COUNSEL COMMENTARY

Congress Focuses on Incumbent Protesters

DoD incumbent contractors will face potential financial penalties for filing protests that lack a reasonable legal or factual basis.

BY STEPHEN L. BACON

During the past several years, the U.S. Congress has considered potential legal mechanisms that would impose financial penalties on contractors that file unsuccessful bid protests.

In 2025, Congress required the Government Accountability Office (GAO) to propose a process that would require unsuccessful protesters to pay protest-related costs incurred by the Department of Defense (DoD) and the contract awardees' lost profits that would have been earned during the pendency of the protest.[1]

After studying these issues, GAO concluded that the "fee-shifting" proposal from Congress was impractical because information regarding protest-related costs and contractor profit rates are not readily available or easily collected.

In addition, GAO did not endorse a fee-shifting process because of the "chilling effect" it could have on protest participation, which GAO believes is vital to maintaining the integrity of the procurement system.

As an alternative to the broad fee-shifting provision proposed by Congress, GAO offered a more limited proposal for lawmakers to consider.

Specifically, GAO noted, "Congress might consider a focused statutory requirement for DoD to include a contract provision that would permit DoD to recoup – or otherwise withhold – profit or fee where the incumbent contractor files a protest that is subsequently dismissed as legally or factually insufficient or for otherwise being procedurally infirm."[2]

Congress ultimately adopted this requirement in Section 875 of the National Defense Authorization Act (NDAA) for Fiscal Year 2026 even though DoD itself believed the costs associated with implementing a withholding and forfeiture process would outweigh any benefits.

This provision adds a new variable to the decision-making equation for incumbent contractors that are considering filing a bid protest at GAO.

Section 875: How It Works

Under the Competition in Contracting Act (CICA), a protest filed at GAO challenging the award of a contract triggers a "stay" of performance on that contract during the pendency of the protest.

To ensure that work can continue, agencies routinely award extensions or new "bridge" contracts to the incumbent contractor to perform while the protested contract is being challenged.

Section 875 seeks to discourage incumbent contractors who try to exploit

this dynamic by filing frivolous protests to extend their incumbency.

Section 875 directs DoD to amend the *Defense Federal Acquisition Regulation Supplement (DFARS)* to authorize contracting officers to withhold up to 5% of payments owed to incumbent contractors during the pendency of a GAO protest.[3]

If the incumbent contractor's protest is ultimately dismissed "based on a lack of any reasonable legal or factual basis," the incumbent contractor will forfeit the amounts withheld.[4]

The statute applies to the specific circumstance in which a DoD contractor performing an incumbent contract protests a follow-on contract for goods and services "that are the same or substantially similar to" those acquired under the incumbent contract.[5]

The withholding and forfeiture provisions apply to payments made "under a contract that was awarded or extended" because of a GAO protest that triggered a CICA "stay" of performance.[6]

The specific procedural mechanisms used to implement Section 875 will be detailed in a forthcoming *DFARS* rule expected by June 2026. This will likely include a new standard clause that gives contracting officers the contractual right to execute the payment withholding and forfeiture provisions of Section 875.

A New Calculus for DoD Incumbent Protesters

Historically, protesters have not had to worry about financial penalties for filing a bid protest. Once Section 875 is implemented, however, DoD incumbent contractors will face the threat of real monetary consequences if they choose to file a protest at GAO.

The withholding of 5% of payments, and the possibility that those funds could ultimately be forfeited, will have ramifications for incumbent contractors that are considering a protest.

As an initial matter, Section 875 is likely to create an incentive for incumbent contractors to file more protests at the U.S. Court of Federal Claims (COFC) instead of GAO. Section 875 only applies to protests filed at GAO.

Thus, an incumbent contractor can avoid a reduction in cash flow and a potential hit to their bottom line by filing their protest at the COFC.

This option will not be available in every case because the COFC generally lacks jurisdiction to resolve task and delivery order protests. However, in cases where a protest may be filed at either GAO or the COFC, incumbent contractors that are subject to Section 875 may begin to view the COFC as a more favorable forum.

This could accelerate a recent trend of a greater share of protests being filed at the COFC.

Section 875 will also influence the preparation of protests that DoD incumbent contractors choose to file at GAO.

Contractors must always ensure that their protest grounds are well-supported both legally and factually, but Section 875 raises the stakes and requires incumbent contractors to exercise even greater diligence when preparing their protests to avoid a potential forfeiture of payments.

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When preparing a protest, contractors have access to relatively limited information about the agency's evaluation and source selection decision.

As a result, contractors are often forced to make inferences based on incomplete information to develop their protest grounds. If GAO considers an inference too speculative or unsupported, the protest may be dismissed for failing to state legally or factually sufficient grounds.

In practice, there can be a fine line between reasonable inference and speculative conjecture. In these cases, the threat of financial penalties under Section 875 may cause more protesters to err on the side of not asserting grounds that could be dismissed as speculative.

A more cautious approach in this regard can have a substantial impact on protest litigation and outcomes in some circumstances.

For example, at GAO, protesters are only entitled to agency documents related to the grounds alleged in the protest.

This means that if the protester challenges an agency's evaluation under Factor 1 but not Factors 2 and 3 of the evaluation criteria, the agency will only be required to produce records related to Factor 1, and the protester's counsel will have very little insight into how the agency evaluated Factors 2 and 3.

Because of this dynamic, protesters who assert grounds covering more of the solicitation's evaluation factors are generally in a better position to find errors in the source selection process. Accordingly, DoD incumbent protesters could have a more limited record at GAO if Section 875 causes them to narrow the scope of their protests.

Open Implementation Questions

Although Section 875 is relatively short and straightforward, there are some issues that will need to be clarified through the DoD rulemaking process.

One threshold question is how the *DFARS* rule will define which protest grounds lack a "reasonable legal or factual basis" to trigger the forfeiture penalty.

GAO dismisses protest grounds for a variety of reasons under its procedural rules. Presumably, the forfeiture penalty will be triggered if a ground is dismissed as "legally or factually insufficient" because the protester fails to adequately support their allegations with legal authority or factual evidence.[7]

But GAO also dismisses grounds that are untimely, outside the jurisdiction of GAO or otherwise not appropriate for GAO consideration under 4 C.F.R. § 21.5. It remains to be seen whether the forfeiture penalty will apply only to grounds dismissed as "legally or factually insufficient," or whether it will also encompass grounds that are untimely or procedurally defective.

The statute refers to protests dismissed "based on a lack of any reasonable legal or factual basis," which appears to suggest a focus on the substance of the protest allegations and evidentiary support rather than procedural defects.

But GAO's report to Congress, which ultimately led to the passage of Section 875, proposed a forfeiture provision that would

apply "where an incumbent contractor files a protest that is subsequently dismissed as legally or factually insufficient or for otherwise being procedurally infirm."[8]

The *DFARS* rule will need to clarify whether procedural dismissals will cause forfeiture under Section 875.

There is also a question regarding how the forfeiture penalty will apply to protests that include multiple grounds. Bid protests routinely assert several grounds challenging different aspects of the agency's evaluation.

It is common for GAO to sustain a protest on some grounds while denying or dismissing other grounds.

The statute does not specifically address the scenario in which a protest includes a mix of legally cognizable or meritorious protest grounds and other grounds that lack a reasonable legal or factual basis.

If one ground is dismissed for lack of a reasonable legal or factual basis, but other grounds are denied on the merits or even sustained, does the forfeiture penalty apply?

This question should be answered in the rulemaking, and it could have a substantial impact on how often the forfeiture provision is triggered in practice.

Conclusion

Section 875 is the first law that targets frivolous protesters. By imposing financial penalties on DoD incumbent contractors, Congress has added a new dimension to the protest decision-making calculus.

The forfeiture provisions will likely cause incumbent contractors to exercise greater caution when deciding whether to challenge a follow-on contract award. Some may choose to file at the COFC to avoid the withholding and forfeiture regime entirely. Others may narrow the scope of their protests to avoid asserting grounds with uncertain legal or factual support.

The ultimate impact of Section 875 may depend on how DoD resolves open implementation questions, including, for example, its application to multi-ground protests.

Contractors should monitor these developments closely and, once Section 875 is implemented, exercise caution before filing any protest that could subject them to the withholding and forfeiture provisions. **CM**

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The views expressed in this article are those of the author and do not necessarily reflect the views of Rogers Joseph O'Donnell or its clients. This article is for general information purposes and is not intended to be and should not be construed as legal advice.

ENDNOTES

1 Pub. L. No. 118-159, § 885(a)(3).
2 See Government Accountability Office Report No. B-423717 (Jul. 14, 2025), available at: https://www.gao.gov/assets/880/879950.pdf.
3 Pub. L. No. 119-60 ("FY2026 NDAA"), § 875(a)(1).
4 Id. § 875(a)(2).
5 Id. § 875(b)(2).
6 Id. § 875(b)(5).
7 See 4 C.F.R. § 21.5(f).
8 GAO Report B-423717 at 2.

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Small Business Implications of the Revolutionary FAR Overhaul

Understanding the RFO and tracking agency implementation are crucial, but knowledge alone isn't enough. Small businesses must turn insight into action. The companies that succeed in this transition will be those that stay curious, stay connected, and stay ahead.

By DeeAnn Gunnells

The popular phrase, "It's *not the strongest that survives, but the most adaptable*," often attributed to Charles Darwin, could serve as a mantra for small businesses navigating the Revolutionary Federal Acquisition Regulation (FAR) Overhaul (RFO).

The Federal Acquisition Regulatory Council (FAR Council), backed by the Office of Federal Procurement Policy (OFPP) via Executive Order 14275, launched the RFO to modernize federal procurement.

The RFO changes are already effective across all *FAR* agencies, but implementation details continue to evolve as agencies issue their own deviations and policy updates. Many small businesses may already be dealing with many of the new rules. Small businesses should prepare now for today's deviations and tomorrow's finalized *FAR*.

As a small business owner, the changes to the FAR may seem overwhelming. Understandably, operating a small business can be challenging when trying to keep up with changing contracting regulations, as many business owners are stretched thin and wear many hats.

However, as a reminder, the purpose of the RFO is to improve the readability of the *FAR* by providing clarity and removing non-statutory requirements. The goal of the RFO was also to create a faster, more agile, and mission-focused acquisition system. These objectives should be enough to make any small business owner very happy!

On a different note, agencies are also closely monitoring changes and incorporating them into their own culture at their own pace. For agencies that use the *FAR*, it is understandable that they need to incorporate changes more quickly. Other agencies that do not use the *FAR* (e.g., Federal Aviation Administration (FAA)) may incorporate *FAR* changes by other means.

Because acquisition modernization affects both *FAR*-based and non-*FAR* agencies, this article explores the Department of Transportation (DOT) RFO implementation and the Federal Aviation Administration (FAA) parallel modernization through updates to their own regulation. The FAA operates under the Acquisition Management System (AMS) for its acquisition regulations, not the *FAR*, and has already begun incorporating changes through deviations.[1]

This article offers a simplified overview for small business owners curious about what the RFO might mean for them. It highlights some of the key *FAR* parts that were revised and will impact small businesses. Ultimately, the goal is to help small businesses understand these regulatory changes, enabling them to act with strategic awareness and preparation rather than react after the fact.

To better understand the proposed changes to the *FAR*, this article references the *FAR* practitioner albums available at www.acquisition.gov.

FAR Parts With Greatest Impact to Small Businesses

Among the many revisions introduced through the RFO, several FAR parts stand out for their significant impact on small businesses. The following sections provide an overview of the changes within these parts that small businesses should understand and prepare for.

TABLE 1. FAR Threshold Increases for FY 26

Description	Current Threshold	Proposed Increase Threshold
Micropurchase Threshold	$10,000	$15,000[2]
Simplified Acquisition Threshold	$250,000 ($7.5 million for commercial)	$350,000 ($9 million for commercial)[3]
8 (a) Competition Limitation Threshold	$25 million	$30 million[4]
Subcontracting plan Threshold	$750,000 ($1.5 million for construction)	$900,000 ($2 million for construction)[5]
Historically Underutilized Business Zone (HUBSZone) Sole-Source Threshold	$4.5 mil ($7 million for manufacturing)	$5.5 mil ($8.5 million for manufacturing)[6]
Women-Owned Small Business (WOSB) Sole-Source Threshold	$4.5 mil ($7 million for manufacturing)	$5.5 mil ($8.5 million for manufacturing)[7]

FAR Part 6: Competition Requirements

Small businesses should be aware that this part has been streamlined to focus primarily on competition. All socioeconomic policies were moved to FAR Part 19. There were also several threshold increases shown in Table 1.

Many items were removed from the *FAR* that were not statutory and added to the FAR Companion Guide. The FAR Companion 2.0 was published in October 2025, with the following goals:

- Maximize the flexibilities of the *FAR*.
- Apply sound judgment.
- Balance risk.
- Effectively and efficiently deliver the mission.[8]

The FAR Companion Guide strongly encourages acquisition professionals to use new approaches and innovative contracting actions and share their experiences on the Periodic Table of Acquisition Innovations (PTAI).

Small businesses should also visit www.acquisitiongateway.gov and check out the new location of the PTAI finder for "Benefiting Small Businesses." Since collaboration is a key to success, the Chief Acquisition Officers (CAO) Council and other agencies have encouraged acquisition professionals to share information on the PTAI to increase small-business participation.

The PTAI helps small businesses in the following ways:

- Reduced barriers to entry by simplifying the procurement process, lowering bid and proposal costs, and streamlining submission processes.
- Faster contract awards can help small businesses, which may not be able to sustain cash flows for burdensome, lengthy acquisition timelines.
- Commercial procurements, modular contracting, and agile procurement methods may align more with how small businesses operate.
- Emphasizing solutions and mission over compliance attracts companies of all sizes and allows companies to showcase their unique capabilities.[9]

Small businesses should monitor the PTAI finder for best practices and incorporate them into their strategic plans.

FAR Part 7: Acquisition Planning

A continuing theme in the changes made to the *FAR* centers on innovation and a faster, more agile acquisition system. The changes to FAR Part 7 have stayed true to the theme. FAR Part 7 acquisition planning must now integrate small-business considerations previously located in FAR Part 10, including bundling, substantial bundling, and consolidation review, to ensure these impacts are evaluated at the outset.

The update clearly distinguished between task/delivery orders and the award of new contracts. The update makes placing a task/delivery order a faster, more streamlined process, reducing the amount of pre-award action required compared with awarding new contracts. Since task/delivery orders will be less time-consuming, small businesses can expect to see more awards under existing indefinite-delivery, indefinite-quantity

contracts (IDIQs), governmentwide acquisition contracts (GWACs), and multiple award contracts (MACs) vs. new awards.

The shift of bundling and consolidation requirements from FAR Part 10 to FAR Part 7 reinforces the need to consider small-business impacts early in acquisition planning. This shift should prompt small businesses to target early conversations with either the government or prospective prime contractors.

FAR Part 8: Required Sources of Supplies and Services

Under the rewritten FAR Part 8, agencies are now instructed to use designated "required-use" government-wide contract vehicles for commercial products and services unless the agency grants an exception.

For small businesses, this indicates a structural shift: using the right vehicle is quickly becoming a gatekeeper to opportunity. Firms not part of the government-wide contract vehicle may see fewer solicitations. However, those that secure or partner into the contract vehicles can benefit from multi-agency scale and simplified acquisition pathways.

The revision to FAR Part 8 also included consolidation of the following:

- FAR Parts 38 (Federal Supply Schedule Contracting) was moved to the General Services Administration (GSA) Manual (GSAM)/R538.
- FAR Part 51 (Use of Government Sources by Contractors) moved into FAR Part 8.

Another change to FAR Part 8 clarified the procedures for establishing and using blanket purchase agreements (BPAs), removed certain approval restrictions for single-award BPAs, and reinforced the preference for multiple-award BPAs where appropriate to promote competition and flexibility.

This opportunity gives small businesses more room to maneuver. The shift means that small businesses should position themselves not simply as reactive bidders, but as strategic partners ready for agile, recurring work under schedule-based vehicles and BPAs. This is another reason why small businesses need to engage early in the acquisition process.

FAR Part 12: Acquisition of Commercial Products and Commercial Services

One of the most significant updates to FAR Part 12 is the expansion of simplified commercial procedures to acquisitions up to $9 million. This allows agencies to use requests for quotes (RFQs) followed by purchase orders, which reduces the administrative burden, accelerates timelines, encourages innovation, and creates more opportunities for small businesses to enter the market. Another notable change is that simplified procedures for commercial acquisitions authorized by statute are now consolidated in Part 12, placing all commercial items in a single location.

An unexpected change is that the FAR Council has given contracting officers discretion to accept late quotes or proposals under FAR Part 12. Yes, you read that right: "late" doesn't necessarily mean "lost" anymore; a contracting officer now has discretion to accept late quotes/proposals under certain circumstances. This decision may help small businesses that face tight proposal timelines.

Part 12 now clarifies that if necessary commercial products or services are available from a priority source in Part 8 (e.g., Federal Supply Schedules or GWACs), agencies must acquire from that source. If not, they may use streamlined solicitation, evaluation, and award procedures in this subpart.

FAR Part 13: Simplified Procedures for Non-Commercial Acquisitions

Under the rewrite, FAR Part 13 shifted from simplified procedures for the acquisition of commercial products and services to "Simplified procedures for the acquisition of noncommercial products and services valued at or below the simplified acquisition threshold (SAT)." The revision moved all information regarding simplified procedures for commercial acquisitions to FAR Part 12.

FAR Part 19: Small Business

Small businesses can finally breathe; Part 19 has been streamlined and reorganized. Non-statutory information has been moved to the FAR Companion Guide. As a result, the structure is clearer and easier for small businesses to navigate. FAR Part 19 was retitled to reflect a direct focus on small business rather than "small business programs." Important changes to FAR Part 19 include:

1. The "Rule of Two" applies to contracts, not task orders or delivery orders, since it is a statutory requirement for acquisitions above the micro-purchase threshold (MPT). The "Rule of Two" continues to apply for contracts greater than the simplified acquisition threshold (SAT) .
2. Updates include language stating that contracting officers may, at their discretion, set aside orders placed under multiple award contracts.
3. Set-aside decisions made under a multiple-award contract cannot be protested, which includes challenges based on the "Rule of Two".
4. For task orders, agencies' contracting offices will determine the size of small businesses at the

contract level. The small business size will only be updated when certain events occur, such as exercising options.
5. Contracting officers must first try to award an acquisition as a competitive 8(a) order using an Small Business Administration-approved government-wide contract before awarding a sole source 8(a) award.
6. Contracts do not need to be formally released from the 8(a) program if the follow-on will be set aside for another socio-economic program. (e.g., HUBzone or women-owned small business).

As a reminder, the "Rule of Two" refers to the required set-aside where the contracting officer has identified two or more businesses that can provide the required supplies or service.[10]

Understanding Impact and Applicable Regulations

Understanding the *FAR* revisions is essential, but it is only half the equation. Each agency will interpret and implement these changes through the lens of its own acquisition culture, mission priorities, and internal guidance.

For small businesses, success in this new environment depends on more than regulatory literacy; it requires understanding how your target agencies plan to operationalize the RFO. Monitoring deviations, guidance updates, and communication channels is critical.

For example, the FAA utilizes the AMS, yet it often mirrors federal acquisition reforms. The FAA has utilized interim changes, waivers, and memos to maintain alignment with the overhaul. Unlike *FAR*-based agencies, the FAA uses a more flexible framework that allows it to integrate policy updates quickly through interim changes, waivers, and program guidance letters (PGLs), which frequently serve as the FAA's interpretation of evolving acquisition policy.

For small businesses that want to do business with the FAA, this means understanding the FAA's parallel acquisition system is essential, because the AMS frequently interprets and incorporates reforms differently, and sometimes sooner, than the *FAR*.

While DOT illustrates how a *FAR*-based agency integrates the RFO, the FAA demonstrates how modernization can look inside an agency that operates outside the *FAR*. Since April 2025, FAA has issued 43 revised AMS clauses and removed 27 clauses. It has also issued AMS interim changes, AMS waivers, AMS memos, and PGLs, which are guidance documents used to interpret or implement laws, regulations, or FAA-specific policies.

A clear example of how AMS updates can shape small business participation is R-PGL-25-07 (2025), which updated the FAA's civil rights and small disadvantaged business participation requirements for Airport Improvement Program (AIP)-funded work.

This PGL sharpened expectations for airport sponsors on subcontracting, reporting, and outreach to small and disadvantaged firms, directly influencing how prime contractors structure their teams and how small businesses position themselves for aviation-related opportunities.

Because updates such as R-PGL-25-07 are issued through AMS and not the *FAR*, they often take effect sooner and reflect FAA-specific policy priorities. For small businesses pursuing FAA or airport infrastructure work, monitoring AMS guidance is essential; overlooking PGLs can result in missed requirements or lost subcontracting opportunities.

Together, DOT and FAA demonstrate how agency-level implementation of the RFO can take different forms depending on the acquisition system. But the message to small businesses is the same: staying competitive requires watching both *FAR*-based deviations and agency-specific policy updates.

Small Business Insight

The first step for any small business navigating the RFO is to stay informed. Regularly monitoring www.acquisition.gov and agency policy notices ensures that updates to model deviations and implementation guidance don't slip by unnoticed.

Small businesses should also follow thought leaders such as Chris Palmer, Founder and Consultant at Apex Federal Contracting LLC, and Sam Le, Managing Member of Sam Le Law PLLC, who frequently share practical insights and policy analysis on LinkedIn related to the RFO. Their posts often offer real-time interpretation of regulatory shifts and practical implications for small contractors, providing information that can help firms act from a place of awareness rather than reaction.

Small businesses can also subscribe to *FAR News* email alerts at www.acquisition.gov to receive notifications when the FAR Council releases new Federal Acquisition Circulars (FACs), model deviations, or policy updates.

Small and Disadvantaged Business Utilization (OSDBU)

Small businesses should review their target agencies' procurement policies or visit their Office of Small and Disadvantaged

Business Utilization (OSDBU) websites. Many agencies provide newsletters or email alerts to keep stakeholders informed about updates, interim guidance, and acquisition policy memos.

If an agency doesn't offer alerts or newsletters, small businesses may consider using a website monitoring tool to automatically track updates on acquisition pages. It is also helpful to connect with Small Business Specialists or OSDBU offices within target agencies since they often have early insights into acquisition planning and upcoming requirements. Agency forecasts of contracting opportunities are available at GSA's Forecast Tool or each agency's OSDBU page.

Above all, build relationships early; visibility and trust established before a solicitation is issued often make the difference between being noticed and being overlooked.

Periodic Table of Acquisition Innovations (PTAI)

Small businesses must be as innovative and adaptable as possible. One of the best ways to achieve this is by leveraging the Periodic Table of Acquisition Innovations (PTAI). The PTAI is a powerful, collaborative tool that captures the spirit of the RFO.

Knowledge is power, and the PTAI is where this knowledge is shared and amplified. By exploring tested acquisition practices and proven innovations, small businesses can learn from successful strategies across government and adapt those lessons to their own approaches.

As the popular quote often attributed to Charles Darwin reminds us, survival belongs not to the strongest, but to those most adaptable to change. The PTAI provides small businesses with the insights and collaborative energy necessary to evolve, innovate, and succeed in a rapidly transforming environment.

Chris Palmer, Founder & Consultant at Apex Federal Contracting LLC, says, "I've had several clients ask me about the PTAI. I'm personally a fan, and the way I've explained it to my clients is that they can think of it as the government's playbook (and the same can be said for the *FAR* and RFO). Pick about any sport; would it be helpful to study the other team's playbook? Not that you'll use any of it personally but study their playbook and you can devise potential solutions for if/when you find a solicitation with an evaluation scheme that you've never seen before."

Reporting Resources

Small businesses that succeed under the RFO will be those that anticipate opportunities rather than wait for them. Small businesses can gain a competitive advantage by researching past set-asides and award trends using tools such as www.USASpending.gov and www.SAM.gov to identify which agencies to target.

Platforms such as FedBidSpeed.com can also be used to monitor pre-solicitations and teaming requests, giving

you a valuable head start on positioning your company before formal announcements. Above all, build relationships early; visibility and trust established before a solicitation is issued often make the difference between being noticed and being overlooked.

In today's revolutionary acquisition environment, small businesses must position themselves not as reactive bidders, but as strategic partners prepared for agile, recurring work under schedule-based vehicles and BPAs.

The RFO rewards adaptability, collaboration, and efficiency; qualities that small firms naturally bring to the table. Although the OFPP has signaled the creation of a new class of "Required-Use" Contracts, no vehicles have been designated yet. For now, small businesses should focus on monitoring OFPP announcements and agency forecasts to respond quickly when guidance is released.

Businesses should focus on aligning with Required-Use Contracts as designated by the OFPP or pursue other government-wide or agency-specific vehicles that best match their offerings. Participating in industry days, matchmaking sessions, and procurement webinars provides valuable insight into how agencies intend to implement new contracting approaches and fosters key connections with acquisition professionals.

At the same time, small businesses should continually refresh their capability statements and marketing materials to highlight the qualities most valued under the RFO, reflecting agility and innovation. Above all, thriving under the RFO requires staying curious, innovative, and connected, keeping pace with the latest *FAR* and policy updates, engaging early with agency requirements, and collaborating across the acquisition community to help shape solutions before solicitations ever appear.

Conclusion

Understanding the RFO and tracking agency implementation are crucial, but knowledge alone isn't enough. Small businesses must turn insight into action. The companies that succeed in this transition will be those who stay curious, stay connected, and stay ahead.

The following will prepare small contractors not only navigate the RFO as it happens but also position themselves as informed, prepared partners in a modernized acquisition landscape.

Small businesses must stay alert to RFO updates and agency-level deviation postings.

Be sure to subscribe to www.acquisition.gov and agency policy alerts to track implementation timelines and procedural changes.

Small businesses should track agency-specific guidance for their prospective contracting opportunities. This includes monitoring agency procurement websites for interim guidance, deviation notices, and policy updates. It is also important to follow agency acquisition supplements, such as the GSAM for GSA, to understand how individual agencies are interpreting and applying the RFO framework.

Do not sleep on the Periodic Table of Acquisition Innovations (PTAI)! It is strongly encouraged for all small business owners to visit www.acquisitiongateway.gov and explore the PTAI Finder and pay attention to the section titled "Benefiting Small Businesses."

Small businesses should strategically research prior set-asides and award trends. It is important to connect with small business specialists or OSDBU offices within your target agencies, as they often have early insight into acquisition planning and set-aside decisions. The main goal is to build relationships before solicitations are released. Attend industry days, matchmaking sessions, and procurement webinars to learn how agencies intend to implement the new contracting approaches.

Monitor OFPP announcements and agency guidance for upcoming designations of Required-Use Contracts, and in the meantime, focus on identifying government-wide or agency-specific vehicles that already align with your capabilities.

Most importantly, small businesses should refresh their capability statements and marketing materials to reflect RFO priorities. They should ensure that their capability statements reflect agility, innovation, and performance-driven outcomes.

"I've seen so many companies focus on things like probability of win (PWIN)," Palmer observes. "Contractors should not focus on flimsy relationships rather than focusing on telling the story of how they can perform better, faster, smarter, and cheaper."

As the RFO continues to unfold, remember the point of the opening quote in this article: adaptability will define success. That popular phrase often attributed to Charles Darwin, "*It is not the strongest that survives, but the most adaptable*," captures the regulatory shift happening now for small businesses.

The federal acquisition environment is changing faster than ever, and those who stay informed, build relationships early, and embrace new tools and procedures will not only survive the transition –they will lead it. The RFO is not an obstacle; it's an invitation for small businesses to innovate, be agile, and collaborate within a procurement system built for the next generation of government partnerships. **CM**

TABLE 2. FAA References

FAR Practitioner Albums	https://www.acquisition.gov/far-overhaul/practitioner-albums
Department of Transportation (DOT) Acquisition Regulation (TAR) Class Deviations	https://www.transportation.gov/mission/administrations/assistant-secretary-administration/procurement/tar-class-deviations
DOT FAR Agency Deviations	https://www.acquisition.gov/far-overhaul/far-part-deviation-guide
Federal Register	https://www.federalregister.gov/
FAA Contract Clauses	https://fast.faa.gov/contractclauses.cfm
FAA Program Guidance Letters (PGLs)	https://www.faa.gov/airports/aip/guidance_letters
Version 1.0 of the FAR Companion Guide (released on September 9, 2025, and provides context and practical advice for federal procurement professionals working with the revised FAR parts)	https://www.acquisition.gov/sites/default/files/page_file_uploads/FAR-Companion-Version-1.pdf
Periodic Table of Acquisition Innovations (PTAI) Finder	https://acquisitiongateway.gov/ptai-finder
GSA Forecasting Opportunities	https://www.gsa.gov/small-business/forecast-of-contracting-opportunities
Agency Forecasting Opportunities	https://www.acquisition.gov/procurement-forecasts
FAR Part 19 Changes	https://info.winvale.com/blog/what-small-business-contractors-need-to-know-about-the-far-part-19-overhaul
Links to research prior set-asides	https://www.usaspending.gov/
Links to research prior set-asides	https://sam.gov/

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Thank you to Chris Palmer, Founder & Consultant, Apex Federal Contracting, LLC, and Sam Le, Managing Member, Sam Le Law PLLC, for your insight in reviewing the article and providing valuable feedback.

ENDNOTES

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International Economic Sanctions, Contract Management, and U.S. Contract Law

By implementing risk assessment frameworks, including sanctions clauses, and conducting due diligence, businesses can mitigate risks and ensure legal and operational compliance in a dynamic regulatory environment.

By Raphael Picard

EDITOR'S NOTE: In today's geopolitical climate, the intersection of international economic sanctions and U.S. contract law has shifted from a niche regulatory issue to a critical driver of global commerce. Sanctions are now a primary tool of U.S. foreign policy, making compliance essential for corporate survival. At the core of this challenge is contractual risk allocation. United States. contract law provides the necessary framework to manage the sudden illegality of transactions when the Office of Foreign Assets Control (OFAC) issues new restrictions.

Without agile contract management, firms risk being trapped between breach-of-contract claims and severe government penalties. This feature delves into the implications of economic sanctions and the ways to mitigate risk and have a strategy to address potential delays or disruptions. For companies that are in the international space or are planning to work on a global scale, this feature has the strategies and best practices you need to consider implementing at your organization.

When Russia invaded Ukraine in February 2022, the United States, European Union (EU), and other allied jurisdictions rapidly imposed extensive sanctions on Russia.

These measures compelled banks and companies worldwide to freeze payments, suspend performance, or terminate thousands of cross-border commercial contracts, particularly in the energy, finance, logistics, and technology sectors.

This immediate contractual disruption illustrates the practical power of international economic sanctions.

International economic sanctions (IES) are binding legal measures governed by international and domestic law. Their primary purpose is to restrict the activities of targeted states, entities, or individuals in order to influence or coerce changes in state behavior.

Sanctions achieve this objective by prohibiting or limiting access to financial institutions, payment systems, trade financing, and international commercial transactions.

Although sanctions are directed at states or designated actors, their effects extend far beyond public authorities. In practice, sanctions are implemented through private-sector compliance, directly affecting companies, financial institutions, and contractual relationships across global supply chains.

As a result, businesses operating internationally must assess sanctions risk as a core contractual issue, since non-compliance can lead to severe legal, financial, and reputational consequences.

At the contract level, legal systems, particularly U.S. contract law, provide mechanisms to address sanctions-related disruption, including doctrines that may excuse performance or permit termination when sanctions render contractual obligations unlawful or impossible to perform.

Sanctions directly affect contractual obligations by prohibiting transactions with sanctioned parties. To avoid disputes, financial exposure, and reputational harm, businesses must ensure that their contracts comply with all applicable laws regarding sanctions.

Assumptions for Contract Management

International economic sanctions play a significant role in contract management, affecting business operations, trade agreements, financial transactions, and compliance strategies. Companies engaging in cross-border contracts must navigate legal frameworks, risk mitigation, and compliance measures to avoid violating sanctions laws.

This article explores the relationship between contract management and economic sanctions, including legal implications, risk management, and best practices.

Effective contract management in the context of IES requires a proactive approach, incorporating due diligence, compliance mechanisms, and legal safeguards to protect contracting parties.[1]

Contract governance is a critical function in international business, ensuring that agreements are structured to comply with legal, regulatory, and commercial frameworks.[2]

Economic sanctions present unique challenges that require careful consideration from contract managers.

When drafting agreements, the following provisions are essential:

- **Legal Compliance:** Contracts must be structured to comply with current sanctions laws, ensuring parties avoid violations and related penalties.[3]
- **Risk Allocation:** Agreements should clearly state which party is responsible for sanctions compliance to minimize exposure to legal risks.
- **Monitoring and Due Diligence**: Ongoing evaluation of all parties and supply chains is essential to

detect potential sanctions breaches.

- **Flexibility and Termination Rights:** Contracts should contain clauses allowing modification or termination if sanctions change, reflecting doctrines in U.S. law that excuse performance when compliance becomes impracticable (e.g., UCC § 2-615, Restatement (Second) §§ 261, 264).

Three major elements should be considered in the context of U.S. contract law and sanctions compliance.

First, contracts that involve sanctioned parties may become unenforceable due to illegality. This aligns with Restatement (Second) § 178, which renders contracts unenforceable if the interest in enforcing them is clearly outweighed by a public policy against such enforcement, as in the case of transactions violating U.S. sanctions law.[4]

Second, many jurisdictions allow contracts to be terminated if continued performance violates sanctions laws.

Third, force majeure clauses can provide relief when sanctions make contract performance impossible.

IES as a Risk to International Contracts

If a party to a contract is subject to sanctions, it may be unable to fulfill its contractual obligations, leading to breaches and potential disputes.[5] This is why understanding IES as a distinct risk is important.

The complexity of this risk is further magnified by the varying approaches to sanctions across legal systems because different jurisdictions apply sanctions differently, affecting global contract enforcement.

Let's evaluate jurisdictional considerations from the United States and the European Union as a first approach because these jurisdictional differences often create significant compliance challenges for international business in unexpected ways.

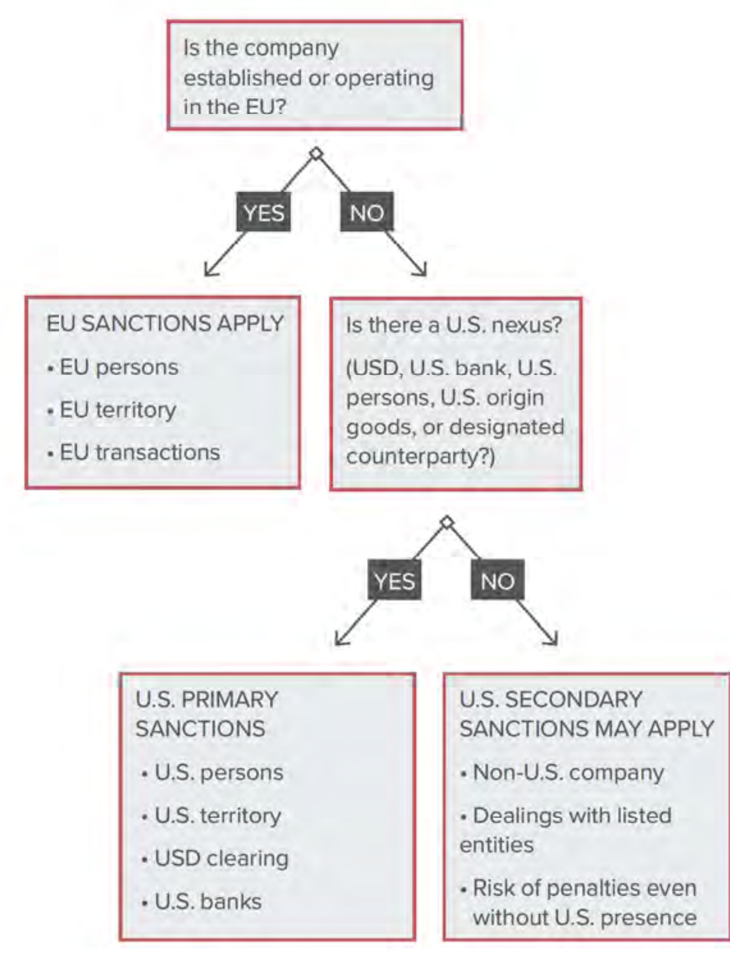
For example, a European company may lawfully sell products to an Iranian counterparty under EU law, yet still be exposed to U.S. secondary sanctions if that counterparty is listed on U.S. sanctions lists.

U.S. secondary sanctions mean that, even without a U.S. nexus, non-U.S. companies can be penalized for certain dealings with sanctioned parties. In practice, this exposure can result in loss of access to the U.S. financial system, including the inability to clear U.S.-dollar payments, use U.S. correspondent banks, or rely on global payment and messaging infrastructures such as SWIFT, Visa, Mastercard, or American Express.

These consequences become relevant to EU companies as soon as their transactions, financing arrangements, insurers, or banking partners depend – directly or indirectly – on U.S. financial channels.

Penalties may include civil fines, asset freezes, restrictions on banking relationships, or designation on U.S. sanctions lists, and typically materialize upon regulatory investigation, enforcement action, or attempted execution of a prohibited transaction.

FIGURE 1. Conducting a Contract or Transaction With a Sanctioned Entity



By contrast, EU sanctions are jurisdictionally limited and apply only to EU persons, entities established under EU law, or activities conducted within EU territory.[6]

As shown in Figure 1, economic sanctions introduce significant risks in international contracting, affecting financial transactions and supply chains.[7] The primary risks associated with IES are analyzed hereafter.

Regulatory, Financial, and Operational Impacts on Contracts

Engaging with a sanctioned entity or conducting prohibited transactions can expose businesses globally to significant regulatory penalties, including civil fines, criminal liability, and reputational harm, as well as immediate operational consequences such as frozen assets, blocked bank transfers, and suspended payment mechanisms.

When financial institutions are required to halt transactions involving sanctioned parties, payments may be delayed or rendered impossible, causing otherwise valid contracts to become commercially or legally unviable.

In addition, international economic sanctions can disrupt supply chains, as companies sourcing goods or services from sanctioned jurisdictions face delivery delays, substitute-supplier risks, and increased operational and compliance costs.

Those risks can lead to legal complexity where sanctions compliance is often governed by overlapping legal frameworks (e.g., United Nations (UN), EU, and U.S. regulations), requiring expert legal and compliance oversight.

To mitigate these risks, contract managers must integrate sanctions screening, compliance clauses, and contingency planning into their contractual frameworks.[8]

Practical Advice: Risk Management and Mitigation

Effective integration requires a systematic approach that addresses both preventive measures and responsive protocols across the entire contract lifecycle. Several strategies for risk management in contract management can be applied to mitigate risks associated with international economic sanctions.

To address these risks, businesses must embed sanctions compliance mechanisms into their contract management processes. A proactive approach enables companies to manage the complexity of international economic sanctions while preserving contractual integrity and business continuity.

Explicit sanctions clauses mitigate or eliminate the regulatory, reputational and financial risk by requiring contracts to include explicit provisions outlining parties' obligations to comply with applicable sanctions laws, aligning directly with effective risk management strategies in contract management. (Morrison & Foerster (2023)[9]

Due diligence and screening require companies, before entering into an agreement, to systematically screen counterparties, beneficial owners, directors, and key subcontractors against applicable international sanctions lists (including the Office of Foreign Assets Control, EU, and UN lists), and verify transaction structures, payment routes, and end uses through Know Your Customer (KYC) and related compliance protocols in order to identify and prevent potential sanctions violations.

Force majeure and hardship clauses should include provisions to allow contract suspension or termination if sanctions make performance impossible.[10] Contracts should include (1) sanctions compliance clauses allowing termination if a party becomes sanctioned, (2) representations and warranties confirming compliance with applicable sanctions laws, and (3) specify dispute resolution mechanisms in case sanctions impact contractual obligations.[11]

These contractual adaptations are consistent with UCC § 1-302, which allows parties to vary their contractual terms by agreement, provided such terms do not disclaim obligations of good faith, diligence, or reasonableness. Explicit sanctions clauses thus allow the parties to allocate risks consistent with freedom of contract provisions under U.S. commercial law.

Escrow and payment structures could be foreseen for accounts or alternative payment mechanisms to mitigate financial risks.[12]

Legal and regulatory monitoring requires the establishment of defined compliance procedures, including the designation of responsible compliance personnel, continuous monitoring of sanctions updates across relevant jurisdictions, periodic re-screening of counterparties and transactions, internal escalation and approval processes for flagged risks, documented decision-making, and regular training of contract managers and operational teams on sanctions obligations and response protocols.

These monitoring and compliance frameworks enable organizations to identify sanctions developments in real time and assess their contractual impact before violations occur.

Considerations for Integrating IES Risk

By integrating IES risk considerations throughout the contract lifecycle, companies can safeguard their interests and ensure regulatory adherence as described below.[13]

Enforcement and Penalty Data (Risk Avoidance Evidence)

Settlement data published through OFAC enforcement actions and annual enforcement reports indicates that companies maintaining documented, risk-based sanctions compliance programs frequently benefit from material penalty mitigation. Comparative analysis of statutory maximum penalties and final settlement amounts in publicly released cases shows reductions commonly ranging from approximately 30% to over 50%, while many non-egregious cases result in cautionary letters or no-action outcomes instead of monetary penalties.[14,15]

Timing of Sanctions Breaches (Lifecycle Relevance)

Enforcement data drawn from OFAC civil penalty notices demonstrates that sanctions violations overwhelmingly arise from acts of contract performance, such as payments, deliveries, or services rendered, rather than from contract execution itself. Public enforcement actions consistently describe violations occurring over extended periods during performance, often following counterparty designation or regulatory changes after contract signature. This pattern confirms that sanctions risk is predominantly a lifecycle risk, requiring continuous monitoring and contractual controls beyond the pre-award phase.[16]

Cost of Non-Integration vs. Cost of Prevention

Comparative analysis of sanctions enforcement outcomes and compliance cost studies demonstrates that preventive compliance costs are materially lower than post-violation remediation expenses. OFAC enforcement actions regularly combine monetary penalties with mandatory, multi-year remediation measures, including system upgrades, audits, and external oversight, whose aggregate costs significantly exceed the marginal cost of implementing sanctions screening, contractual controls, and monitoring during the contract lifecycle. The data confirms that sanctions compliance delivers measurable cost avoidance, not merely regulatory alignment.[17]

Contractual Outcomes Data (Dispute and Continuity)

Comparative analysis of sanctions-related contract disputes and enforcement outcomes indicates that agreements incorporating explicit sanctions clauses and monitoring mechanisms are more resilient under regulatory disruption. Where contracts contain clear sanctions-triggered suspension or termination rights, performance is typically adjusted or lawfully discontinued without escalation to litigation or significant value destruction. By contrast, sanctions-related disputes that reach courts or arbitration disproportionately involve contracts that lack sanctions-specific risk allocation, confirming the preventive value of contract-embedded compliance mechanisms.[18]

Sanctions clauses reduce disputes not because sanctions are rare—but because contracts that anticipate sanctions enable orderly disengagement before conflicts escalate.

Industry and Professional Standards (Normative Evidence)

Enforcement outcomes, regulatory compliance frameworks, and sanctions-related dispute patterns consistently demonstrate that sanctions risk cannot be effectively managed at a single contract stage. Public enforcement actions show that violations most often arise from gaps between due diligence, drafting, performance monitoring, and termination mechanisms. By contrast, organizations integrating international economic sanctions risk across the entire contract lifecycle – combining pre-award screening, sanctions clauses, continuous monitoring, and controlled exit rights – experience reduced regulatory exposure, improved contractual resilience, and greater preservation of commercial value.[19]

Sanctions compliance fails not at signature, but at lifecycle handoffs, making integrated contract governance more effective than isolated controls.

At the pre-contractual phase, during negotiations, businesses must conduct risk assessments, screen counterparties, and include compliance-related provisions.[20] König & Terwinghe (2014) conducted an extensive analysis of *counterparty risk frameworks*, emphasizing the necessity of *due diligence and creditworthiness screening* before contract finalization. They note that early-stage screening helps prevent exposure to insolvency, replacement, or operational risks.[21]

During the execution phase, ongoing compliance is maintained by periodically re-screening counterparties, monitoring payment flows and transaction structures, and reviewing changes in ownership, subcontractors, or applicable sanctions lists to detect newly sanctioned parties, prevent blocked payments, and address sanctions-related risks before contract performance is disrupted.

At amendment and renewal, contract modifications or renewal language must reflect current sanctions regulations.[22]

Finally, when sanctions disrupt contract performance or give rise to disputes, businesses should rely on predefined contractual

mechanisms, such as suspension, termination, and dispute resolution clauses, to manage disagreements and exit affected agreements in a legally compliant manner.

The IES Opportunity for Contract Management

While economic sanctions present significant challenges, they can also create opportunities for companies that effectively manage compliance.[23] Businesses that proactively address IES risks can leverage compliance capabilities as a competitive advantage, particularly in enhancing compliance programs.[24]

Companies with robust sanctions compliance programs can position themselves as reliable partners in regulated industries.[25]

Competitive differentiation enables the demonstration of strong compliance measures at the tender stage, making a contractor more attractive to employers concerned about regulatory risks.[26]

It can also constitute new business opportunities for firms specializing in compliance consulting, risk assessment, and alternative trade solutions can capitalize on the demand for sanctions expertise.[27]

Regulatory certainty for clients and investors enhances the likelihood of engaging with businesses that have a clear strategy for navigating sanctions-related challenges.[28]

Companies that treat IES compliance as a strategic asset rather than a mere regulatory burden can gain a significant competitive edge in international markets.[29,30]

When companies elevate IES compliance from an operational burden to a strategic capability, they position themselves to outperform peers.

Enforcement outcomes demonstrate that firms treating sanctions compliance as a strategic, enterprise-wide capability consistently experience lower regulatory exposure and enforcement costs than peers with reactive compliance programs.[31]

Treating international economic sanctions compliance as a strategic investment, rather than a purely defensive obligation, requires companies to develop scalable compliance infrastructures, including automated screening tools, transaction monitoring systems, and tailored sanctions-risk protocols embedded in contract management processes.

These capabilities not only reduce the likelihood of regulatory violations and enforcement actions but also strengthen corporate reputation, preserve access to global financial institutions, and enable participation in high-trust international markets where counterparties, lenders, and insurers increasingly assess sanctions compliance as a condition of doing business. In this sense, investment in IES capabilities serves as both a risk-mitigation mechanism and a source of competitive differentiation (JWG & CSS, 2020; Min, 2023).

Norms, Laws, and Best Practices for IES Risk Management

There is no single global standard that guarantees full protection for companies managing international economic sanctions (IES) risks. Instead, businesses must rely on a combination of international frameworks and best practices developed by different organizations, each addressing sanctions compliance from a distinct perspective.

For example, the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises provide principles for responsible business conduct, including expectations on compliance, due diligence, and risk management in sanctioned environments.

The UN Global Compact encourages companies to align their operations with international legal norms, including economic sanctions, through governance, ethics, and compliance commitments.

In parallel, the Financial Action Task Force (FATF) issues recommendations on anti-money laundering and counter-terrorism financing that are directly relevant to sanctions compliance, particularly with respect to transaction monitoring, customer due diligence, and financial controls.

Together, these frameworks do not replace binding sanctions laws, but they offer practical guidance that helps companies structure effective compliance programs and mitigate regulatory exposure.

Best practices for managing international economic sanctions risk begin with the implementation of a risk-based compliance program.

Rather than applying uniform controls, companies should assess sanctions exposure based on their industry, geographic footprint, transaction types, and counterparty risk, and then tailor their compliance measures accordingly.

This approach allows organizations to allocate resources efficiently while maintaining alignment with applicable sanctions regimes.

A core element of this risk-based approach is third-party due diligence. Companies should establish structured vetting procedures for suppliers, customers, agents, and other business partners, including screening for ownership, control, and sanctions exposure, in order to identify and mitigate the risk of indirect or downstream sanctions violations.

Regular training and audits would also ensure employees and stakeholders are aware of sanctions risks through ongoing training and internal audits. And last but not least, engage with legal

and compliance experts to seek expert advice on evolving sanctions laws and integrating best practices into contract management.[32]

To operationalize the preceding recommendations, examining case studies of contract management under sanctions provides critical practical insight.

For example, analysis of contracts affected by the Iran nuclear sanctions illustrates how companies adapted contractual clauses, payment structures, and termination rights in response to rapidly changing regulatory constraints.

Such case studies demonstrate how sanctions risks materialize in real transactions and how proactive contract management can mitigate disruption, preserve value, and ensure compliance.

Following the outbreak of the Russia–Ukraine conflict, many companies invoked force majeure clauses or terminated contracts as newly imposed Western sanctions on Russia rendered performance unlawful or commercially impossible.

Businesses engaged with Russian counterparties faced abrupt payment blocks, loss of banking channels, and restrictions on the delivery of goods, technology, and services, even where contracts had been validly executed prior to the sanctions.

Energy supply agreements, banking and financing arrangements, and technology licensing or service contracts were particularly affected, illustrating how sanctions can rapidly transform geopolitical developments into immediate contractual and operational risks.

Remediation and Risk Management

A practical approach to remediation and risk management through contract management at contract negotiation includes main clauses to remedy this type of identified risk.

With a compliance framework now introduced and established, the following represent a practical approach for remedying identified sanctions risks in international contracts:

- Compliance with sanctions laws should ensure that both parties must comply with all applicable international sanctions laws, including those imposed by the United Nations, the European Union, the United States, and other relevant jurisdictions.[33]
- In the field of representations and warranties, each party represents and warrants that neither they nor any of their subsidiaries or affiliates are subject to any sanctions or are involved in any activities that would render the agreement non-compliant with applicable sanctions laws.[34]
- As far as due diligence and monitoring is concerned, parties agree to conduct thorough due diligence on all counterparties and maintain ongoing monitoring to ensure compliance with sanctions regulations throughout the duration of the contract.[35]
- The notification of sanctions-related events should enable parties to promptly notify each other in the event of any sanctions-related issues or developments that could affect the performance of the contract.[36]
- The termination rights should include provisions for either party to reserve its right to terminate the contract if continued performance would result in a breach of applicable sanctions laws.[37]
- Indemnification clause shall ensure that each party agrees to indemnify and hold the other harmless against any losses, damages, or penalties arising from breaches of sanctions compliance.[38]
- As far as force majeure is concerned, it should include a force majeure clause that covers events related to sanctions, allowing parties to suspend or terminate the contract without penalty if sanctions impede contract performance.[39] U.S. courts interpret force majeure narrowly unless expressly drafted. Under UCC § 2-615 and Restatement § 261, sanctions-related impossibility must be specifically foreseen in the clause to avoid disputes. Therefore, drafting sanctions as explicit triggering events for force majeure or termination rights ensures greater enforceability.
- The audit rights shall grant each party the right to audit the other's compliance with the sanctions-related provisions of the contract periodically.[40]
- Training and awareness obligation shall ensure commitment to regular training and updates for employees and stakeholders on sanctions compliance and risk management.[41]

Key Takeaways

International economic sanctions significantly impact contract management, requiring businesses to adopt proactive compliance measures.

By implementing risk assessment frameworks, including sanctions clauses, and conducting due diligence, businesses can mitigate risks and ensure legal and operational compliance in a dynamic regulatory environment. **CM**

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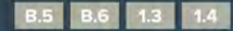

Procurement Tribunals Warn About GenAI Misuse

Tribunals are losing their patience with hallucinated case law and will escalate measures to punish federal contractors that misuse GenAI.

By David P.J. Timm

In 2026, the General Accountability Office (GAO) and other procurement Tribunals[1] will escalate measures to punish federal contractors that misuse generative artificial intelligence (GenAI misuse) in legal filings.[2] Tribunals are losing their patience with protests and monetary appeals filled with hallucinated case law.

In 2025, 31 separate filings mostly resulted in warnings and only two sanctions.[3] GAO led the way, warning 10 *pro se* protesters and sanctioning one for repeated GenAI misuse. GAO has now given fair warning to the procurement community and seems unlikely to be lenient moving forward.

GenAI Misuse in 2025 and Looking Forward

Tribunals will be justified in issuing increasingly harsh sanctions to deter GenAI misuse. The procurement community already laments the waste created by frivolous protests. Awardees are forced to pause work during time- and resource-intensive litigation. Tribunals and federal agencies have limited resources to resolve litigation swiftly.

GenAI accelerates this problem. Sycophantic large language models (LLMs) fabricate citations and confabulate facts. These models give their users unwarranted confidence in the strength of their claims. This results in contractors generating false but plausible legal filings with blinding speed.

Tribunals are coming to recognize the risks: waste of judicial resources, procurements mired in endless protests, and the corruption of legal decisions that rely on hallucinated legal citations.

Each year, there are only about 3,600[4] federal contract disputes, including size and bid protests, monetary claims and appeals, and related litigation (together, "Disputes") at specialized judicial or quasi-judicial tribunals like GAO. More than four million new contracts and orders are signed annually by the federal government.[5]

Procurement tribunals did not mention GenAI in any public decisions prior to 2025. Among these 3,600 disputes, at least 31 filings and 20 final or interim tribunal decisions involved GenAI misuse. All but one of these cases were initiated by *pro se* litigants.

So far there is only one confirmed instance of a law firm misusing GenAI in a federal procurement

dispute.[6] GAO and ASBCA have each issued one sanction for GenAI misuse. These patterns are shown in Figure 1.

Of these Tribunals, GAO has spent the most time warning protesters that inaccurate legal filings may be dismissed as a sanction. GAO has issued warnings to protesters in 10 bid protest decisions.[11] It is likely that other protests involve GenAI misuse, but GAO only makes certain decisions public.[12]

GAO has been more aggressive in addressing GenAI misuse compared to other tribunals because frivolous protests are more wasteful than monetary appeals. The agency and the awardee, if it intervenes in the protest, must spend time and resources reviewing filings, identifying GenAI misuse, and arguing for dismissal. The agency and awardee must then wait while GAO reviews the protest, considers the arguments, and issues its own findings.

The taxpayer is also on the hook. While protests are being reviewed, the agency and the apparent awardee are prohibited from moving forward with the procurement by the Competition in Contracting Act (CICA).[13] GAO is statutorily required to resolve bid protests within 100 days.

Most protests are resolved before the agency produces a report, spending an average of just 24 days on the GAO docket.[14] Depending on the disposition of the protest, it may take months longer for the agency's corrective action to be implemented and for the contract performance to begin. A flood of frivolous protests might make this typical timeline unrealistic.

At COFC, there are only five known instances of GenAI misuse.[15] The ASBCA has referenced the issue twice, sanctioning a law firm for GenAI misuse in October

FIGURE 1. Instances of GenAI Misuse in 2025

	Total	GAO	COFC	ASBCA	CBCA	OHA
Filings[7]	**31**	23	5	2	1	0
Decisions[8]	**20**	12	5	2	1	0
Warnings[9]	**15**	10	5	0	0	0
Sanctions[10]	**2**	1	0	1	0	0

FIGURE 2. Analysis of Protester Citations

Protester Citations	Description	Detected by GAO
Palmetto GBA, LLC, B-412414.3 (2016)	Hallucination	Yes
The Emergence Group, B-400403 (2008)	Hallucination	Yes
Pacific Sky Supply, Inc., B-203644 (1981)	Hallucination	Yes
American Imaging Services, Inc., B-401942 (2010)	Hallucination	Yes
JRS Mgmt., B-409232 (2014)	Hallucination	No
Hawthorn Co., B-411206 (2015)	Hallucination	No
InfraMap Corp., B-410676 (2015)	Hallucination	No
Tantus Technologies, Inc. B-411608.2 (2005)	Real but summary inaccurate	No
Delex Systems, B-400403 (2008).	Real but irrelevant	No
Crosstown Courier Service, Inc., B-419118 (2020)	Hallucination	No
K-Paul Properties, LLC, B-416333 (2018)	Hallucination	No
Analytica LLC, B-420853.2 (2023)	Hallucination	No
Pemco Aeroplex, Inc., B-310372 (2007)	Real but irrelevant	No
Tyonek Global Services, LLC, B-420916 (2022)	Hallucination	No

2025.[16] The CBCA and OHA have not mentioned GenAI misuse in any public decisions to date.

Case Studies

What does GenAI misuse look like in practice? In one notable GAO decision, GAO and the agency took great pains to identify and explain the protester's reliance on hallucinated legal citations.[17] The agency identified two irregular citations; GAO identified four. But an analysis of all of the protester fillings, obtained through GAO's version of FOIA (4 CFR 81), showed that GAO and the protested agency failed to identify numerous additional hallucinated cases (see Figure 2).Though unremarked upon by the protested agency, the Federal Bureau of Investigation (FBI), and GAO, there are placeholders commonly generated by GenAI in exhibits to the initial protest. Specifically, in the "Requested Documents" section, there is a placeholder with brackets around it that said, "[Your Company Name]." In other words, the protester neglected to fill in their own company name after using an LLM to generate their protest.

The FBI moved to dismiss the protest on the merits but also discussed "unverifiable and irregular" legal citations. The FBI did not discuss the possibility that this was GenAI misuse. In particular,

the FBI pointed to two of these citations.

The protester responded two days later (speedy filings are a noted hallmark of protesters relying on GenAI). GAO denied the protest on the merits, noting that the protester completely ignored the DOJ's claims that it failed to provide valid citations. Instead of addressing that concern, the protester doubled down, citing new authorities. These were just as problematic. An analysis of all hallucinated protester citations is shown in Figure 2.

GenAI misuse can be intentional or unintentional. As with the preceding case, most misuse is likely unintentional negligence: a failure to verify the accuracy and relevance of the LLM output. This type of GenAI misuse is harmful but is not weaponized. In other cases, protesters likely know they are misusing the technology but do not care because the cost to use GenAI is extremely low.

Consider one contractor that filed 15 bid protests and two CBCA appeals within eight months.[18] All have been denied or dismissed to date. After repeated misuse of GenAI in separate bid protests, GAO issued sanctions, dismissing four separate protests at one time because the protester's "actions undermine the integrity and effectiveness of our process."[19]

That was an egregious example of intentional misuse. Other situations are murkier. Consider a protester that filed three protests related to the same solicitation on September 4, September 10, and November 25, 2025.[20] GAO ultimately dismissed all three on December 22, 2025. The filings were filled with "a number of irregularities in the citations. . ."

In another case, the protester filed two protests: one on August 8 and the other on August 21, 2025.[21] During the litigation, GAO "identified several irregularities in the decision citations provided by the protester." GAO asked for copies of the authorities and the protester failed to provide them. This is a trend in GenAI misuse. In 2025, only three contractors caught and confronted with misuse of GenAI admitted their reliance on an LLM. Worse, eight of the 20 implausibly denied using an LLM.

Recommendations for Tribunals

In 2026, Tribunals will develop internal procedures to fast-track litigation tainted

by GenAI misuse for swift dismissal. So far, only two federal procurement dispute resolution tribunals have discussed the growing epidemic of frivolous disputes outside of a legal decision.

ASBCA updated its website to warn, "The current generation of AI tools are known to sometimes create materially false characterizations of legal precedent, misquote cases, and even create nonexistent case citations." The CBCA, in its latest annual report, notes, "Technology is ripe for abuses but also opportunities."

These Tribunals should go further by requiring (1) disclosure of GenAI use in filings and (2) certification that the facts and citations have been verified. This pre-filing certification requirement would put contractors on notice of the risk of hallucinations. Tribunals would also be permitted to swiftly identify and dismiss frivolous protests. **CM**

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ENDNOTES

1. Tribunals include GAO, the Court of Federal Claims (COFC), the Armed Services and Civilian Boards of Contract Appeals (ASBCA and CBCA), and the Small Business Administration's Office of Hearings and Appeals (OHA) (together, "Tribunals").
2. GenAI misuse is defined as the intentional or negligent use of an LLM resulting in inaccuracies that waste public and private resources.
3. David P.J. Timm, *GenAI misuse in Procurement Litigation*, Burr & Forman Government Contracting (January 6, 2026), https://www.burr.com/government-contracting/GenAI-misuse-in-procurement-litigation.
4. In FY24 about 1,800 bid protests were filed at GAO. Half as many monetary appeals and bid protests were filed at COFC in FY24 (886). The CBCA and ASBCA, together, saw fewer than 800 monetary appeals in FY25. OHA regularly decides under 100 size appeals per year. There is no reliable data on Agency-level bid protests, but experts estimate these are especially rare. *See* Yukins, Christopher R. "STEPPING STONES TO REFORM: MAKING AGENCY-LEVEL BID PROTESTS EFFECTIVE FOR AGENCIES AND BIDDERS BY BUILDING ON BEST PRACTICES FROM ACROSS THE FEDERAL GOVERNMENT." *Public Contract Law Journal*, vol. 50, no. 2, 2021, pp. 197–250. *JSTOR*, https://www.jstor.org/stable/27243262. Accessed 25 Nov. 2025.
5. *See* https://web.archive.org/web/20241127180854/https://www.whitehouse.gov/omb/briefing-room/2023/11/08/fact-sheet-biden-harris-administration-announces-new-better-contracting-initiative-to-save-billions-annually/
6. *Huffman Constr., Co.,* ASBCA Nos. 62591, 62783 (October 23, 2025)(Striking a reply brief as a sanction for GenAI misuse).
7. Even when only one final decision is generated, if there are multiple distinct cases filed each is counted as a "Filing." For instance, while GAO issued only one final decision related to *KE System Services, Inc.*, there were three distinct case numbers meaning the contractor filed three separate protests.
8. A "Decision" means a final or interim disposition of a one or more legal filings in a written finding by the tribunal.
9. A "Warning" is where a tribunal states that it could have but chose not to exercise its authority to sanction a contractor for GenAI misuse. If a contractor was sanctioned, it is not considered a warning.
10. A "Sanction" is a specific exercise by the tribunal of its inherent authority to punish the contractor for GenAI misuse. For instance, GAO dismissed four protests at once as a sanction for repeated GenAI misuse in *Oready, LLC*, B-423649.1; B-423650.1; B-423670.1; B-423670.2 (Sep. 25, 2025).
11. *Raven Investigations & Security Consulting*, LLC B-423447 (May 7, 2025); *Oready, LLC*, B-423524.1 (June 5, 2025); *Assessment and Training Solutions Consulting Corp.* B-423398 (June 27, 2025); *Wright Brothers Aero, Inc.* B-423326.2 (July 7, 2025); *BioneX, LLC* B-423630 (July 25, 2025); *Oready, LLC* B-423524.2 (August 13, 2025); *Helgen Indus. d/b/a/ DeSantis Gunhide* B-423635 (August 26, 2025); *IBS Government Services, Inc.* B-423583 (August 29, 2025); *Supplying Demand, LLC* B423810.2 (November 24, 2025); *KE System Services, Inc.*, B-423881.3 (December 22, 2025).
12. *See e.g., Oready, LLC, B-423524* (June 5, 2025) (unpublished). The majority of GAO bid protest filings do not result in a published decision because they are either unremarkable and GAO uses its discretion to not publish a public decision, or they are resolved via corrective action by the agency or withdrawal by the protester before a decision is rendered.
13. 31 U.S. Code § 3553.
14. Only 34.6% of bid protesters at GAO ever see the Agency Report. Just 23% led to a decision on the actual issues raised in the protest. For the 65% of "non-developed" protests where no agency report was issued, they were "resolved on average within 23.39 days." *See* GAO-25-108652.
15. *Sanders v. United States*, 176 Fed. Cl. 163 (2025); *Parra v. United States*, No 25-cv-431 (June 27, 2025); *Polinski v. United States*, No. 25-cv-783 (October 15, 2025); *McCaster v. United States*, No. 24-cv-2027 (October 23, 2025); *Strong v. United States*, No. 24-cv-1537 (November 13, 2025).
16. *Medical Receivables Solutions, Inc.*, ASBCA No. 64036 (July 15, 2025)(Declining to address the agency's allegations of GenAI misuse); *Huffman Constr., Co.,* ASBCA Nos. 62591, 62783 (October 23, 2025)(Striking a reply brief as a sanction for GenAI misuse).
17. *Helgen Indus. d/b/a/ DeSantis Gunhide* B-423635 (August 26, 2025).
18. GAO was shut down and did not accept new filings for 43 days during this period: *Oready, LLC*, B-423524.1 (June 5, 2025); *Oready, LLC*, B-422910.2 (June 18, 2025); *Oready, LLC*, B-423524.2 (August 13, 2025); *Oready, LLC*, CBCA 8427 (August 27, 2025); *Oready, LLC*, B-423823.1 (September 11, 2025); *Oready, LLC*, B-423905.1 (September 22, 2025); *Oready, LLC*, B-423650.1 (September 25, 2025); *Oready, LLC*, B-423649.1 (September 25, 2025); *Oready, LLC*, B-423670.1 (September 25, 2025); *Oready, LLC*, B-423670.2 (September 25, 2025); *Oready, LLC*, B-423906.1 (September 26, 2025); *Oready, LLC*, B-423758.1 (December 8, 2025); *Oready, LLC*, B-424096.1 (December 11, 2025); *Oready, LLC*, B-424126.1 (January 2, 2026); *Oready, LLC*, B-424096.2 (January 5, 2026); *Oready, LLC*, B-423934.1 (January 9, 2026).
19. *Oready, LLC*, B- B-423649.1; B-423650.1; B-423670.1; B-423670.2 (Sep. 25, 2025).
20. Even when only one final decision is generated, if there are multiple distinct cases filed each is counted as a "Filing." For instance, while GAO issued only one final decision related to *KE System Services, Inc.*, there were three distinct case numbers meaning the contractor filed three separate protests.
21. *Supplying Demand, LLC* B423810.2 (November 24, 2025).

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