

ARTICLE

Government contracting for space companies: the new (old) frontier

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President Trump's election has placed a renewed focus on space-related business opportunities. In his inauguration speech, President Trump committed to pursuing a new "manifest destiny into the stars, launching American astronauts to plant the stars and stripes on the planet Mars."

This renewed interest has created excitement among venture capitalists, institutional investors, and others about the potential of space-based opportunities, with some experts estimating that the commercial space industry will outpace global GDP by over 150% and grow to over \$1 trillion by 2040.

Recognizing the expanded capabilities of the commercial space industry, the Department of Defense in its 2022 National Defense Strategy has sought to "increase collaboration with the private sector in priority areas, especially with the commercial space industry, leveraging its technological advancements and entrepreneurial spirit. " The U.S. Space Force Commercial Space Strategy of 2024 has committed to "leverag[ing] the commercial sector's innovative capabilities, scalable production, and rapid technology refresh rates" to achieve Agency missions.

Although some space missions will still be achieved through traditional government contracts, many will rely on commercial space technology. And, as the Space Force has recognized, even traditional government contracts need "Space Mission Enablers" provided by

Authors

John R. Prairie
Partner
202.719.7167
jprairie@wiley.law
Jonathan C. Clark
Associate
202.719.4731
jcclark@wiley.law

Practice Areas

Civil Fraud, False Claims, *Qui Tam* and Whistleblower Actions
Government Contracts
GSA Schedule and Commercial Item Contracts
Internal Investigations and False Claims Act
Patent and Data Rights Counseling and Disputes
Small Business Programs and Nontraditional Defense Contractors
Strategic Competition & Supply Chain

non-traditional space companies including "capabilities and services such as decision support software and tools, rapid prototyping, artificial intelligence, data management, ground support, and modeling and simulation."

Unique risks and requirements of working with the federal government

Space-related government contracts are the new (old) frontier for space and satellite companies. Although the government – and particularly DoD – has increasingly adopted alternative, faster methods of integrating new technologies and solutions, these methods still come with risks and requirements not found in the commercial space industry.

Contractors that fail to meet these requirements risk severe consequences, including potential civil or criminal liability, suspension, or debarment.

This article highlights some of the most important things a space or satellite company should consider before pursuing government contracts. These topics are not meant to be exhaustive, but merely an overview of several key issues businesses must consider before performing government contracts.

The Federal Acquisition Regulation and agency supplements: Space companies and others in the space industry are accustomed to operating in a complex regulatory environment. But when working on space-related contracts with the federal government, the regulatory regime becomes even more complex.

Most traditional government contracts are subject to the Federal Acquisition Regulation (FAR) and applicable agency supplements including the Defense Federal Acquisition Regulation Supplement (DFARS) or NASA FAR Supplement (NFS). These regulations have unique clauses and requirements, some of which can be "read into" a government contract even if not included in the contract.

General compliance: The FAR, DFARS, NFS and other regulations create unique compliance requirements not found in the private sector.

For example:

- DFARS 252.204-7012 and -7021 require contractors to implement cybersecurity practices above and beyond what might be expected in a typical commercial contract, including reporting cyber incidents to DoD within 72 hours and submitting to mandatory DoD compliance assessments.
- Contract-Specific ISO Requirements: Government contracts often require ISO certifications such as ISO 9001, ISO 14001, ISO/IEC 27001, and others.
- FAR 4.1102 requires nearly all companies working with the federal government be registered in SAM.gov, obtain a D-U-N-S Number, CAGE code, DD2345 Certificate, and meet other requirements.
- FAR 52.203-13 requires companies to have a written code of business ethics and conduct, provide it to employees involved in contract performance, and implement an ethics training program and internal control system to promote compliance with government requirements.

- Various FAR provisions (FAR 52.222-XX) require compliance with labor and employment standards unique to federal contracts.
- There are also unique clauses related to space, including DFARS 252.225-7049 and DFARS 252.225-7051, which prohibit the acquisition of certain commercial satellite services, including commercial launch services, or the use of certain commercial launch vehicles.

The government has tried to ease the burden on space companies and non-traditional contractors by increasing the number of Other Transaction Agreements (OTAs) for space-related procurements. OTAs are flexible contracting arrangements, typically for R&D and follow-on production, that are not subject to the FAR.

But statutes authorizing OTAs, such as 10 U.S.C. § 4022, impose specific requirements, including compliance with the Procurement Integrity Act, use of competitive procedures "to the maximum extent practicable," and government audit rights. The government can also include FAR or DFARS requirements in OTAs as needed. Thus, while OTAs are more flexible, they still come with unique risks.

Intellectual property: Working with the federal government raises unique intellectual property concerns. For example, under DFARS 252.227-7013, if the government funds the development of technical data or computer software, the government receives broad rights to disclose and use them, including the right to disclose such information to other contractors and allow them to use the data. Even for commercial products and commercial services, DFARS 252.227-7015 gives the government the right to use covered technical data and software for government purposes.

A contractor's intellectual property rights often hinge on whether the contractor properly disclosed its previously existing intellectual property and marked it properly when sharing it with the government. Thus, companies working with the government must adequately protect their intellectual property and appropriately limit the government's rights.

Commercial item contracts: The government is increasingly using "commercial item contracts" for space-related procurements due to their less onerous requirements. For example, commercial item contracts are exempt from the Truth in Negotiations Act (TINA), so companies need not provide certified cost or pricing data.

Commercial item contracts also offer significant intellectual property advantages, as the government typically receives only standard commercial license rights. However, government contracts for commercial products or services are still subject to FAR Part 12.

For example, FAR 52.212-4 and FAR 52.212-5, the standard terms and conditions for commercial products or services, include unique government contract clauses, such as: the Disputes clause, which creates special requirements for suing the government; the Termination for the Government's Convenience clause, which allows the government to unilaterally terminate a contract; and, the Compliance with Laws Unique to Government Contracts clause which requires contractors to comply with various other laws not applicable to commercial contracts.

Supply chain: Government contractors face strict supply chain integrity restrictions. The federal government is particularly worried about foreign adversaries attempting to compromise critical systems through cyber intrusions, malware insertion, and exploitation of third-party vendors.

These concerns are heightened for space-related procurements given their critical nature and reliance on highly specialized components. Space companies pursuing government contracts must comply with numerous supply chain restrictions including, the Buy American Act; Federal Acquisition Security Council orders; DFARS 252.225-7052; DFARS 252.225-7064; FAR 52.204-25; and upcoming restrictions on the use of certain semiconductors.

Small business: The government has sought to boost small business participation in space procurement through "set-aside" contracts and opportunities like the Space Force's SpaceWERX program and other Small Business Innovation Research (SBIR)/Small Business Technology Transfer (STTR) opportunities.

But SBIR/STTR contracts have unique rules and restrictions, including some related to the government's ability to use products developed using SBIR/STTR funds, technical data rights, and limitations on funding. Small businesses that have received venture capital investments should carefully consider whether they can compete for SBIR/STTR contracts because there are special eligibility requirements for firms owned by venture capital or private equity firms.

Other considerations: Working in the space industry and with the federal government involves navigating strict export controls as many spacecraft and related items are subject to worldwide licensing requirements and some may be covered by the International Traffic in Arms Regulation (ITAR).

Many space government contracts also require access to classified information, making them subject to Foreign Ownership, Control, or Influence (FOCI) rules. Space companies with foreign investors, owners, or employees must be especially cautious when performing government contracts or else they risk running afoul of the FOCI rules or export controls.

False Claims Act, audits, and investigations: Government contractors that falsely certify their compliance with contract requirements face unique risks under the False Claims Act for submitting false claims for payment to the government, including potential civil or criminal liability.

Contractors are potentially subject to audits performed by entities including the Defense Contract Management Agency and Defense Contract Audit Agency, which ensure contracts comply with relevant regulations and meet performance, quality, and delivery requirements. Additionally, government contractors are potentially subject to Inspector General investigations or Congressional inquiries aimed at examining allegations of fraud, waste, or abuse.

Conclusion

As space-related government contract opportunities continue to grow, space and satellite companies, non-traditional contractors, and small businesses seeking to work with the federal government should consider the unique risks and obligations of government contracting.

Space-related government contracts present a unique opportunity for companies to expand and position themselves for success in the burgeoning commercial space industry. However, navigating this complex business environment poses significant challenges that companies should not take lightly. Companies should thus ensure they understand the unique aspects of government contracts before taking that "one small step" of becoming a government contractor.