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WASHINGTON, DC

STARTUP & ACCELERATE SERIES

**Open for Business:
Your Startup and Government Contracts**

Stephen E. Ruscus

Topics

- Pros and Cons
- Federal Market Place
- Contract Types
- Government Opportunities
- Important Government Contract Issues and Considerations

OVERVIEW



Government Contracts Pros and Cons

- Pros
 - Funding
 - Recognition
 - Know-How
- Potential Cons
 - IP rights
 - Compliance Obligations
 - Certain mandatory contract clauses
 - Level of government involvement – added steps/delay

Life Cycle Considerations

- Government Contract-Specific Issues Must be Considered
 - Before seeking funding
 - During performance of contracts
 - Upon sale of company

Federal Marketplace

- The government spent over \$550 billion through contracts for goods and services, including R&D, in 2018
 - \$358.3 billion – Department of Defense
 - \$195.8 billion – Civilian Agencies
- Over \$40 billion spent through “Federal Supply Schedule” contracts in 2018
 - The government purchases everyday items sold to the commercial marketplace through these contracts
 - e.g., IT, office supplies, tools, furniture, etc.

Types of Government Contracts

- Fixed-Price, Cost-Reimbursement, Time & Materials
- Commercial item or Non-commercial item
- Special contract types (e.g., R&D, Construction, Major Weapons Systems, Utilities, etc.)
- FAR based contracts
 - FAR clauses incorporated in the contract depend on contract type and value

Other Types of Agreements

- Non-Procurement Agreements
 - Used when the principal purpose of the transaction is to stimulate or support research and development for a public purpose
 - All executive agencies have authority to enter into cooperative agreements and grants
 - 2 CFR Part 200 – Uniform Guidance
 - Some agencies have supplements to 2 CFR Part 200 (e.g., DOE at 2 CFR Part 900)

Other Types of Agreements

- Grants
 - Research projects with a public purpose when substantial government involvement is not expected
- Cooperative Agreements
 - Research projects with a public purpose when substantial government involvement is expected
- Collaborative Research and Development Agreements (CRADAs)
 - Agreements between a federal laboratory/facility and one or more non-federal parties
 - Collaborative agreement with substantial government involvement

Other Types of Agreements

- Other Transaction Agreements
 - Agreements other than contracts, grants or cooperative agreements awarded pursuant to statutory authority
 - Agencies with OT authority: DOD, DOE, DHS, NASA, FAA, DOT, TSA, and HHS
 - Generally, OT authority may be used only when the use of a procurement contract, grant, or cooperative agreement is not feasible or appropriate
 - Not subject to FAR
 - Offers flexibility to nontraditional government contractors

Other Types of Agreements

- Other Transaction Agreements

- "Nontraditional defense contractor" is a business unit that has not, for a period of at least one year prior to the date of the OT agreement, entered into or performed on:
 - Any contract that is subject to full CAS-coverage; or
 - Any other contract in excess of \$500,000 to carry out prototype projects or to perform basic, applied, or advanced research projects for a federal agency, that is subject to the FAR

FAR-Based Contracts

- Key Values for FAR-Based Contracts
 - Micropurchase Threshold
 - Generally \$10,000
 - Virtually no regulations apply
 - Simplified Acquisition Threshold
 - Generally \$250,000
 - Subset of regulations apply to contracts between micropurchase threshold and simplified acquisition threshold
 - Increase of regulations (e.g., compliance requirements) for contracts over the simplified acquisition threshold
 - Other thresholds in FAR for specific compliance requirements, e.g.,
 - Ex-US portions of contract > \$550K for certain compliance plan portions of Combating Trafficking in Persons clause
 - \$750K for small business subcontract plan
 - \$2M for certified cost or pricing data
 - Code of Ethics contract is expected to exceed \$6 million and the performance period is 120 days or more

Commercial Item Contracting

- Commercial Items are --
 - Items sold or offered for sale to the general public that are “of a type” customarily used by the general public for non-governmental purposes
 - Items with “minor modifications” from those sold or offered for sale commercially
 - Installation services, maintenance services, repair services, training services in support of commercial items
 - Services of a type offered and sold competitively in the commercial market with limited restrictions

Commercial Item Contracting

■ FAR Part 12 Provides

- Commercial items are acquired under terms and conditions similar to those offered in the commercial marketplace
- "Tailoring" provision allows contractor to negotiate using many of its own standard terms and conditions
- Past performance is an important element for evaluation
- The government should acquire only those rights in technical data and computer software that the contractor offers to the public
- The government gets no rights in inventions

FSS Contracting

- One of the largest programs used by the government to purchase commercial items
 - Contracts are not competed
 - Catalog style
- Federal government agencies and other approved legal entities may purchase commonly used supplies and services under FSS contracts
- State and Local entities can use GSA FSS contracts for IT and Security products and services under cooperative purchasing
- The General Services Administration has primary management responsibility of FSS contracts

FSS Contracting

- Key FSS Compliance Issues
 - Commercial Sales Practice Disclosures
 - Does not apply if a contractor selects “Transactional Data Reporting”
 - Price Reduction Clause monitoring
 - GSA’s version of an MFC provision
 - Does not apply if a contractor selects “Transactional Data Reporting”
 - Industrial Funding Fee (IFF) Reporting and Payment
 - IFF funds the FSS program
 - Current GSA rate is 0.75%
 - Current VA rate is 0.5%

BUSINESS OPPORTUNITIES FOR GOVERNMENT CONTRACTORS



Business Opportunities/Angles for Start Up Government Contractors

- Unsolicited research proposal that demonstrates a unique and innovative concept
 - A proper proposal must be comprehensively evaluated by the agency
- After a favorable evaluation, the proposal still may be returned when its substance -
 - (1) Is available to the Government without restriction from another source;
 - (2) Closely resembles a pending competitive acquisition requirement;
 - (3) Does not relate to the activity's mission; or
 - (4) Does not demonstrate an innovative and unique method, approach, or concept, or is otherwise not deemed a meritorious proposal.
- The contracting officer may commence negotiations on a sole source basis only when
 - (1) An unsolicited proposal has received a favorable comprehensive evaluation;
 - (2) A justification and approval has been obtained (see [6.302-1\(a\)\(2\)\(i\)](#) for research proposals or other appropriate provisions of [subpart 6.3](#), and 6.303-2(c));
 - (3) The agency technical office sponsoring the contract furnishes the necessary funds; and
 - (4) The contracting officer has complied with the synopsis requirements of [subpart 5.2](#).

Business Opportunities/Angles for Start Up Government Contractors

- Proposed contract actions expected to exceed \$25,000 must be synopsisized in the Government Point of Entry
 - Now SAM.gov
 - Searchable by key word, agency, dates, notice type industry NAICS Code or PSC (Product and Service Code), small business set aside, place of performance, etc.
 - Contains ability to receive email notifications about saved searches
 - Not required for proposed contract action results from the acceptance of an unsolicited research proposal, other exceptions
- For synopsisized solicitations, the contracting officer generally must make available the solicitation itself, including specifications, technical data, and other pertinent information determined necessary by the contracting office

Business Opportunities/Angles for Start Up Government Contractors – Small Business

- Both the government and large business prime contractors have requirements for small business participation
- Certain contract opportunities are set aside for small businesses
- Subcategories include small disadvantaged, small woman-owned, small veteran-owned, small service-disabled veteran-owned, and HUBZone
- Small business status is self-certified as are some subcategories. Others are SBA certified, such as HUBZone small business.
- Size is based on average single year number of employees or three-year average annual receipts, depending on the industry (13 CFR 121.201)
- Size includes aggregate for all affiliates
 - Not just parents, subsidiaries and systems
 - Also any entity that directly or indirectly controls the company based on majority or certain minority ownerships of voting shares, common management, identify of interest between family members or business partners and other factors.
 - And any other entities those affiliated entities control

Business Opportunities/Angles for Start Up Government Contractors – Small Business

- [Dynamic Small Business Search \(DSBS\)](#) is a database that government agencies use to find small business contractors for upcoming contracts
- [SubNet](#) is a database of subcontracting opportunities posted by large contractors looking for small businesses to serve as subcontractors.
- The SBA maintains a directory of [federal government prime contractors with subcontracting plans](#).
- The GSA publishes a [subcontracting directory](#) for small businesses that are looking for subcontracting opportunities with prime contractors.
- The U.S. Department of Defense (DoD) maintains a similar [directory of large prime contractors](#) that small businesses can use to find subcontracting opportunities

Business Opportunities/Angles for Start Up Government Contractors

- FSS contracts
 - No competition
 - Catalog style contract under which government users place orders
- Hunting subcontract/teaming agreement opportunities by marketing capabilities to prime contractors
- Acting as a supplier to a government contract reseller/distributor
- Project awards to members under Consortium OTAs
 - Consortia organized by focus area, e.g., mission to accelerate the development of medical solutions that prevent and treat injuries and restore America's military and veterans to full health
 - Companies sign membership agreement and pay fees
 - Solicitations for research projects are issued by the consortium; ideas may originate from the government
 - Interested members submit project information summaries/white papers
 - Government and private sponsors review project ideas
 - Research solicitations for selected projects are issued
 - The sponsor evaluates proposals and selects awardees
 - Company, consortium and government execute a project award.

Business Opportunities/Angles for Start Up Government Contractors

- Project awards to members under Consortium OTAs (cont'd)
 - E.g., solutions sought in the areas of:
- Focus Area #1: Prolonged Field Care
- Focus Area #2: Medical Readiness
- Focus Area #3: Emerging Technologies
- Focus Area #4: Maximizing Human Potential
- Focus Area #5: Applied Medical Robotics and Machine Perception and Intelligence Systems

Business Opportunities/Angles for Start Up Government Contractors

- BARDA OTAs/Broad Area Announcement
 - BARDA is soliciting proposals for the advanced research and development of medical countermeasures under the BARDA Broad Agency Announcement (BAA-18-100-SOL-00003)
 - Request to meet with BARDA (TechWatch Meeting)
 - White paper
 - Full proposal
 - Negotiations
 - Award
 - 17 areas of interest, some suspended, e.g,
 - Advances manufacturing platforms to support the development of necessary medical countermeasures
 - Multiple COVID areas of interest
 - Radiological/Nuclear Threat Medical Countermeasures
 - Diagnostics

Business Opportunities/Angles for Start Up Government Contractors – SBIR/STTR

- Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) program awards
- Statute requires agencies to set aside portions of research dollars for small businesses.
 - E.g., for SBIR, if agency extramural R&D budget is >\$100M, then 3.2% shall be spent with small business concerns
 - FY 19: \$3.28B for SBIR; \$453M for STTR
- Multiple agencies have SBIR/STTR programs
- E.g. Army SBIR
 - Issues 2021 Broad Area Announcement
 - Proposals submitted on open topics, e.g.,
 - Streamline and accelerate the process of field artillery ammunition transfer through automation using computer vision and AI algorithms deployed on mobile devices.
 - Develop/demonstrate the capability to measure multi-directional winds from the aviation platform to the target, and accommodating platform motion in real time. Successful application of this capability could foundationally change the employment of aviation weapon systems and associated Tactics, Techniques, and Procedures (TTP).

Business Opportunities/Angles for Start Up Government Contractors – SBIR/STTR

- Phase I determines the scientific, technical, and commercial merit and feasibility of ideas submitted under the programs. (generally \$150K)
- Phase II is the principal R/R&D effort and is expected to produce a well-defined deliverable prototype. A prototype is defined as a model of something to be further developed, which includes designs, protocols, questionnaires, software, and devices. (generally, up to \$1M, e.g., \$750,000 for 2 years)
- Phase III include contracts that derive from, extend, or complete efforts under earlier phases.
 - Proposer is required to obtain funding from either the private sector, a non SBIR Government source, or both, to for example, develop the prototype (build on the Phase II SBIR technology developments) into a viable product or non- R&D service for sale in military or private sector markets.
- Extremely valuable IP rights accrue that also follow sale of technology
 - Use of properly market SBIR/STTR data during protection period/use after period
 - “must award” sole source Phase III contracts
 - Phase IIIs are exempt from SBA’s size standards. SBIR firms can and still get Phase IIIs. A large firm can purchase the SBIR firm and still receive Phase IIIs.
- Separate small business size and eligibility standards –
 - 500 employees
 - must be a concern which is more than 50% directly owned and controlled by one or more individuals (who are citizens or permanent resident aliens of the United States) and/or other small business concerns; or more than 50% owned by multiple VCs with no single VC owning more than 50 unless small and >50% US individual owned
 - different affiliation rules

APPENDIX I:

IMPORTANT ISSUES FOR GOVERNMENT CONTRACTORS



Administrative Issues

- Obtain a DUNS Number
- Determine NAICS codes (13 CFR 121.201)
- Register in SAM
 - DUNS number
 - TIN
 - Metadata
 - Parents and Ultimate Parents
 - Bank information
 - Small business designations
 - NAICS codes
 - Country of origin certifications
 - Many representations and certifications
- Seek certification as a veteran-owned small business or Historically Underutilized Business Zone (HUBZone) small business

IP

- Data vs Patents
- Patent
 - Government shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced for or on its behalf, the subject invention throughout the world.
 - Sometimes government inserts ownership clause
 - Sometimes contract required to transfer title for failure to report invention, elect ownership or maintain the patent
 - neither the Contractor nor any assignee shall grant to any person the exclusive right to use or sell any subject invention in the United States unless the person agrees that any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States.
 - Waiver available under certain circumstances

IP

- Patents (cont'd)
- March in rights to requiring licensing
 - action is necessary because the contractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;
 - action is necessary to alleviate health or safety needs;
 - action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the contractor, assignee, or licensees; or
 - action is necessary because the US manufacture agreement accompanying the grant of an exclusive rights license agreement required by section 204 has not been reached or is breached

IP

- Data
- Recorded information including trade secrets
 - Contractor generally owns data
 - Government generally receives unlimited rights in data and unrestricted rights in software developed under the Contract/developed exclusively at government expense
 - Limited rights in data and restricted rights in software products outside the contract/wholly at private expense that is delivered under the Contract and properly marked.
 - Limited rights data may have to be disclosed in the proposal
 - Marking and organized communication of data is key.
- DOD has third category of Government Purpose Rights for data developed with mixed funding
 - (i) Use, modify, reproduce, release, perform, display, or disclose technical data within the Government without restriction; and
 - (ii) Release or disclose technical data outside the Government and authorize persons to whom release or disclosure has been made to use, modify, reproduce, release, perform, display, or disclose that data for United States government purposes.

Terminations for Convenience

- Government can terminate at any time when in the government's interest
 - Mandatory
 - Read in to contract even when deliberately omitted by parties
 - Contractor receives costs incurred through termination and reasonable termination costs but not lost profits.
 - Government retains IP rights received under contract
 - Contractor needs to consider possible T/C when negotiating subcontracts

Changes

- The government has the unilateral right to change the contract in certain areas.
 - E.g., fixed price and cost reimbursement contracts
 - Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the Government in accordance with the drawings, designs, or specifications.
 - Method of shipment or packing.
 - Place of delivery.
 - E.g., time and materials contracts ... above plus
 - Description of services to be performed.
 - Time of performance (*i.e.*, hours of the day, days of the week, etc.).
 - Place of performance of the services.
 - Amount of Government-furnished property
- Contractor must continue to perform the contract, even if it would have vetoed the change given a choice.
- Entitled to an equitable adjustment in cost and schedule.
 - Timing – 30 days of written change order
 - Record keeping
 - Disputes

Contractor Acquired Government Property

- Contractor-acquired property means property acquired, fabricated, or otherwise provided by the Contractor for performing a contract, and to which the Government has title
- The Contractor shall use Government property, either furnished or acquired under this contract, only for performing this contract, unless otherwise provided for in this contract or approved by the Contracting Officer
- Under fixed price type contracts, in the absence of financing provisions or other specific requirements for passage of title in the contract, the Contractor retains title to all property acquired by the Contractor for use on the contract, except for property identified as a deliverable end item.
- Title to all other property, the cost of which is reimbursable to the Contractor, shall pass to and vest in the Government upon -
 - (A) Issuance of the property for use in contract performance;
 - (B) Commencement of processing of the property for use in contract performance; or
 - (C) Reimbursement of the cost of the property by the Government, whichever occurs first.
- Required property management systems.

Cost Accounting

- Generally for cost-reimbursement type contracts
- Government contracts required cost accounting may be different from tax accounting
 - Detailed and complex cost accounting rules
- Incurred cost audits may question or disallow costs after payment and result in recoupment
- Annual determination of approved indirect rates.
- Direct labor is the foundation for cost reimbursement
- Time keeping systems, SOPs and training are critical
- Significant financial and compliance risk

Classified Contracts

- Personal Clearances
- Facility Clearances
- Key Management Personnel US citizens
- Facility Security Officer
- Insider Threat Program Senior Official
- Foreign Ownership and Control
 - foreign interest has the power, direct or indirect, whether or not exercised, to direct or decide matters affecting the management or operations of the company in a manner which may result in unauthorized access to classified information or may affect adversely the performance of classified contracts
 - Reviewed as part of Facility Clearance
 - Complexity when there are corporate families
 - Complexity at change of control
 - E.g., Five percent (5%) or greater increase in the beneficial ownership of the business organization, as determined by voting or investment rights, by one or more foreign interests
 - Mitigation – Board Resolution, Security Control Agreement (foreign interest doesn't control but controls board seat – outside directors, government security committee, technology control officer), Special Security Agreement (owned or controlled by foreign entity), Proxy Agreement and Voting Trust

Cybersecurity

- FAR 52.204-21, Basic Safeguarding of Covered Contractor Information Systems
 - Requires basic safeguarding requirements for federal contractor information stored on contractor IT systems
 - Basic safeguarding requirements (15 requirements), select examples –
 - Limit information system access to authorized users, processes acting on behalf of authorized users, or devices (including other information systems)
 - Verify and control/limit connections to and use of external information systems.
 - Identify information system users, processes acting on behalf of users, or devices.
 - Authenticate (or verify) the identities of those users, processes, or devices, as a prerequisite to allowing access to organizational information systems
 - Limit physical access to organizational information systems, equipment, and the respective operating environments to authorized individuals
 - Update malicious code protection mechanisms when new releases are available.
 - Perform periodic scans of the information system and real-time scans of files from external sources as files are downloaded, opened, or executed

Cybersecurity

- DFARS 252.204-7012, Safeguarding Covered Defense Information and Cyber Incident Reporting
 - Basic requirements
 - NIST control framework
 - Cyber incident reporting
 - Flow downs
 - Ongoing compliance
 - Focus on the protection of controlled unclassified information (CUI) on a contractor's systems, including what constitutes this information and what steps should be taken to adequately safeguard it
 - DoD is moving to a third-party certification requirement for system assessments (CMMC)
 - Failing to comply with cybersecurity requirements can create False Claims Act liability

Cybersecurity

- DFARS 252.204-7012, What is “CUI”?
 - Information of such sensitivity as to warrant placing degree of control over its use and dissemination – can be technical or operational
 - Includes –
 - “For Official Use Only” information
 - “Sensitive But Unclassified” information
 - DOD Unclassified Controlled Nuclear Information
 - “Sensitive Information”
 - Information contained in technical documents
 - Export controlled information

Subcontracting

- May require government consent
- Scope of subcontract work may be limited in small business set aside prime contracts.
- Requirement administration and oversight
- Must include flow down clauses
 - Clauses from prime contract that are incorporated in the subcontract
 - Two types –
 - Mandatory – the contractor **shall** include the substance of this clause... (e.g., equal opportunity obligations)
 - Discretionary – necessary for the contractor to comply with its contractual obligations but not required (e.g., foreign sourcing requirements)
 - Flowdown clauses frequently triggered by subcontract dollar value threshold

Subcontracting

- What flow downs are Required?
 - Different requirements for different type of subcontracts:
 - Commercial Item – limited list in FAR 52.212-5(e) or 52.244-6 depending on type of prime contract
 - Fixed Price
 - Time & Materials
 - Cost Reimbursement
 - Cost-Plus-Fixed-Fee
 - Could be additional clauses in the prime contract that must be included in subcontracts
 - Must read the contract to understand required flowdowns

Country of Origin/Domestic Sourcing/Supply Chain

- Generally triggered by contract dollar value
- Buy American Act
 - Domestic end product is *manufactured in the US*, where cost of components mined, produced, or manufactured in the United States exceeds 55 percent of the cost of all its components (different if predominately of iron and/or steel)
 - Except that the component test is waived for commercial off the shelf products (subset of commercial items)
 - Non availability exception (government right)
- Trade Agreements Act (above @ \$180,000))
 - Price disadvantage against domestic end products waived for designated countries
 - Purchase of products of non-designated countries prohibited
 - Non availability exception (government right) have price preference
- “Counterfeit Parts” regulations requiring policies and systems to trace electronic parts included in end items delivered to the government
- Recent bans on inclusion of Kaspersky, Huawei and ZTE products and services in government contracts

Questions?



Save The Date

A scenic view of the Washington, DC skyline, featuring several prominent skyscrapers and modern buildings. In the foreground, there are lush green trees and a row of blooming cherry blossom trees along a waterfront. The sky is clear and blue.

WASHINGTON, DC

STARTUP & ACCELERATE SERIES

**Building a Better Team:
Employee Onboarding and Benefit Options**

Thursday, August 12 @ 12:30pm

Biography



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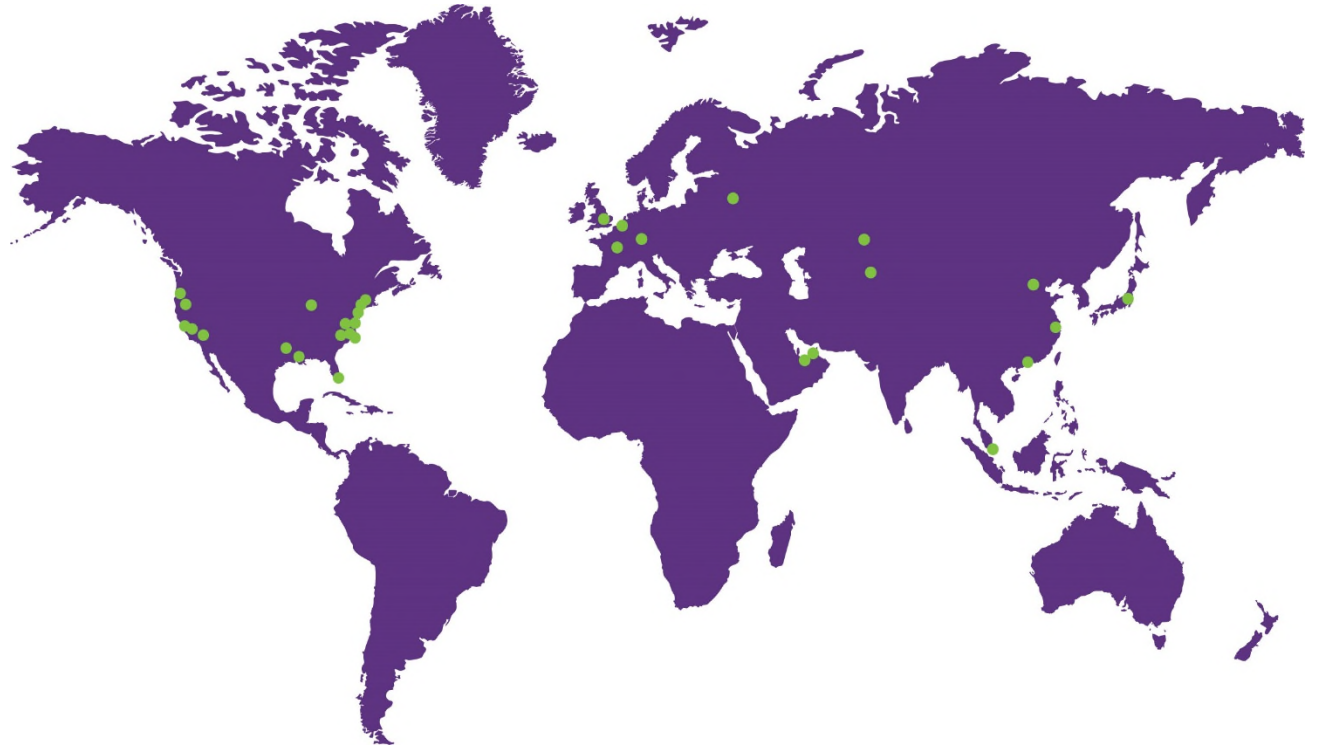
Stephen E. Ruscus represents clients in government contracts procurement, US federal drug pricing programs, and in litigation before the Boards of Contract Appeals, the US Court of Federal Claims, and the US Government Accountability Office (GAO). He also advises in protest practice before the US Small Business Administration and in matters relating to federal procurement of commercial items and services, including those under Federal Supply Schedule contracts.

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

Abu Dhabi
Almaty
Beijing
Boston
Brussels
Century City
Chicago
Dallas
Dubai
Frankfurt
Hartford
Hong Kong
Houston
London
Los Angeles
Miami
Moscow
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