30, 2016); 86 Fed. Reg. 67126, 67135 (Nov. 24, 2021) (refusing again because providing a definition “could generate significant confusion”).

Remaining Barriers & Risks for Commercial Vendors (cont.)

The “Who Qualifies As a Subcontractor?” Question (cont.)

- The lack of clear and consistent guidance regarding what entities constitute “subcontractors” creates **significant compliance risks** for private companies considering entry into the federal marketplace:
 - **For prime contractors:**
 - Will this company partner with me if I have to flow down FAR/DFARS clauses?
 - What if my supplier refuses to accept a mandatory flow-down because it does not feel it is a “subcontractor” for purposes of that clause?
 - What is my potential liability if I agree to not flow something down, but the government later takes a different position?
 - How can I properly price my proposal given these risks and considerations?
 - **For primes’ suppliers and other business partners:**
 - I signed a teaming agreement and we won the contract, but now the prime is trying to push down terms that I do not think apply. What can I do?
 - How can I decide whether to enter this space without knowing in advance what the compliance requirements are going to be?

Questions?

Don't be shy!

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HK>A

Venable Presenters



Chris Griesedieck, Jr.

Partner

+1 202.344.4771

cgriesedieck@Venable.com

Chris Griesedieck's practice encompasses government contract and grant-related matters, including claims, requests for equitable adjustment, and bid protests. Chris supports large and small companies doing business with defense and civilian agencies. He advises and represents clients on cost and pricing issues, including the Federal Acquisition Regulation Cost Principles and Procedures and the Cost Accounting Standards. Chris helps clients comply with the Service Contract Labor Standards (formerly the Service Contract Act of 1965) and the U.S. General Services Administration's Multiple Award Schedule. He also addresses organizational conflicts of interest, post-employment restrictions on former federal officials, and the ratification of unauthorized commitments.



Allison Siegel

Associate

+1 703.760.1656

amsiegel@Venable.com

Allison Siegel is an experienced analyst and advisor on federal regulatory matters. Allison assists clients with government contracts and federal grant matters, including federal investigations, bid protests, claims, litigation, regulatory compliance, mergers and acquisitions, and grant funding disallowances. She represents clients in bid protests and interventions before the Government Accountability Office (GAO) and the U.S. Court of Federal Claims. In her time as a trial attorney with the U.S. Department of Justice (DOJ), Allison managed and investigated civil False Claims Act (FCA) cases originating from qui tam relators, disclosures, and government sources alleging federal procurement, international trade, and healthcare fraud.

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HKA Presenters



Tom Reynolds

Partner

+1 202.556.2965

tomreynolds@hka.com

Tom Reynolds is a forensic accountant with 20 years of experience across multiple industries. He has acted as an assistant to the named expert on five occasions. Tom has assisted in the preparation of expert reports for matters in litigation, recently in connection with a \$385 million Cost Accounting Standards (CAS) 405 and 406 deferred cost dispute. He has led or assisted in several investigations, including in relation to alleged False Claims Act violations, assessing compliance with regulations and statutes, quantifying damages, and assessing the appropriateness of business system practices.



John Polcari

Director

+1 202.420.7680

johnpolcari@hka.com

John is well versed in the general design and maintenance of compliant contractor indirect cost allocation structures, and he assists clients in their review, interpretation, and exclusion of unallowable costs prior to government audits. He has worked across the consulting, engineering, information technology, cybersecurity, construction, infrastructure, and healthcare sectors. John has a bachelor's degree in finance and accounting. He serves as treasurer of the Board of Contracts Appeals Bar Association and is a member of the National Contracts Management Association and the National Defence Industry Association. He has published articles regarding various compliance issues and has undertaken numerous speaking engagements on matters related to accounting, cost, and pricing.

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