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Core Aspects of Federal Procurement Law in Technology Transactions

New Rules--Selling Commercial Software and
Hardware to the US Government

New Emphasis--Using “Other Transaction
Agreements”

Cybersecurity Requirements When Selling to the
US Government

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The University of Texas School of Law

31st Annual Technology Law Conference

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New Rules, Selling Commercial Software and Hardware to the US Government

- In 2018, the US Department of Defense issued a final rule regarding the procurement of commercial items.
- A company can now benefit from liberal procurement rules if it qualifies as a “nontraditional defense contractor”.
- The new rule defines a nontraditional defense contractor as an entity that is not currently performing and has not performed any contract or subcontract for the Department of Defense that is subject to full CAS coverage for at least one year preceding the solicitation to which the contractor is responding. See CAS at 41 USC 1502.

CO Discretion

- In accordance with DFARS 212.102, a contracting officer, subject to the procedures found in this subpart, may treat supplies and services offered to the US Government by nontraditional defense contractors as commercial items making the commerciality aspects of FAR Part 12 and DFARS Part 212 applicable to these procurements. The CO makes a decision to use commercial acquisition procedures for a procurement and then must follow 212.102 to paper the decision to avoid a subsequent argument by a competitor that there has been a flaw in the procurement process prompting a protest.

Commercial Software

- Treatment as a nontraditional defense contractor for the sale of commercial computer software to the US Government invokes use of FAR 12.212 and DFARS 227.7202.
- This allows the offeror to utilize its standard commercial license agreement to protect intellectual property.
- The FAR and DFARS uses language “shall be acquired under licenses customarily provided to the public”.
- Caveat, so long as consistent with Federal law and otherwise satisfy the Government’s needs.

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