



CONSIDERATIONS FOR COMPANIES ENTERING THE FEDERAL CONTRACTING SPACE

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AGENDA

- Why Contract With The Federal Government?
- What's Different About Contracting With The Federal Government?
 - General Differences
 - Criminal/Civil/Administrative Penalties
 - “Commercial Item” v. Non-Commercial Item Contracts
 - Audit & Oversight
 - Strict v. Substantial Performance
 - Unilateral Changes
 - Terminations For Convenience
 - Accounting And Pricing Requirements
 - Dispute Resolution

WHY CONTRACT WITH THE FEDERAL GOVERNMENT?

- Largest buyer of goods and services in the world
 - Even during recessions/economic downturns, the Government is still purchasing goods and services
 - Set aside contracts for small/disadvantaged businesses to reduce competition and barriers to entry
- Revenue benefits
 - Steady customer
 - Recover costs of running your business (e.g., overhead, G&A)
 - Portfolio diversification
- Cash flow benefits
 - Very low risk for payment default
 - Timely collections of accounts receivable

COVID-19 FEDERAL CONTRACTING ENVIRONMENT

- Significant opportunities to enter into or expand footprint with Government due to increased Federal spending in response to COVID-19
- Coronavirus Aid, Relief and Economic Security (CARES Act) - \$2.2 trillion to enhance economy and support national security supply chain
- Top agency funding under CARES Act
 - Departments of Labor (DOL), Health and Human Services (HHS), Education and Related Agencies: \$172.1B
 - Departments of Transportation and Housing: \$48.5B
 - Department of Homeland Security: \$45.9B
- Defense Production Act (DPA) – requires contractors/private businesses to prioritize Government contracts for national security (e.g., medical equipment and supplies) over other contracts

WHAT'S DIFFERENT ABOUT CONTRACTING WITH THE GOVERNMENT?

- General Differences
- Criminal/Civil/Administrative Penalties
- “Commercial Item” v. Non-Commercial Item Contracts
- Audit & Oversight
- Strict v. Substantial Performance
- Unilateral Changes
- Terminations for Convenience
- Accounting and Pricing Requirements
- Dispute Resolution

GENERAL DIFFERENCES

- Inability to Negotiate Many Terms and Conditions
 - Many terms are prescribed by regulation (the “Federal Acquisition Regulation” or “FAR” and the various agency FAR supplements) and are not subject to negotiation.
 - Many FAR terms and conditions address accountability and transparency concerns that do not apply to private entities.
 - Limitations on the Government’s liability (e.g., availability of funds)
 - Contracting officer notice and approval
 - Under the so-called “*Christian Doctrine*,” mandatory clauses that expresses a significant or deeply ingrained strand of public procurement policy are read into contracts by operation of law, even if the clause is not in the contract. *G. L. Christian & Associates v. United States*, 312 F.2d 418 (Ct. Cl. 1963).
 - Clauses included in a contract in violation of a statute or regulation may be read out of a contract. *Empresa de Viacao Terceireense*, ASBCA No. 49827, 00-1 BCA ¶ 30,796.

GENERAL DIFFERENCES

- Inability to Negotiate Many Terms and Conditions (cont'd)
 - Statutory/regulatory competition requirements further limit opportunities for negotiation of contract terms.
 - Agencies usually must solicit proposals and evaluate proposals against the solicitation.
 - A proposal that takes exception to a solicitation's terms may not be acceptable absent a revision to the solicitation that notifies all other offerors that the stated term will be waived.
 - One benefit of standardized, regulatory contract terms is a body of caselaw interpreting and applying those terms, as well as regulatory history explaining their origin and evolution.

GENERAL DIFFERENCES

■ Sources of Contract Law

1. Federal procurement statutes & regulations, including the FAR system
 - Federal statutes and regulations preempt contract terms and commercial law.
2. The Contract
3. Precedential and persuasive interpretations of procurement law and similar contract language
 - Many of the tribunals that adjudicate Federal Government contract disputes do not adjudicate private contract disputes (e.g., the U.S. Court of Federal Claims v. U.S. District Courts), resulting in different approaches to similar terms and concepts.
4. Commercial contract law
 - “If [the Government] comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there.” *Cooke v. United States*, 91 U.S. 389, 398 (1875).
 - When all else fails, look to the *Restatement (Second) of Contracts*. E.g., *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604, 608 (2000).
5. Non-procurement statutes, regulations, and caselaw
6. Agency policy guidance (e.g., DCAA CAM)

GENERAL DIFFERENCES

- Government Authority
 - Federal law places strict limits on the authority of Government officials to make contractually binding commitments.
 - Usually only Contracting Officers can incur contractual obligations (not Contracting Officer's Representatives).
 - However, most Contracting Officers are organizationally separate from the Government entity that is the “customer” of the supplies/services being purchased and that may be providing day-to-day direction regarding contract performance.
 - The Government is bound only by Government agents acting within the actual scope of their authority to contract. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947).
 - Actual authority can usually be determined by viewing a Contracting Officer's warrant or a COR's letter of appointment.
 - Acts of Government agents which exceed their contracting authority do not bind the Government, regardless of whether an individual relying on that agent understood the limits of his/her authority.
 - Actual authority can be implied if it is an inherent or integral part of the agent's express authority.
 - No apparent authority, *i.e.*, no authority based on reasonable perceptions regarding how an agent holds himself out to the public.

GENERAL DIFFERENCES

■ Availability of Appropriations

- “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law” U.S. Const., Art. I, Sect. 9, Cl. 7.
- Congressional appropriations contain *time* and *purpose* limitations, and Executive agencies do not have authority to expend funds in fiscal years or for purposes other than those designated by Congress.
 - Most appropriations are annual, and therefore most contracts are structured to include a base period ≤ 1 year and annual options.
 - Contracts may be awarded in advance of the availability of appropriated funds, but are expressly conditioned on the availability of funds.
 - Options are typically discretionary, and need not be exercised even if appropriated funds are available.
 - Agencies cannot use money from one appropriation to fund a contract that serves a purpose that is different from the purpose designated in the appropriation.
- The Antideficiency Act, 31 U.S.C. §§ 1341 *et al.*, makes it a crime for Federal employees to make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.

GENERAL DIFFERENCES – CONTRACT CLOSEOUT

- There is a formal process to closeout Government contracts.
- Contract closeout occurs when a contractor has met all the terms of a contract, all administrative actions have been completed, all disputes have been settled, and final payment has been made.
- The procedures for contract closeout are located at FAR 4.804.
- Contracts using simplified acquisition procedures should be considered closed when the Contracting Officer receives evidence of receipt of property and final payment, unless otherwise specified by agency regulations.
- Time standards for closing out contract files are found in FAR 4.804 (see chart on next slide). The length of time required to close a contract is different depending on contract type.
- Quick closeout procedures (FAR 42.708) should be used by the Government - when appropriate - to reduce administrative costs and to enable de-obligation of excess funds.

GENERAL DIFFERENCES – CONTRACT CLOSEOUT (CONT)

Standard Closeout Timeframes (FAR 4.804)	
Timeframes	MOCAS Codes and Contract Types
6 Months	J FIRM FIXED PRICE
36 Months	L FIXED PRICE INCENTIVE R COST-PLUS AWARD FEE S COST CONTRACT T COST SHARING U COST-PLUS-FIXED-FEE V COST PLUS INCENTIVE FEE Y TIME AND MATERIALS Z LABOR HOUR
20 Months	A FIXED PRICE REDETERMINATION K FIXED PRICE W/ECONOMIC PRICE ADJUSTMENT O OTHER – BASIC ORDERING AGREEMENT/BLANKET PURCHASE AGREEMENT (BOA/BPA)

****MOCAS is Mechanization of Contract Administration Services; It is an integrated system supporting post award administration and contract payment.**

GENERAL DIFFERENCES – PROGRESS PAYMENTS

- FAR 32.501-1 – Progress Payments Based on Cost
 - “(a) The customary progress payment rate is 80 percent, applicable to the total costs of performing the contract. The customary rate for contracts with small business concerns is 85 percent.”
 - Payment is limited to supplies/services that have been paid or will be paid by the contractor in accordance with terms and conditions of subcontract or vendor invoice; and paid within 30 days of contractor payment request to Government.
 - Contractor should only invoice costs that are reasonable, allocable to the contract and consistent with generally accepted accounting principles and practices.

- Applies to fixed price contracts.
- Allows for “unusual” progress payments in limited circumstances.
- Defines “contract price” for the calculation of progress payment amounts.

GENERAL DIFFERENCES – PERFORMANCE-BASED PAYMENTS

- FAR 32.1001 – Performance-Based Payments
 - Performance-based payments are the preferred Government financing method when the contracting officer finds them practical, and the contractor agrees to their use.
 - Performance-based payments are fully recoverable, in the same manner as progress payments, in the event of default.
 - Payments are based on defined performance criteria versus cost accumulation.
 - Applies to fixed price contracts.

- Performance-based payments may be made on any of the following bases
 - Performance measured by objective, quantifiable methods.
 - Accomplishment of defined events.
 - Other quantifiable measures of results.

GENERAL DIFFERENCES – CONTRACT TYPES AND VEHICLES

- Firm Fixed Price
 - Based on a fixed pre-determined price.
 - Contractor assumes risk for controlling costs.
 - Common for commercial item acquisition under FAR Part 12.

- Cost Reimbursement
 - Reimbursed for allowable, reasonable incurred costs.
 - Government assumes risk for controlling costs.
 - High administrative/compliance burden.

- Indefinite Delivery Indefinite Quantity (IDIQ) Contract Vehicle
 - Definite Quantity: delivery of definite quantity of supplies or service for a fixed period.
 - Indefinite Quantity: delivery of indefinite quantity of supplies or services for a fixed period.
 - Indefinite quantity includes minimum and maximum quantity limits.

GENERAL DIFFERENCES – CONTRACT TYPES AND VEHICLES (CONT)

- Governmentwide Acquisition Contracts (GWACs)
 - Pre-competed, multiple award IDIQ contracts.
 - Used to provide IT solutions such as systems design, software engineering, information assurance, enterprise architecture solutions.
- GSA Schedules – Federal Supply Schedule (FSS)/Multiple Award Schedules (MAS)
 - Negotiated terms and conditions under FAR Part 12.
 - Streamlined ordering procedures.

CRIMINAL/CIVIL/ADMINISTRATIVE PENALTIES

- Criminal
 - False Claims Act, 18 U.S.C. § 287
 - Conspiracy to Defraud the United States, 18 U.S.C. §§ 286, 371
 - False Statement Act, 18 U.S.C. § 1001
 - Major Fraud Act, 18 U.S.C. § 1031
 - Mail and Wire Fraud, 18 U.S.C. §§ 1341-43
 - Anti-Kickback Act, 41 U.S.C. §§ 8701-8707 (also imposes civil and administrative penalties)
 - Procurement Integrity Act, 41 U.S.C. §§ 2101-2107 (also imposes civil and administrative penalties)
- Civil
 - False Claims Act, 10 U.S.C. §§ 3729-33
 - Program Fraud Civil Remedies Act, 31 U.S.C. §§ 3801-3812
 - Truthful Cost or Pricing Data (f/k/a “Truth in Negotiations Act” or “TINA”), 10 U.S.C. § 2306a; 41 U.S.C. §§ 3501-3509
- Administrative
 - Suspension/debarment
 - Penalties for unallowable cost, FAR 42.709

The above list is not exhaustive.

CRIMINAL/CIVIL/ADMINISTRATIVE PENALTIES

- False Claims Act, 10 U.S.C. § § 3729-33
 - The False Claims Act (FCA) has been the U.S. Government’s primary legal tool for combatting fraud in Federal programs.
 - The U.S. Department of Justice recovered over \$3 billion under the FCA in 2019, and has recovered an average of nearly \$2.5 billion per year since 2006.
 - The FCA imposes civil liability on an individual or company that:
 - Knowingly presents, or causes to be presented, a materially false or fraudulent claim for payment or approval,
 - Knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim, or
 - Knowingly making false records to avoid or decrease an obligation to pay the Government (“reverse false claim”).

CRIMINAL/CIVIL/ADMINISTRATIVE PENALTIES

- False Claims Act (cont'd)

- The FCA allows for civil actions by the Federal Government, as well as “qui tam” actions by persons and entities with evidence of fraud, known as “relators,” who sue on behalf of the Government.
 - In qui tam actions, the Government has the right to intervene and join the action.
 - If the Government declines to intervene, the private plaintiff may proceed on his/her own.
- The FCA is a civil statute, but provides for the heavy penalties that make it quasi-criminal in nature:
 - Treble damages
 - Civil penalties of \$11,181 to \$22,363 for each violation
 - Relator’s attorney’s fees and expenses.

COMMERCIAL V. NON-COMMERCIAL CONTRACTS

- The value of a contract and whether the contract is for “commercial items” dictate the specific provisions of the FAR that apply.
- The Federal Acquisition Streamlining Act (FASA) establishes a preference for purchasing commercial items on standard commercial terms to satisfy requirements.
- Commercial items are supplies that are customarily used by the general public or by non-Government entities for purposes other than Government purposes, or services sold competitively in substantial quantities in the commercial marketplace based on established catalogue or market prices for specific tasks performed.
- Commercial item contracts are governed by FAR Part 12, which establishes acquisition policies more closely resembling those of the commercial marketplace.

AUDIT & OVERSIGHT

- Government contractors are subject to audit and oversight by multiple Government entities:
 - Generally, the Comptroller General (GAO) “shall have access to and the right to examine any of the Contractor’s directly pertinent records involving transactions related to this contract or a subcontract hereunder and to interview any current employee regarding such transactions” FAR 52.215-2(d)(1); *accord* FAR 52.212-5(d) (commercial item contracts).
 - For flexibly priced contracts (e.g., cost-reimbursement, labor hour, time & materials, etc.), the Contracting Officer “shall have the right to examine and audit all records and other evidence sufficient to reflect properly all costs claimed to have been incurred or anticipated to be incurred directly or indirectly in performance of this contract.” FAR 52.215-2(b).
 - FAR inspection clauses (FAR 52.246-2 et seq. & FAR 52.212-4) generally allow the Government to inspect supplies and services at the contractor’s facilities.
 - Inspectors General, the Department of Justice, GAO, and Congressional Committees have authority to issue a variety of subpoenas and other compulsory process against contractors.
- Recordkeeping requirements
 - FAR 4.703(a) generally requires Government contractors to retain documents and make them available to the Government for three years after final payment, unless a longer period is specified in a particular contract. *Accord* FAR 52.212-5(d) (commercial item contracts).

STRICT V. SUBSTANTIAL PERFORMANCE

- Government generally entitled to strict compliance.
- No common law “substantial performance” rule.
- Courts recognize a limited “substantial compliance” defense to a default termination where:
 - Delivery was timely;
 - Contractor believed in good faith that it complied with the contract’s requirements;
 - Defects are minor and can be corrected within a reasonable time; and
 - Time is not of the essence.

Radiation Tech., Inc. v. U.S., 366 F.2d 1003 (Ct. Cl. 1966).

- Exception only entitles contractor to a reasonable time to correct defects.

UNILATERAL CHANGES

- The “Changes” clauses in Government contracts generally allow the Government to unilaterally add, subtract, or modify the work required by the contract. FAR 52.243-1 *et seq.*
- The Changes clauses provide that, “[i]f any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.” FAR 52.243-1(b).
- Failure to agree on an equitable adjustment is a dispute; however, the contractor must perform the contract as changed pending resolution of the dispute. FAR 52.243-1(e).
- “Constructive changes” occur when the Government, through action or inaction, intentionally or unintentionally, imposes a change without invoking a Changes clause.
 - Contract interpretation disputes over the scope of work are often resolved as constructive changes.

UNILATERAL CHANGES

- Only the contracting officer can issue changes that bind the Government.
- Contractor's must notify the contracting officer of alleged changes to confirm whether the Government is officially ordering the change.
- Changes must be “within the general scope” of the contract.
 - Test is whether the change could objectively have been within the contemplation of contractors responding to the original solicitation; “cardinal” (out-of-scope) changes must be the subject of a new solicitation.
- The changes clause may not be used to unilaterally change the commercial terms of a contract, including payment and warranty terms.

TERMINATIONS FOR CONVENIENCE

- Gives Government the right to unilaterally terminate a contract at any time/for nearly any reason.
- Terminations for convenience provisions allow for contractors to recover allowable costs associated with the termination (e.g., severance costs associated with terminated employees).
- After termination, a final termination settlement proposal should be submitted by the contractor.
- Special cost principle for termination costs at FAR 31.205-42.

ACCOUNTING AND PRICING REQUIREMENTS

- All information voluntarily submitted must be truthful—See Criminal/Civil/Administrative Penalties
- Many solicitations require the submission of specific cost or pricing information
- Certain contracts are subject to the Truthful Cost or Pricing Data statute (a/k/a the “Truth in Negotiations Act” or “TINA”)
- Many solicitations require compliance with the Cost Principles found in FAR Part 31
- Other contracts are subject to the Cost Accounting Standards (“CAS”)

ACCOUNTING AND PRICING REQUIREMENT - TINA

- TINA was intended to level the playing field between contractors and the Government by giving Government negotiators access to the cost and pricing data (e.g., factual, verifiable information) reasonably available to the contractor at the time of bid submission.
- When applicable, TINA requires:
 - Contractors to disclose cost or pricing data and to certify that such data are accurate, complete, and current; and
 - Prime contracts include a provision for a **downward price adjustment** if the negotiated price is significantly higher as a result of **“defective” cost or pricing data**.
- Knowledge of defective data or intent to defectively price is not required for a TINA violation.
- TINA violation can also result in other ramifications such as suspension or debarment, fraud investigations, allegations of false claims.

ACCOUNTING AND PRICING REQUIREMENTS – TINA (CONT)

- The TINA threshold for obtaining certified cost or pricing data is negotiated procurements of \$2,000,000 or more.
- TINA exemptions
 - Prices based on adequate price competition
 - Prices set by law or regulation
 - Commercial items (FAR part 12)
 - Waiver granted by head of contracting agency
- Prime contractor is responsible for obtaining certificate of cost or pricing data from subcontractor(s) if no exemption exists.

ACCOUNTING AND PRICING REQUIREMENTS – FAR PART 31

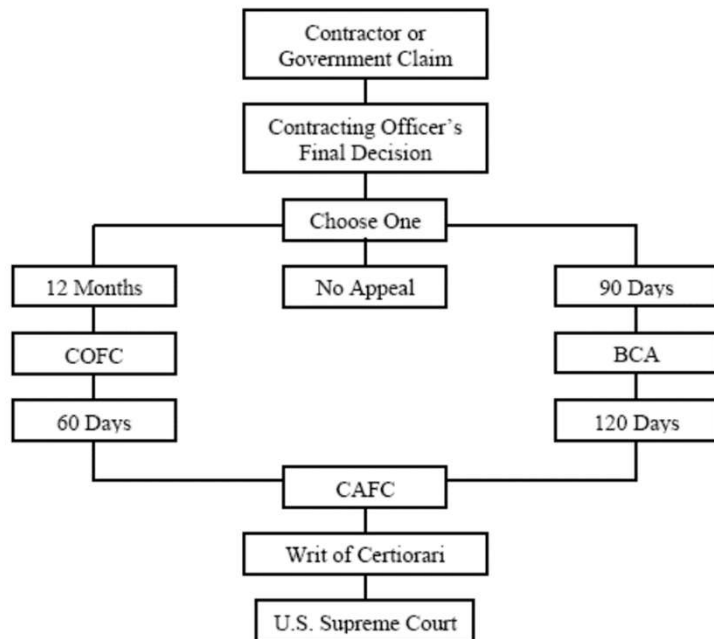
- The pricing of certain contracts is subject to the cost principles stated in FAR Part 31
- Broadly speaking, FAR Part 31 covers:
 - Cost accounting requirements (similar to managerial accounting and distinct from financial and tax accounting)
 - Project based accounting (distinct from cost center based accounting)
 - Allowable and unallowable costs
 - Direct and indirect costs
 - Certain concepts related to the pooling and allocation of indirect costs

ACCOUNTING AND PRICING REQUIREMENTS - CAS

- The Cost Accounting Standards (CAS) govern the measurement, assignment, and allocation of costs to certain types of Government contracts
- Generally speaking, CAS may apply to negotiated contracts of significant value
 - Exemptions from CAS stipulated in 48 CFR 9903.201
- May require disclosure of contractor cost accounting practices for cost estimation and cost accumulation
- 19 standards in total
- Two types of coverage: full (all 19 standards) and modified (4 standards)

DISPUTE RESOLUTION

The Disputes Process



- Contract Disputes Act, 41 U.S.C. §§ 7101-7109, and the Disputes Clause, FAR 52.233-1
 - “Claim” defined—sum certain/adjustment of contract terms
 - Six year statute of limitations
 - Certification requirement for claims \geq \$100K
 - CO Decision FINAL unless appealed
 - CDA Interest
 - Obligation to Proceed

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