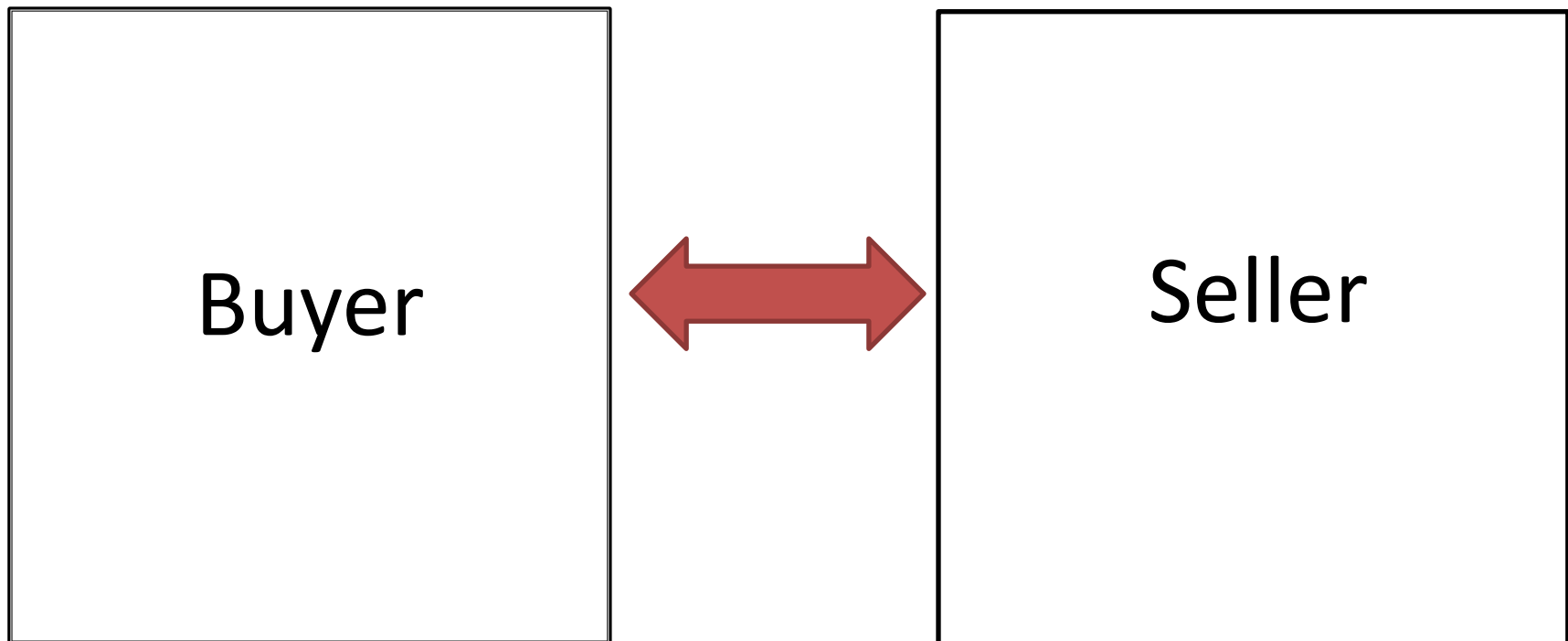


Government  
Contracts  
BACK TO BASICS

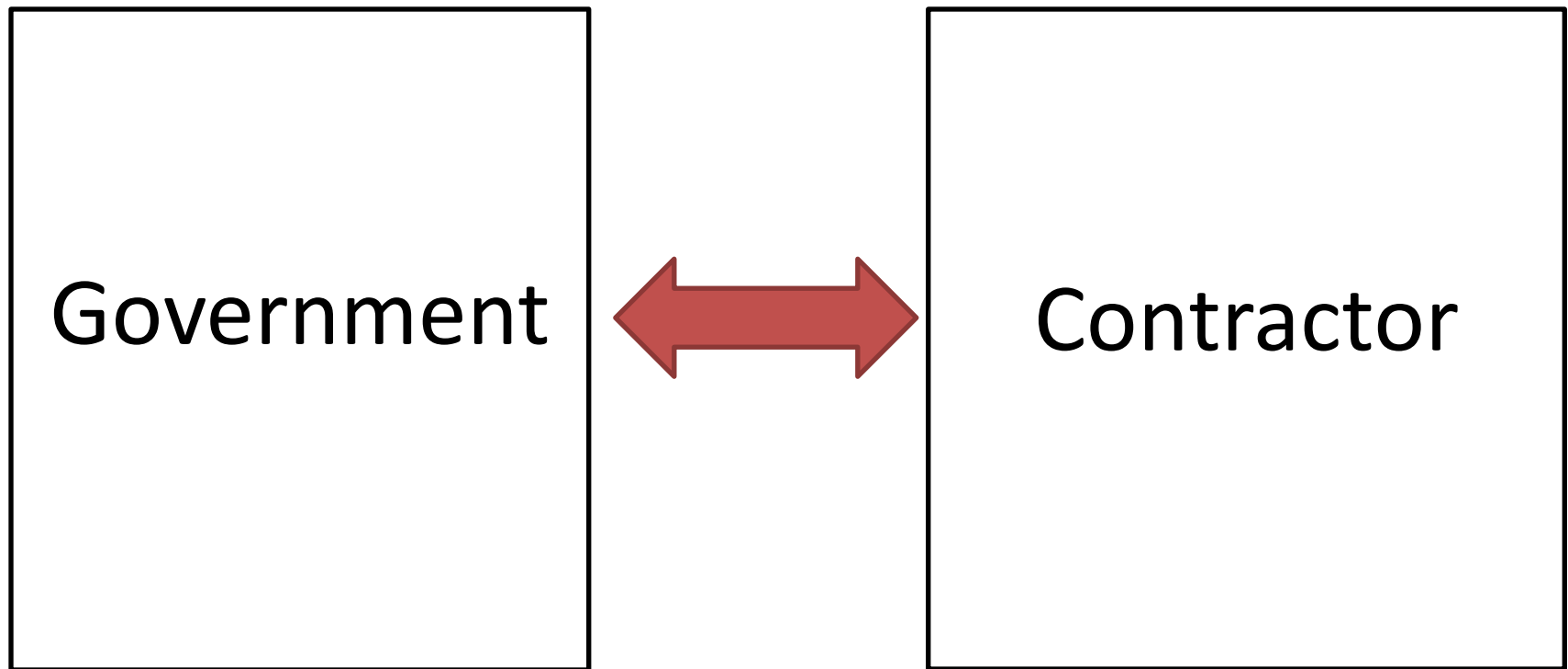
# WELCOME AND OVERVIEW

**Peter J. Eyre**

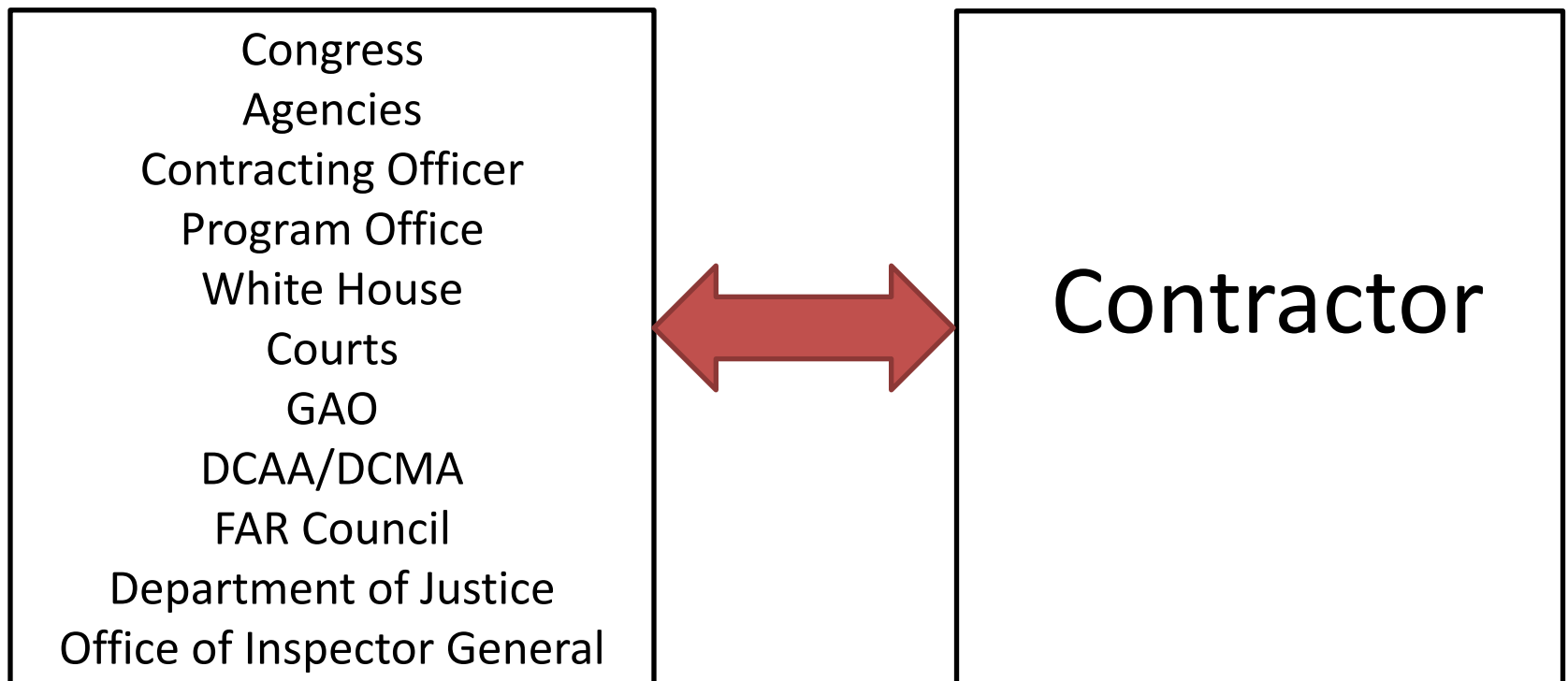
# Commercial Transaction



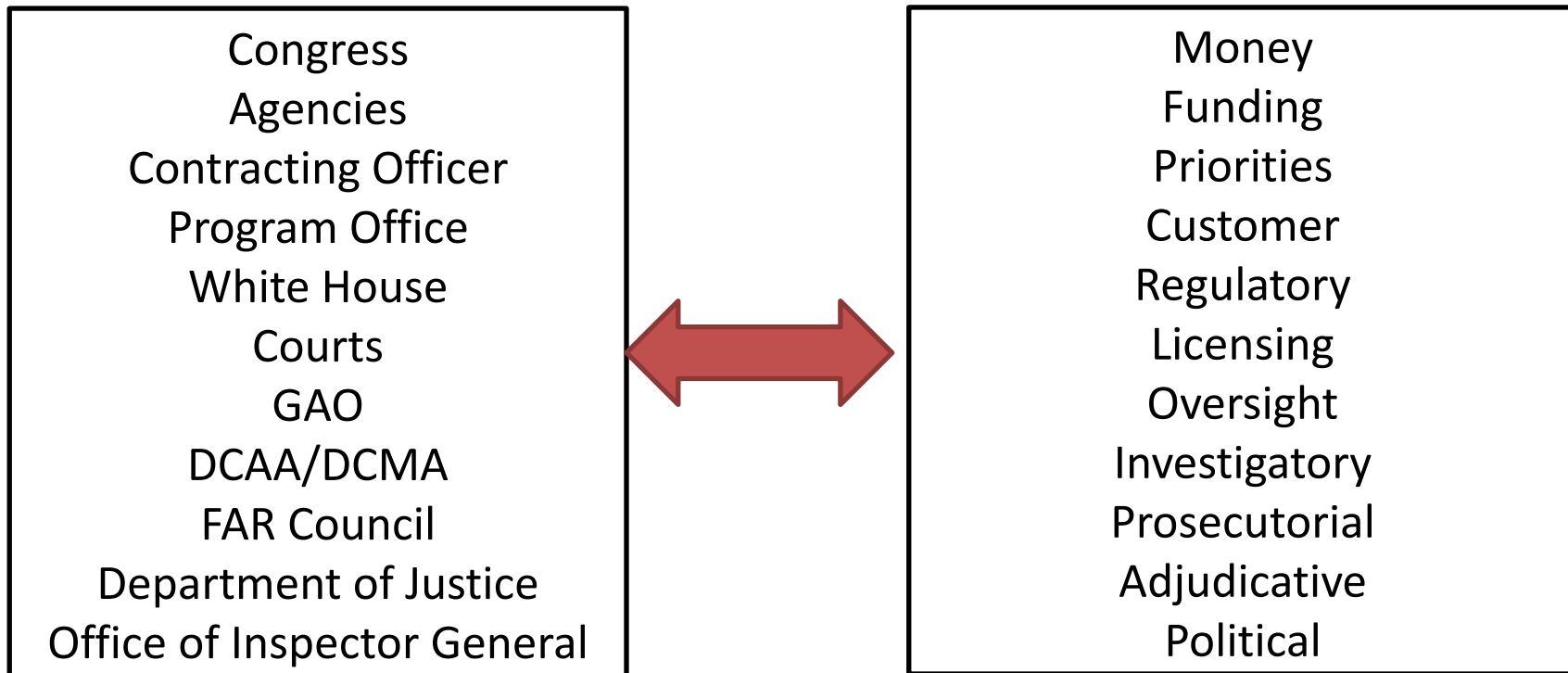
# Government Contracts Transaction



# Government Contracts Transaction



# The Government Plays Many Roles



# The Landscape

- U.S. Government purchases more than \$500 billion/year from the private sector
- Lots of opportunities as a prime or lower tier contractor



# Public Sector Contracts Are Unique

- Special statutes, regulations, and contract terms, e.g.,:
  - Convenience terminations
  - Unilateral changes
  - Certain terms unenforceable
  - Implementation of social policies
- Litigation limits (sovereign immunity)
- Limitations on authorized representatives

# Government Enforcement Tools

- Audits and investigations
  - IGs, DOJ, FBI, DCAA
- Federal & State Statutes
  - False Claims Acts
  - False Statements Acts
- Civil False Claims Act
- Mandatory Disclosure
- Suspension & Debarment
- Contract Termination
- Past Performance Reviews





# Agenda

- Foundational Statutes and the FAR
- Source Selection and Bid Protests
- Ethics and Compliance
- Costs and Pricing
- Commercial Item Contracting
- Intellectual Property
- Cybersecurity
- Changes, Claims, and Terminations

# QUESTIONS?

Peter Eyre  
[peyre@crowell.com](mailto:peyre@crowell.com)  
(202) 624-2807

# CONCEPTS, STATUTES & REGULATORY FRAMEWORK

**Alan W. H. Gourley**  
**Mark Ries**  
**Yuan Zhou**

## Foundational Concepts

“When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.”

*Lynch v. United States*, 292 U.S. 571, 579  
(1934)

# Foundational Concepts

“Men must turn square corners when they deal with the Government.” *Rock Island, A. & L. R. Co.*, 254 U.S. 141, 143 (1920)

**But:**

“[T]here is no reason why the square corners should constitute a one-way street.” *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 388 (1947) (J. Jackson *dissenting*)

“While it is true enough, . . . , that one who deals with the Government may need to ‘turn square corners,’ . . . , he need not turn them twice.” *United States v. Winstar Corp.*, 518 U.S. 839, 922 (1996) (J. Scalia *concurring*)

## Legal Authority to Contract

- Well established that Government has plenary authority to contract.
- BUT:
  - Sovereign is generally immune from suit
  - Congress controls the purse
  - Limits on authority

## Limits on Authority – Agency

- Statutory restrictions must be followed
  - *Christian Doctrine*
- Consequences of “illegal” contract:
  - *Void ab initio*
  - Voidable

## Limits on Authority – Personnel

“The Government is too vast, its operation too varied and intricate, to put it to risk of losing that which it holds for the nation as a whole because of the oversight of subordinate officials.” *Montana Power Co. v. Federal Power Comm.*, 185 F.2d 491, 497 (D.C. Cir. 1950)

- Government agents must have actual authority;
- Agency concept of apparent authority does not apply to agents of the government.
- “It is well-settled, however, that government officials are presumed to act conscientiously and in good faith in the discharge of their duties.” *L.P. Consulting Group, Inc.*, 66 Fed. Cl. 238 (2005).



# Appropriations

- Anti-Deficiency Act – USG must have available appropriations in order to commit funds for procurement
- Impoundment
  - Procedures for compelling Executive to spend funds appropriated

## Challenging Government Actions

- Waivers of sovereign immunity
  - limited
- Sovereign Acts Doctrine – when is USG performance excused because of legislative or regulatory action. *See United States v. Winstar Corp., supra*

## Challenging Government Actions

- Challenging administrative actions that unfavorably impact government performance:
  - *Bowen v. Massachusetts*, 487 U.S. 879 (1988)
  - *Megapulse, Inc. v. Lewis*, 672 F.2d 959 (D.C. Cir. 1982)

# Foundational Statutes

# Foundational Statutes (sampling)

## Basic Procurement Statutes

- Armed Services Procurement Act (“ASPA”) of 1947, Title 10
- Federal Property and Administrative Service Act (“FPASA”), Title 41

## Evolutionary Procurement Statutes

- Office of Federal Procurement Policy Act
- Competition in Contracting Act (“CICA”) of 1984
- Federal Acquisition Streamlining Act (“FASA”), 1994

## Longstanding Regulatory Statutes

- Anti-Assignment Act
- Buy American Act of 1933 (“BAA”)
- Truth in Negotiations Act of 1962 (“TINA”)
- Defense Production Act of 1950

# Foundational Statutes (sampling)

## Integrity Statutes

- False Claims Act (“FCA”)
- Procurement Integrity Act (“PIA”)
- Anti-Kickback Act

## Jurisdictional Statutes

- Tucker Act
- Contract Disputes Act (“CDA”) of 1978

## Specialized (Socio-Economic) Statutes (Just a Few Examples)

- Small Business Act (“SBA”)
- Service Contract Act (“SCA”)
- Javits-Wagner-O’Day Act (“Ability One”)

## Annual Authorization and Appropriation Acts

# Governing Regulations: How the FAR Works

# Federal Acquisition Regulation (FAR)

- Formally published in Code of Federal Regulations (CFR) at Title 48, Chapter 1
- Establishes uniform policies and procedures for acquisition by all federal agencies
- Basic regulation applicable to acquisition of supplies and services
- “Contracting by regulation” – 90% or more of the clauses in government contracts are prescribed by regulation
- Nearly 2,000 pages

VOLUME I—PARTS 1 TO 51

## FEDERAL ACQUISITION REGULATION

ISSUED MARCH 2005 BY THE:  
GENERAL SERVICES ADMINISTRATION  
DEPARTMENT OF DEFENSE  
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION



# Organization of the FAR

- Subchapter A – General
  - Part 1 – FAR System
  - Part 2 – Definitions of words and terms
  - Part 3 – Improper Business Practices & PCI
  - Part 4 – Administrative Matters
- Subchapter B – Competition and Acquisition Planning
  - Part 5 – Publicizing Contract Actions
  - Part 6 – Competition Requirements
  - Part 7 – Acquisition Planning
  - Part 8 – Required Sources of Supplies and Services
  - Part 9 – Contractor Qualifications
  - Part 10 – Market Research
  - Part 11 – Describing Agency Needs
  - Part 12 – Acquisition of commercial items

# Organization of the FAR

- Subchapter C – Contracting Methods and Contract Types
  - Part 13 – Simplified Acquisition Procedures
  - Part 14 – Sealed Bidding
  - Part 15 – Contracting by Negotiation
  - Part 16 – Types of Contracts
  - Part 17 – Special Contracting Methods
  - Part 18 – Emergency Acquisitions
- Subchapter D – Socioeconomic Programs
  - Part 19 – Small Business Programs
  - Part 22 – Application of Labor Law to Gov Acquisitions
  - Part 23 – Environment, Occupational Safety, Drug-Free
  - Part 24 – Protection of Privacy and Freedom of Information
  - Part 25 – Foreign Acquisition
  - Part 26 – Other Socioeconomic Programs

## Organization of the FAR

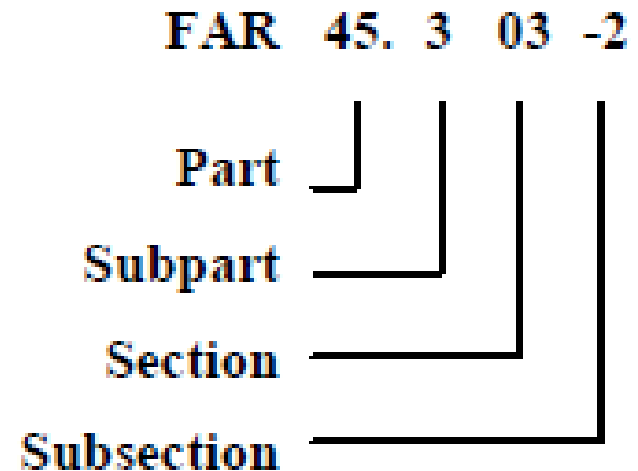
- Subchapter E – General Contracting Requirements
  - Part 27 – Patents, Data, and Copyrights
  - Part 28 – Bonds and Insurance
  - Part 29 – Taxes
  - Part 30 – Cost Accounting Standards Administration
  - Part 31 – Cost Accounting Standards (CAS)
  - Part 32 – Contract Financing
  - Part 33 – Protests, Disputes, and Appeals
- Subchapter F – Special Categories of Contracting
  - Part 34 – Major System Acquisition
  - Part 35 – Research and Development Contracting
  - Part 36 – Construction and A&E Contracts
  - Part 37 – Service Contracting
  - Part 38 – Federal Supply Schedule Contracting
  - Part 39 – Acquisition of Information Technology
  - Part 41 – Acquisition of Utility Services

# Organization of the FAR

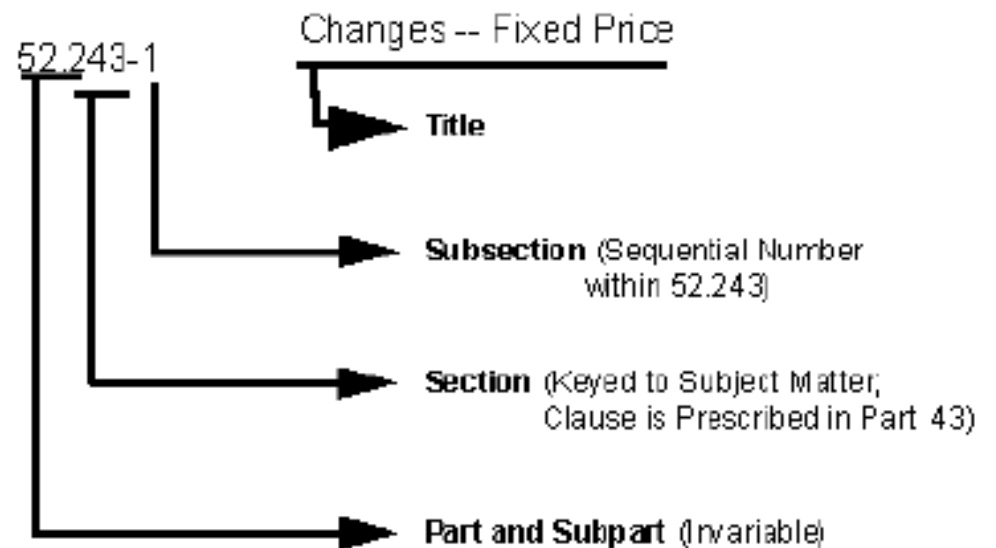
- Subchapter G – Contract Management
  - Part 42 – Contract Administration and Audit Services
  - Part 43 – Contract Modifications
  - Part 44 – Subcontracting Policies and Procedures
  - Part 45 – Government Property
  - Part 46 – Quality Assurance
  - Part 47 – Transportation
  - Part 48 – Value Engineering
  - Part 49 – Termination of Contracts
  - Part 50 – Extraordinary Contractual Actions
  - Part 51 – Use of Government Resources by Contractors
- Subchapter H – Clauses and Forms
  - Part 52 – Solicitation Provisions and Contract Clauses
  - Part 53 – Forms

# Organization of the FAR

- Citing the FAR:



- Standard provisions and clauses numbered 52. 2 xx -xx



# Agency Supplements

Ch. Agency/Department

- 2 Defense
- 3 Health & Human Servs.
- 4 Agriculture
- 5 General Servs Admin
- 6 State
- 7 Agency for Int'l Dev
- 8 Veterans Affairs
- 9 Energy
- 10 Treasury
- 12 Transportation
- 13 Commerce
- 14 Interior
- 15 Environ Protection Agency
- 16 OPM – Fed EE Health Benes
- 17 Office of Personnel Mgmt

Ch. Agency/Department

- 18 Nat'l Aero & Space Admin
- 19 Broadcasting Bd of Governors
- 20 Nuclear Reg Commission
- 21 OPM – Fed Emp Gp Life Ins
- 23 Social Security Admin
- 24 Housing & Urban Dev
- 25 Nat'l Science Foundation
- 28 Justice
- 29 Labor
- 30 Homeland Security
- 34 Education
- 44 Fed Emergency Mgmt Agency
- 51 Army (“AFARS”)
- 52 Navy (“NMCARS”)
- 53 Air Force (“AFFARS”)
- 54 Defense Logistics (“DLAD”)

## DoD FAR Supplement (DFARS)

- 48 CFR Chapter 2 – over 1500 pages
  - Hundreds more standard clauses
  - Standard clauses numbered 252.xxx-xx
- Additional policies implemented
  - *E.g.*, Specialty metals
- Annual DoD authorization acts
  - Means regular changes

# Parts of a Contract



# Standard Contract Format – SF33

|   |                        |   |  |   |                                |   |       |
|---|------------------------|---|--|---|--------------------------------|---|-------|
| <b>SOLICITATION, OFFER AND AWARD</b>  |                        | 1. THIS CONTRACT IS A RATED ORDER UNDER DPAS (15 CFR 700)   |  | RATING  | PAGE                           | OF  | PAGES |
| 2. CONTRACT NUMBER  | 3. SOLICITATION NUMBER | 4. TYPE OF SOLICITATION<br><input type="checkbox"/> SEALED BID (IFB)<br><input type="checkbox"/> NEGOTIATED (RFP) |  | 5. DATE ISSUED  | 6. REQUISITION/PURCHASE NUMBER |   |       |
| 7. ISSUED BY  |                        | CODE  | 8. ADDRESS OFFER TO (if other than Item 7) |   |                                |   |       |
| NOTE: In sealed bid solicitations "offer" and "offeror" mean "bid" and "bidder".  |                        |   |  |   |                                |   |       |
| <b>SOLICITATION</b>   |                        |   |  |   |                                |   |       |
| 9. Sealed offers in original and _____ copies for furnishing the supplies or services in the Schedule will be received at the place specified in item 8, or if hand carried, in the depository located in _____ until _____ local time _____ (Hour) _____ (Date)  |                        |   |  |   |                                |   |       |
| CAUTION - LATE Submissions, Modifications, and Withdrawals: See Section L, Provision No. 52.214-7 or 52.215-1. All offers are subject to all terms and conditions contained in this solicitation.   |                        |   |  |   |                                |   |       |
| 10. FOR INFORMATION CALL:   |                        | A. NAME   |  | B. TELEPHONE (NO COLLECT CALLS)   |                                | C. E-MAIL ADDRESS   |       |
|   |                        | AREA CODE   | NUMBER                                     | EXTENSION   |                                |   |       |
| <b>11. TABLE OF CONTENTS</b>  |                        |   |  |   |                                |   |       |
| (X)   | SEC.                   | DESCRIPTION   |  | (X)   | SEC.                           | DESCRIPTION   |       |
|   |                        | PAGE(S)   |  |   |                                | PAGE(S)   |       |
| PART I - THE SCHEDULE   |                        |   |  | PART II - CONTRACT CLAUSES  |                                |   |       |
|   | A                      | SOLICITATION CONTRACT FORM  |  |   | I                              | CONTRACT CLAUSES  |       |
|   | B                      | SUPPLIES OR SERVICES AND PRICES/COSTS   |  |   | J                              | LIST OF DOCUMENTS, EXHIBITS AND OTHER ATTACH.                             |       |
|   | C                      | DESCRIPTION/SPEC'S/WORK STATEMENT   |  |   | K                              | LIST OF ATTACHMENTS   |       |
|   | D                      | PACKAGING AND MARKING   |  |   | L                              | PART IV - REPRESENTATIONS AND INSTRUCTIONS                                |       |
|   | E                      | INSPECTION AND ACCEPTANCE   |  |   | M                              | REPRESENTATIONS, CERTIFICATIONS AND OTHER STATEMENTS OF OFFERORS          |       |
|   | F                      | DELIVERIES OR PERFORMANCE   |  |   | N                              | INSTRUCTIONS, CONDITIONS, AND NOTICES TO OFFERORS                         |       |
|   | G                      | CONTRACT ADMINISTRATION DATA  |  |   | O                              | EVALUATION FACTORS FOR AWARD  |       |
|   | H                      | SPECIAL CONTRACT REQUIREMENTS   |  |   |                                |   |       |
| <b>OFFER (Must be fully completed by offeror)</b>   |                        |   |  |   |                                |   |       |
| NOTE: Item 12 does not apply if the solicitation includes the provisions at 52.214-16, Minimum Bid Acceptance Period.   |                        |   |  |   |                                |   |       |
| 12. In compliance with the above, the undersigned agrees, if this offer is accepted within _____ calendar days (60 calendar days unless a different period is inserted by the offeror) from the date for receipt of offers specified above, to furnish any or all items upon which prices are offered at the set opposite each item, delivered at the designated point(s), within the time specified in the schedule. |                        |   |  |   |                                |   |       |
| 13. DISCOUNT FOR PROMPT PAYMENT (See Section I, Clause No. 52.232-9)  |                        | 10. CALENDAR DAYS (%)   |  | 20. CALENDAR DAYS (%)   |                                | 30. CALENDAR DAYS (%)   |       |
|   |                        | CALENDAR DAYS (%)   |  | CALENDAR DAYS (%)   |                                | CALENDAR DAYS (%)   |       |
| 14. ACKNOWLEDGMENT OF AMENDMENTS (The offeror acknowledges receipt of amendments to the SOLICITATION for offerors and related documents numbered and dated):  |                        |   |  | AMENDMENT NO.   |                                |   |       |
|   |                        |   |  | DATE  |                                |   |       |
|   |                        |   |  | AMENDMENT NO.   |                                |   |       |
|   |                        |   |  | DATE  |                                |   |       |
| 15A. NAME AND ADDRESS OF OFFEROR  |                        | CODE  |  | FACILITY  |                                | 16. NAME AND THE TITLE OF PERSON AUTHORIZED TO SIGN OFFER (Type or print) |       |
|   |                        |   |  |   |                                |   |       |
| 15B. TELEPHONE NUMBER   |                        | 15C. CHECK IF REMITTANCE ADDRESS IS DIFFERENT FROM ABOVE - ENTER SUCH ADDRESS IN SCHEDULE.                        |  | 17. SIGNATURE   |                                | 18. OFFER DATE  |       |
| AREA CODE   | NUMBER                 | EXTENSION   |  |   |                                |   |       |
| <b>AWARD (To be completed by Government)</b>  |                        |   |  |   |                                |   |       |
| 19. ACCEPTED AS TO ITEMS NUMBERED   |                        | 20. AMOUNT  |  | 21. ACCOUNTING AND APPROPRIATION  |                                |   |       |
|   |                        |   |  |   |                                |   |       |
| 22. AUTHORITY FOR USING OTHER THAN FULL OPEN COMPETITION:<br><input type="checkbox"/> 10 U.S.C. 2304 (c) <input type="checkbox"/> 41 U.S.C. 3304(a) ( )   |                        |   |  | 23. SUBMIT INVOICES TO ADDRESS SHOWN IN (4 copies unless otherwise specified) |                                |   |       |
|   |                        |   |  | ITEM  |                                |   |       |
| 24. ADMINISTERED BY (if other than Item 7)  |                        |   |  | 25. PAYMENT WILL BE MADE BY   |                                |   |       |
|   |                        |   |  | CODE  |                                |   |       |
| 26. NAME OF CONTRACTING OFFICER (Type or print)   |                        |   |  | 27. UNITED STATES OF AMERICA  |                                | 28. AWARD DATE  |       |
|   |                        |   |  |   |                                |   |       |
| (Signature of Contracting Officer)  |                        |   |  |   |                                |   |       |
| IMPORTANT - Award will be made on this Form, or on Standard Form 28, or by other authorized official written notice.  |                        |   |  |   |                                |   |       |
| AUTHORIZED FOR LOCAL REPRODUCTION<br>Previous edition is unusable   |                        |   |  | STANDARD FORM 33 (REV. 6/2014)<br>Prescribed by GSA - FAR (48 CFR) 53.214 (c) |                                |   |       |

B – CLINs

C – SOW

H – Special Clauses

I – Standard Clauses

K – Reqs & Certs

L – Instructions

M – Evaluation factors

Attachments

# Section B

Section B - Supplies or Services and Prices

| ITEM NO | SUPPLIES/SERVICES  | QUANTITY | UNIT | UNIT PRICE           | AMOUNT |
|---------|--|----------|------|----------------------|--------|
| 0001    | Basic Effort<br>CPFF<br>Scope of Work SW-IM-06-03, dated 01 Apr 03, titled "Display Services,"<br>incorporated herein and attached as set forth in Part III, Section J, hereof.<br>PURCHASE REQUEST NUMBER: DS1031 | 29,978   | DPPH |                      |        |
|         |  |          |      | ESTIMATED COST       |        |
|         |  |          |      | FIXED FEE            |        |
|         |  |          |      | TOTAL EST COST + FEE |        |

FOB: Destination

| ITEM NO | SUPPLIES/SERVICES  | QUANTITY | UNIT | UNIT PRICE | AMOUNT |
|---------|--|----------|------|------------|--------|
| 0002    | Data Items<br>CPFF<br>Contract Data Requirements List (CDRL), DD Form 1423, consisting of Line<br>Items Nos. *001 through *004, incorporated herein and attached as set forth in |          |      |            |        |

# Section C

W912CM-04-R-0028

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Section C - Descriptions and Specifications

## DESCRIPTION/STATEMENT OF WORK

### **STATEMENT OF WORK C2 Support to MNF-I**

1. Introduction. This statement of work focuses on providing the Assistant Chief of Staff (ACofS), C2, Multi-National Forces - Iraq (MNF-I) with intelligence operations support.

Identification.

Organization: Multi-National Forces – Iraq (MNF-I)

Location: Baghdad, Iraq (MNF-I AOR)

#### **1.2 Scope of Work.**

1.2.1 Background. The contractor shall provide personnel, management, and any other items and services not Government furnished, necessary to provide the ACofS, C2, MNF-I with intelligence operations support consisting of Interrogation Operations Support, Locally Employed Persons (LEP) Screening, Open Source Intelligence (OSINT), Special Security Office (SSO), Human Intelligence (HUMINT) Support Teams (HST), and Intelligence Support management and support, functioning as resident experts for the implementation of appropriate regulations and standard operating procedures within C2, MNF-I. Contractor shall perform from the offices of the MNF-I and designated interrogation facilities at various locations in Iraq. The Contractor shall provide the requested services, as directed by military authority, throughout the MNF-I area of responsibility (AOR) to assist in all aspects of intelligence support activities, in order to provide timely and actionable intelligence to the commander. The Contractor is responsible for providing administrative supervision for all contractor personnel. Administrative supervision includes performing tasks that free the individual to perform his or her duties (e.g., pay issues).

# Section I

## Section I - Contract Clauses

### CLAUSES INCORPORATED BY REFERENCE

|                  |  |          |
|------------------|--|----------|
| 52.202-1         | Definitions  | DEC 2001 |
| 52.203-3         | Gratuities   | APR 1984 |
| 52.203-5         | Covenant Against Contingent Fees   | APR 1984 |
| 52.203-6         | Restrictions On Subcontractor Sales To The Government  | JUL 1995 |
| 52.203-7         | Anti-Kickback Procedures   | JUL 1995 |
| 52.203-8         | Cancellation, Rescission, and Recovery of Funds for Illegal or Improper Activity   | JAN 1997 |
| 52.203-10        | Price Or Fee Adjustment For Illegal Or Improper Activity   | JAN 1997 |
| 52.203-12        | Limitation On Payments To Influence Certain Federal Transactions   | JUN 1997 |
| 52.204-4         | Printed or Copied Double-Sided on Recycled Paper   | AUG 2000 |
| 52.209-6         | Protecting the Government's Interest When Subcontracting With Contractors Debarred, Suspended, or Proposed for Debarment | JUL 1995 |
| 52.211-15        | Defense Priority And Allocation Requirements   | SEP 1990 |
| 52.215-2         | Audit and Records--Negotiation   | JUN 1999 |
| 52.215-8         | Order of Precedence--Uniform Contract Format   | OCT 1997 |
| 52.215-10        | Price Reduction for Defective Cost or Pricing Data   | OCT 1997 |
| 52.215-12        | Subcontractor Cost or Pricing Data   | OCT 1997 |
| 52.215-13        | Subcontractor Cost or Pricing Data--Modifications  | OCT 1997 |
| 52.215-14        | Integrity of Unit Prices   | OCT 1997 |
| 52.215-15        | Pension Adjustments and Asset Reversions   | DEC 1998 |
| 52.215-16        | Facilities Capital Cost of Money   | OCT 1997 |
| 52.215-17        | Waiver of Facilities Capital Cost of Money   | OCT 1997 |
| 52.215-18        | Reversion or Adjustment of Plans for Postretirement Benefits (PRB) Other than Pensions                                   | OCT 1997 |
| 52.215-20 Alt IV | Requirements for Cost or Pricing Data or Information Other   | OCT 1997 |

# Section L

Page 99 of 115

Section L - Instructions, Conditions and Notices to Bidders

## SUBMISSION OF OFFERS

### **INSTRUCTIONS, CONDITIONS, AND NOTICES TO OFFERORS**

#### 1. General Instructions for the Preparation of Proposals.

This section provides instructions on how to prepare and submit a proposal in response to this solicitation. Offerors that do not meet the minimum mandatory requirements, as defined in Section C, Statement of Work, should not respond.

Notice to Foreign Contractors. Due to the security requirements specified in the Statement of Work (SOW), offers received from Foreign Contractors will not be considered.

Offers shall be sent to the attention of Ms. Liz Graves at the mailing address specified in Block 7 of the Standard Form 33 or the address listed at the end of this paragraph. The address for mail originating in Europe and being delivered via courier service is Wiesbaden Contracting Center, ATTN: Ms. Liz Graves, Division B, Team 1, Konrad-Adenauer Ring 39, 65187 Wiesbaden, Germany.

In addition to sending an offer via courier or mail, offerors shall send e-mail notification to [04R0028@rcc.wbn.usacce.army.mil](mailto:04R0028@rcc.wbn.usacce.army.mil) that an offer was sent and the day it was sent. Subject of e-mail shall be "Submission of Offer RFP W912CM-04-R-0028." Faxed offers are not authorized and will be rejected.

Questions Pertaining to the Solicitation. Offerors may submit questions pertaining to information in the solicitation. Questions shall be submitted via e-mail to [04R0028@rcc.wbn.usacce.army.mil](mailto:04R0028@rcc.wbn.usacce.army.mil). The subject of the e-mail shall be "Questions – W912CM-04-R-0028." Questions shall annotate a reference to the specific solicitation element to which they pertain. All questions shall be submitted to ensure that they are received no later than 10 calendar days before the date for receipt of proposals. All questions and answers, and any resulting amendments, will be sent

# Section M

Section M - Evaluation Factors for Award

## EVALUATION FACTORS AND BASIS

### **EVALUATION FACTORS FOR AWARD**

This procurement is being conducted using formal source selection procedures. The Government intends to award one (but reserves the right to award more than one) contract for Intelligence Support Services including interrogators in support of Operation Iraqi Freedom and the Global War on Terrorism to the responsible offeror(s) whose proposal(s) conforming to the solicitation represent(s) the best overall value(s) to the Government as explained below. The Government will evaluate each proposal strictly in accordance with its content and will not assume that performance will include areas not specified in the offeror's proposal.

The offeror's proposal must demonstrate a clear understanding of the nature and scope of the work required. Failure to provide a realistic, reasonable, and complete proposal may reflect a lack of understanding of the requirements of the contract and may result in a determination that the offer is unacceptable.

The Government will not assess capability on a pass/fail basis, but will use its assessments of capability as a basis for comparing proposals to determine best value.

Evaluation Factors and Their Relative Importance. The evaluation factors are: Technical Proposal, Experience, Past Performance, Business Arrangement, and Cost/Price. Technical Proposal is approximately equal to the combined importance of Experience and Past Performance. Experience and Past Performance are approximately equal in importance. Cost/Price is approximately equal to the combined importance of Experience and Past Performance. Business Arrangement is less important than the other non-cost evaluation factors. The Government considers the non-cost factors, when combined, to be significantly more important than cost/price.

Evaluation Factors. The Government will evaluate proposals on the basis of the following factors and subfactors:

1. Technical Proposal (Factor). The Government will evaluate the completeness of the offer based on documentation provided. The evaluation will assess the technical advantages and proposal risks of each offer as they relate to the requirements contained in this solicitation. The subfactors are listed in descending order of

# Which Clauses Apply?

## FAR and FAR Supplement Clauses are Terms of the Contract

- Prime contracts – Government includes the relevant clauses in full text and/or by reference. Must go to the regulations to read the clauses
- Signing proposal/accepting order accepts these clauses

## Public Policy Dictates

- Omitted clauses required by statute or regulation may be incorporated by operation of law. *Christian doctrine.*
- Included clauses violative of statute or regulation may be read out of the contract.
- Incorrect clauses may be replaced with the correct ones.

| Regulatory Cite | Title  | Date     |
|-----------------|--|----------|
| 52.202-1        | DEFINITIONS  | NOV/2013 |
| 52.203-3        | GRATUITIES   | APR/1984 |
| 52.203-5        | COVENANT AGAINST CONTINGENT FEES   | MAY/2014 |
| 52.203-6        | RESTRICTIONS ON SUBCONTRACTOR SALES TO THE GOVERNMENT  | SEP/2006 |
| 52.203-7        | ANTI-KICKBACK PROCEDURES   | MAY/2014 |
| 52.203-8        | CANCELLATION, RESCISSION, AND RECOVERY OF FUNDS FOR ILLEGAL OR IMPROPER ACTIVITY   | MAY/2014 |
| 52.203-10       | PRICE OR FEE ADJUSTMENT FOR ILLEGAL OR IMPROPER ACTIVITY   | MAY/2014 |
| 52.203-12       | LIMITATION ON PAYMENTS TO INFLUENCE CERTAIN FEDERAL TRANSACTIONS   | OCT/2010 |
| 52.204-4        | PRINTED OR COPIED DOUBLE-SIDED ON POSTCONSUMER FIBER CONTENT PAPER   | MAY/2011 |
| 52.204-10       | REPORTING EXECUTIVE COMPENSATION AND FIRST-TIER SUBCONTRACT AWARDS   | OCT/2015 |
| 52.204-13       | SYSTEM FOR AWARD MANAGEMENT MAINTENANCE  | JUL/2013 |
| 52.209-6        | PROTECTING THE GOVERNMENT'S INTEREST WHEN SUBCONTRACTING WITH CONTRACTORS DEBARRED, SUSPENDED, OR PROPOSED FOR DEBARMENT | OCT/2015 |
| 52.209-9        | UPDATES OF PUBLICLY AVAILABLE INFORMATION REGARDING RESPONSIBILITY MATTERS   | JUL/2013 |

# Flowing Down Contract Clauses



# Challenges & Best Practices

## Potential Challenges

- Prime is responsible for its sub(s); subcontractors also have responsibility to flow down clauses to lower-tier sub(s)
- Identification of which vendors qualify as lower-tier subcontractors (and ensuring that a process is in place to make such identification)
- Knowing which clauses apply to subcontractors

## Best Practices

- Do not fall into trap of flowing down EVERYTHING
- Conduct a multi-step analysis to determine what flows down

# What is a Subcontract?

- Numerous definitions of subcontract/subcontractor
- May include vendors, distributors, brokers and suppliers
- **FAR 44.101 defines subcontract as:**
  - Any contract as defined in subpart 2.1 entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.
- **FAR 44.101 defines subcontractor as:**
  - Any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.

# Multi-Step Analysis

- **What clauses must be flowed down?**
  - Text of the clause will indicate (“The Contractor shall include....”)
- **When must those clauses be flowed down?**
  - Be aware of “triggering” events, e.g., dollar thresholds and certain activities (sometimes, the prime contractor’s best judgment will need to be applied)
- **How must those clauses be flowed down?**
  - Verbatim, in substance, silence

# Examples

- **FAR 52.203-13, Contractor Code of Business Ethics and Conduct**
  - (d) *Subcontracts*. (1) The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts that have a value in excess of \$5.5 million and a performance period of more than 120 days.
- **FAR 52.222-41, Service Contract Labor Standards**
  - (l) *Subcontracts*. The Contractor agrees to insert this clause in all subcontracts subject to the Service Contract Labor Standards statute.

# Multi-Step Analysis

- **Any optional clauses that the prime should consider flowing down?**
  - Termination for Convenience, Changes, Disputes
- **Is the subcontract for a commercial item?**
  - FAR Part 12 requires only minimal flow-downs in commercial item subcontracts (*see* FAR 52.212-5(e) and 52.244-6)

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# **SOURCE SELECTION AND BID PROTESTS: PRE- AND POST-AWARD CONSIDERATIONS**

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# The Procurement Cycle

- Continuous cycle:
  - Source selection
  - Bid protest litigation (during and/or after source selection)
  - Contract performance
- Considerations/timelines driven by need for competition



# CICA's Competition Mandate

- The Competition in Contracting Act of 1984
  - Passed to foster competition and reduce costs
- Mandates full and open competition
  - I.e., all responsible sources are permitted to submit proposals
- Sets minimum time frames after publication before the procurement can be processed
  - Typically procurements must be advertised for at least 15 days before issuance of the solicitation
  - Minimum response times (30-45 days) set for receipt of proposals or bids from the date of issuance of the solicitation

# CICA's Fundamental Requirement of Competition

- Seven exceptions to full and open competition:
  1. Only one responsible source (FAR 6.302-1)
  2. Unusual and compelling urgency (FAR 6.302-2)
  3. Industrial Mobilization, Engineering Development, or Research Capability (FAR 6.302-3)
  4. International Agreement (FAR 6.302-4)
  5. Authorized or Required by Statute (FAR 6.302-5)
  6. National Security (FAR 6.302-6)
  7. Public Interest (FAR 6.302-7)
- Requirements for Justifications for Other than Full and Open Competition
  - Documentation, publication, approval levels

# CICA's Fundamental Requirement of Competition

- Typical procedures that are considered competitive:
  - Sealed Bids in accordance with FAR Part 14
  - Competitive Proposals in accordance with FAR Part 15
  - GSA award schedules if orders are placed following the procedures in FAR 8.405
  - Architect-engineer contracts using procedures in FAR Subpart 36.6
- Different rules apply for:
  - Contracts awarded using the simplified acquisition procedures of Part 13
  - Orders placed under task and delivery order contracts entered into pursuant to Subpart 16.5
  - Orders placed under indefinite-quantity contracts that were awarded using competitive procedures
  - Contract modifications that are within the scope and terms of an existing contract
  - Awards made pursuant to Section 8(a) of the Small Business Act

# Full & Open v. Set-Aside Competitions

- Set-asides limit pool of competition – easier for contractors to compete
- Statutory government-wide goals:  
SB = 23%; SDB = 5%; WOSB = 5%;  
HUBZone = 3%; SDVOSB = 3%
- Set-aside defines eligibility
  - Subcontracting opportunities?
- Potential challenges to set-aside determination

# Understanding the Key Steps in the Procurement Process

- Posting of Draft RFP or Other Pre-Solicitation Notices (not required)
- Issuance of Solicitation
  - Q&As, Amendments
- Proposal Submission
- Evaluation
- Competitive Range Determination (not required)
  - Discussions
  - Request for FPRs (possibly multiple rounds)
- Award
- Debriefing

# Procurement Process: Key Steps

## Acquisition Planning

- Agency must determine requirements and acquisition strategy—i.e., proposed contract type, terms and conditions, and acquisition planning schedules
- FAR encourages agencies to have exchanges with industry to identify and resolve concerns regarding:
  - acquisition strategy;
  - the feasibility of the requirements, including performance requirements, statements of work, and data requirements;
  - the suitability of the proposal instructions and evaluation criteria, including the approach for assessing past performance information; and
  - the availability of reference documents
- Mechanisms: RFIs, industry conferences, draft RFPs, pre-solicitation notices, site visits

# Procurement Process: Key Steps

## Issuance of the Solicitation

- Solicitation must include:
  - Government's requirements
  - Evaluation factors and significant subfactors
  - Information required in offerors' proposals
- The Government must ensure a level playing field and that no offeror receives an unfair competitive advantage
- Solicitation Q&A process can be an effective tool for advocating change to solicitation or identifying shortcomings
  - Understand how to ask questions to improve your competitive standing
- Important to resolve any ambiguity or confusion in the solicitation prior to proposal submission

# Procurement Process: Key Steps

## Proposal Submission

- It is an offeror's responsibility to submit a proposal that establishes its capability and the technical merits of its proposed approach, and allows for a meaningful review by the procuring agency in accordance with the evaluation terms of the solicitation
  - Important to provide all required information
  - Demonstrate compliance with material solicitation requirements
- Key RFP Sections: C, L, M (and H for “special” clauses)
- Ensure timely submission (“late is late”) – even if protest terms of RFP



# Procurement Process: Key Steps

## Evaluation

- FAR Part 15 prescribes policies and procedures governing negotiated acquisitions
- Agencies must evaluate proposals in accordance with stated criteria and may not introduce new criteria midstream without affording offerors a chance to revise proposals
- Agencies may not ignore stated criteria
- Note: While agencies may not create new criteria on the fly, certain unannounced considerations will be deemed to be “encompassed” by stated evaluation criteria (e.g., proposal risk)
- Focus on weighting of factors
- Understand key differences between best-value and LPTA

# Procurement Process: Key Steps

## Exchanges

- Clarifications
  - Limited exchanges between an agency and an offeror for the purpose of eliminating minor uncertainties or irregularities in a proposal, and do not give an offeror the opportunity to revise or modify its proposal
  - It is in the Government's discretion to issue clarification questions
    - offerors should not rely on the Government doing so
- Establishment of competitive range and discussions
  - Discussions occur when an agency communicates with an offeror for the purpose of obtaining information essential to determine the acceptability of a proposal, or provides the offeror with an opportunity to revise or modify its proposal in some material respect
  - If the Government holds discussions, they must be meaningful, equal and not misleading
- Train your employees to recognize permissible communications

# Procurement Process: Key Steps

## Contract Award

- Determination of awardee responsibility
  - Contracting Officer must find the awardee responsible as the Government cannot contract with a non-responsible party
- Notice of award & debriefing
  - Debriefings are an opportunity for an offeror to better understand the basis for an agency's selection decision
  - Timely request debriefing (and accept first date offered)
  - In FAR part 15 debriefings, Government must provide certain information
    - Formats and level of detail provided varies greatly
    - Cannot provide point-by-point comparisons
  - No recourse if Government does not provide a debriefing or all of the information required to be provided by the FAR
  - Understand differences with pre- v. post-award debriefings

# Bid Protests: Preserving Your Right to a Fair Competitive Process

- A bid protest:
  - Is a statutorily created right to challenge procurement ground rules (solicitation terms), proposal evaluations, and award decisions
  - Provides offerors an opportunity to ensure a fair and objective chance to compete for and win government business
- Pre-award protests may allege error in the creation of a procurement solicitation
- Post-award protests may allege error in the evaluation of the protesting company, or errors in the evaluation of the company selected for award
- Note: Some unusual types of bid protests do not quite fit into either box, e.g.:
  - Protests of certain sole source awards
  - Protests of mid-procurement “competitive range” eliminations

## Pre-Award Protests

- Common issues:
  - Solicitation is unduly restrictive/overstates agency needs
  - Ambiguous requirements/terms in the solicitation
  - Inconsistency in terms of RFP
  - Solicitation requirements unnecessarily favor one offeror
  - Solicitation's identification of contract clauses is flawed

## Pre-Award Protests

- Usually must file prior to time set for receipt of proposals
- Effect of filing: If timely filed, agency may not award the contract pending the outcome of the protest
- May still need to submit timely proposal to preserve standing
- Sensitivity to filing while proposal is still subject to agency evaluation
- Practice Tip: Use the solicitation Q&A process before filing protest in order to seek clarification of ambiguous terms and/or advocate for changes to the solicitation

## Post-Award Protests

- Filed after the evaluation process has been completed, and generally after the award decision has been announced
- Common Issues:
  - Deviation from the solicitation's stated evaluation criteria
  - Relaxation of solicitation technical requirements and/or addition of unstated minimum technical requirements
  - Arbitrary proposal evaluation (technical, price, past performance, etc.)
  - Unequal treatment
  - Improper best value tradeoff analysis
  - Lack of meaningful discussions or misleading discussions
  - Organizational Conflicts of Interest
  - Cost/price realism
  - Key personnel bait & switch or late substitutions by awardee
  - Improper determination of contractor responsibility

## Post-Award Protests

- Post-award protests may allege error in the evaluation of the protesting company, or errors in the evaluation of the company selected for award
- Post-Award: If filed within 10 days of award or 5 days after a requested and required debriefing, the agency must immediately suspend contract performance
- Note: The 5-day post-debriefing rule for obtaining a CICA stay of performance is different from the post-debriefing timeliness rule (10 days)
- One of the major challenges of the bid protest process is that you must generally move quickly and file a protest with limited information



## Considerations Before Filing a Protest

- Among the issues offerors should consider before filing a bid protest are:
  - Perception of merits of protest allegations
  - Ability to establish interested party status and prejudice
  - Customer reaction
  - Incumbent status
  - Cost of protesting
  - Likelihood of “win” beyond a sustained protest
    - Agencies often afforded significant discretion
- Tough, high-level decisions to make in short time window

## Bid Protest Forums

- **Agency-Level Protest**
  - Cheapest alternative
  - Slim chance of success, but a good way to make a statement of frustration and/or disappointment without “suing the customer”
- **GAO**
  - Recommended forum in most circumstances
  - Decision-makers have specialized expertise in procurement law
  - Quick process: 100 days from start to finish
  - Mandatory stay of performance when protests are timely filed
  - Recovery of protests costs including attorneys fees for certain successful protests
- **Court of Federal Claims**
  - No automatic stay and unlikely award of protest costs
  - Decisions are binding but can be appealed
  - Can cost more and take longer than GAO protests
- **FAA Office of Dispute Resolution (“ODRA”)**
  - Special forum for Federal Aviation Administration bid protests

## Considerations for Selecting a Bid Protest Forum

- Would protest be time-barred in one or multiple forums?
- Does each forum have jurisdiction over this particular protest?
- How expensive will it be not only to file, but to pursue the protest to decision on the merits?
- What discovery is available to the protester?
- Is a stay of performance or award automatic?
- What is the effect of a protest decision, and what options are available for further review after decision is issued?
- What is the background or experience of the individual who will be deciding the protest?
- What are the current trends for filings and “win-rates”?

## Post-Protest Considerations

- Resolution timelines vary based on forum
  - GAO decision by statute must be issued within 100 days of filing initial protest
- Corrective action – pre- or post-decision
  - Increasingly common
  - Wide variation in implementation timeline
  - Actual corrective action can vary from what was proposed
  - Could lead to additional rounds of protest litigation
- Contract performance builds into next round proposal (past performance, etc.)

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Government  
Contracts  
BACK TO BASICS

# **SPECIAL COMPLIANCE AND ETHICS CONSIDERATIONS FOR CONTRACTORS**

Trina Fairley Barlow  
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# Civil False Claims Act

- Civil False Claims Act (“FCA”)
  - 31 U.S.C. §3729 *et seq.*
  - Enacted in 1863 to punish contractors who defrauded the Union Army
  - Major amendments in 1986, 2009 and 2010
  - Since 1986, has become Government’s primary enforcement weapon for combating fraud, waste, and abuse
  - Rising number of actions, investigations, and referrals
- Also Criminal False Claims Act

## Offenses under the FCA

- **False Claim** – **knowing submission** of a false claim to the Government or a recipient of Government funds, or causing another to submit a false claim.
- **False Record or Statement** – **knowingly making** a false record or statement material to a false claim.
- **Reverse False Claim** – **knowingly making** a false record or statement material to an obligation to pay money to the Government, or **knowingly and improperly avoiding** an obligation to pay money to the Government.
- **Conspiracy** – **conspiring to do** any of the above.



## Qui Tam Provisions

- FCA actions may be initiated by individuals under the FCA's *qui tam* provisions
  - “Relators” (a/k/a “whistleblowers”)
- Relator must file a complaint under seal
- Relator must also serve written disclosures on DOJ describing “substantially all material evidence and information the person possesses”
- DOJ has 60 days to investigate and make intervention decision (extensions are common)

## Damages and Penalties

- Measure of FCA damages: Difference between what the government actually paid and what it should have paid absent the alleged FCA violation ***trebled***
- FCA provided for penalties of \$5,500 to \$11,000 ***per claim*** and may be applied even in the absence of actual damages
- Increased to \$10,781 to \$21,563 for violations after November 2, 2015

## Common FCA Examples

- Labor and Material Overcharging
- False Certifications of Compliance
- Product Substitution
- Unauthorized Substitution of Personnel
- Misrepresentations in Proposals
- Implied Certifications
- Failure to Monitor Subcontractors
- Kickbacks

## Key FCA Trends

- Materiality post-*Escobar*
- “Knowing” ≠ intent to defraud
- Causation not required; instead tendency to influence
- Implied certifications
- New damages theories and use of statistical sampling

# Mandatory Disclosure

- Must disclose in a “**timely**” fashion “**credible evidence**” of:
  - Certain violations of criminal law
  - Violations of the Civil FCA
  - “Significant overpayments” that occur “in connection with the award, performance, or closeout” of a Government contract
- If fail to disclose when required, possible suspension/debarment
- Both a FAR contract clause and a requirement under the FAR suspension/debarment regulations

# Suspension and Debarment

- Administrative exclusions from government contracting
- No new contracts, orders, option exercises, or contract extensions
  - Agencies cannot solicit offers from, award contracts to, or consent to subcontracts with
  - No “discussions” or placement in competitive range
  - Cannot act as agent, representative, or surety
- Continuation of current contracts
  - Agencies “may continue contracts or subcontracts . . .” (i.e., termination not required)
  - Prevailing practice is not to terminate
- To protect the government’s business interests and not to punish

# Suspension and Debarment

- Key concept is “present responsibility”
  - Generally able to be trusted to deal fairly and honestly with the government customer on a going-forward basis
- Who can be suspended/debarred?
  - Individuals and entities (*e.g.*, corporations, partnerships, divisions, or business units within an entity)
  - Parents and affiliates, if warranted
  - Prime contractors, subcontractors, and/or participants at any tier
- Collateral impacts
  - State and local procurement reciprocity
  - Security clearances
  - Export licenses
  - Commercial customers

# Compliance & Ethics Hotspots

- Code of business ethics and conduct
- Gifts, gratuities & entertainment
- Anti-corruption statutes
- Off-limits information
- Hiring decisions





# Suspension and Debarment

- Currently active agencies
  - DoD / Army
  - DoD / Navy
  - DoD / DLA
  - EPA
  - SBA
  - GSA
- Recently active agencies currently on hiatus
  - DoD / Air Force
  - Commerce

## Service Contract Act

- Applies to contracts
  - In excess of \$2,500 with Federal Government
  - Performed in the “United States”
  - Principally for “service” through the use of “service employees”
- Requirements
  - Pay prevailing minimum wage and fringe benefits in accordance with an *incorporated* wage determination or collective bargaining agreement

## Service Contract Act

- Defining “Principally for Service”
- Identifying “Service Employees”
- Compliance Challenges
  - Mapping Issues
  - Calculating Wages and Fringe Benefits
  - Flow-Down Requirements
  - Recordkeeping
  - Penalties

# Davis-Bacon Act

- Applicability
  - Contracts in excess of \$2,000
  - With the Federal Government or District of Columbia
  - For Construction, Alteration, Repair
    - SCA/DBA Mixed Contracts
- Coverage
  - Laborers and Mechanics
  - “Site of Work”

# Davis-Bacon Act

- Key Requirements
  - Pay wages and fringe benefits in accordance with wage determinations
  - Weekly submission of certified payroll
- DBA v. SCA

## **Paid Sick Leave Executive Order**

- Applicable to certain “new” contracts after 1/1/17
- Coverage: Employees who work “on or in connection with” covered contracts
- Accrual: One hour for every 30 hours worked or 56 hours per year granted up front

## A Few Other Obligations

- Federal Minimum Wage for Contractors
- Non-Displacement of Qualified Workers (Service Contracts)
- Anti-Discrimination/Affirmative Action/Pay Equity

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# **COST AND PRICING: NO CONTRACT IS REALLY FINAL**

**Terry Albertson  
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## Three Phases

- Proposal
- Performance and Billing
- Final Payment

# Proposal

- Forward pricing rates
  - Labor rates
  - Indirect cost rates
  - Material and ODCs
- Cost Accounting Standards
  - About how the accounting system works – what gets charged where
  - Flows down from covered primes
    - Exemptions for competition, commercial items, award value, small business
    - No clear rules for requirements contracts, IDIQ, task order, multiple CLINs of different types
  - Disclosure
  - Consistency
  - Substantive requirements

## Proposal (cont.)

- Truth in Negotiations Act (TINA)
  - Disclose certified cost information (to USG and/or to higher tier primes and subcontractors)
  - Competition and commercial item exemptions
  - Covers initial awards and mods over the coverage threshold
- FAR Part 31 “Cost Principles”
  - No exemptions
  - Very complicated and detailed rules – based on politics, policy, and petulance

# Performance and Billing

- Progress payments based on costs (for FFP and FPI contracts)
  - Based on interim labor rates and indirect cost rates
  - Limits on amount billable
  - No specific requirement that costs must be allowable, but . . .
  - Loss ratio formula for contracts that are losing money
- Performance based billing/milestone billing
- T&M billing based on hours worked and actual costs for material
- “Public vouchers” for cost-reimbursement contracting
- All bills subject to periodic audit and testing

# Final Payment

- On FFP contracts, bill on delivery or, if there have been interim payments, liquidate unbilled amounts on delivery – generally no audit of incurred costs and no formal “close out”
- On cost-reimbursement contracts
  - Indirect cost rates for all contracts proposed, audited, and negotiated annually
  - Direct costs are sometimes, but not always, subject to audit
  - Final payment and close out when all costs are known and audits are complete – usually many years after completion of performance
- On FPI contracts, calculate “shareline” adjustments due when all costs are known
- On T&M contracts
  - Verify hours charged to the contract
  - Material reimbursed at actual costs, plus actual indirect cost, if applicable.

# Post-Award Price Adjustments

- FAR Part 31 Allowability Rules
- TINA
- CAS

## FAR Part 31 Allowability Rules

- Annual audit of indirect “incurred cost submission” (ICS)
- Penalties for charging expressly unallowable costs (double damages) or agreed to be unallowable costs (treble damages)
- Applicable generally to cost-reimbursement and FPI contracts and CLINs, not FFP or T&M contracts
- 6-year statute of limitations, probably from submission of annual ICS



# TINA

- Post-award audit limited to contracts and subcontracts subject to TINA at the time of award or at the time of modification (mods may be covered even though award was exempt)
- Prime and sub prices may be adjusted (downward only) to reflect natural and probable consequences of failure to disclose all relevant information at all tiers
- Offsets available for undisclosed data that would have increased price if disclosed
- 6-year statute of limitations, but from when is not decided, except that it is no later than the date of any audit report identifying a potential claim

# CAS

- Downward only price adjustment on any covered contracts for increased costs when:
  - Contractor fails to comply with disclosed or established practices
  - Contractor fails to comply with substantive accounting requirements of CAS
  - Contractor changes accounting practices, other than changes required by the regulations or changes found by the government to be desirable
- Adjustments calculated “in the aggregate” for affected contracts, permitting some netting of increases and decreases (but less than one would hope)
- Statute of limitations
  - For changes, SOL begins to run on the date the contractor discloses the change and provides an estimated cost impact (regardless whether the estimated impact turns out to be accurate)
  - For noncompliance, it is not entirely clear when the government would be charged with knowledge that starts running of the SOL, but certainly no later than the date of any audit report identifying a noncompliant practice

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# COMMERCIAL ITEM CONTRACTING AND GSA FEDERAL SUPPLY SCHEDULES

**Lorraine Campos**  
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**Nkechi Kanu**

# Overview

- Commercial item contracting
  - Policy considerations and shifts over time
  - Commercial item determinations (CIDs)
  - Pricing commercial items
- GSA Federal Supply Schedule (FSS) contracts
  - Commercial sales practices disclosures
  - Price Reduction Clause
  - Sales tracking and Industrial Funding Fee (IFF)
  - Trade Agreements Act
  - Audits and enforcement

# Commercial item procurements

- Federal Acquisition Streamlining Act of 1994 (FASA)
  - Reduce regulatory burden to encourage commercial companies to supply the government
  - Provide incentive for USG and its prime contractors to source commercial products
- Clinger-Cohen Act of 1996
  - Defined subset of commercial items: commercially available off-the-shelf (COTS)

# Commercial item procurements

- More favorable terms/reduced risk
  - “Changes” must be bilateral
  - Exception from the Truth in Negotiations Act (TINA) and Cost Accounting Standards (CAS)
  - Reduced audit rights
  - Fewer mandatory clauses
  - Reduced administrative burden generally
- Simplified Acquisition

# Commercial item procurements

## Definitions of “Commercial Item” – FAR 2.101

- 1) Of a type customarily used by the general public for purposes other than governmental purposes, and—
  - (i) Has been sold, leased, or licensed to the general public;  
or
  - (ii) Has been offered for sale, lease, or license to the general public.
  
- 2) Technologically evolved from (1) and will be available in commercial marketplace in time.



## Commercial item definition

3) Would be (1) or (2) except for modifications of a type customarily available in commercial marketplace or minor non-commercial modification made to meet Federal Government requirements.

# Commercial item definition

- 4) Combinations of (1), (2), (3) and (5).
- 5) Installation, maintenance, repair, training, other services in support of (1)-(4) items, if similar services are provided contemporaneously to the general public under similar terms and conditions.
- 6) Services of a type sold in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved.
- 7) Non-developmental items, if developed exclusively at private expense and sold in substantial quantities on a competitive basis to multiple state and local governments.

# Commercial item procurements

- “Of a type” analysis
  1. “Of a type” customarily used by the general public or by non-governmental entities for purposes other than governmental purposes
    - Qualifying items do not have to be identical to those in the commercial marketplace
  2. Has been offered for sale, lease, or license to the general public
    - Company does not have to show that it has made a contractual offer to a non-government customer
    - If company is able to show “various advertising and marketing efforts,” including having “standard product brochures” that may be sufficient
    - Indicia that a product has been “offered for sale” include: listing the product on a website for sale, delivering prototypes or test systems, producing and making available advertising materials

# Commercial Item Service

- Any Service
  - Of a type offered and sold competitively in substantial quantities in the commercial marketplace;
  - Based on established pricing (catalog or market);
  - Specific tasks performed or achieved; and
  - Standard commercial terms and conditions.

*FAR 2.101(6)*

# COTS – Commercially Available Off the Shelf

- A COTS item is any supply item including construction, that is:
  - A commercial item as defined in FAR 2.101(1).
  - Sold in substantial quantities in the commercial marketplace.
  - Offered to the federal contract (or subcontract) without modification, as sold in the commercial marketplace.

## FAR 2.101

*While COTS items are, by definition commercial items, not all commercial items are COTS.*

# Commercial item procurements

- Who decides?
  - Government contracting officer
  - Higher-tier contractors
  - The Court?
- Role of certifications / dealing with certification requests

## Prior commercial item determinations

- 10 U.S.C. § 2306a(b)(4) / 2016 NDAA
  - CO “may presume that a prior commercial item determination made by a military department, a Defense Agency, or another component of the Department of Defense shall serve as a determination for subsequent procurements of such item.”
  - If the CO does not make this presumption, must have review by head of contracting activity, who issues a written determination

## Impact on Government Contracting

- Prime and subcontractors are only required to accept a smaller number of FAR clauses
  - Offeror Reps and Certs
  - Contract Terms and Conditions
  - Statutes and Executive Orders



## Commercial item pricing

- Where procurement qualifies as a “commercial item”, CO is prohibited from requiring “certified” cost or pricing data
  - Can ask for data
- Only gets rights in data “customarily provided to the public” *except* as provided by agency specific statute

## Commercial item pricing

- “Data *other than* certified cost or pricing data”
- Defined term that can include:
  - Pricing data
  - Cost data
  - Judgmental information
- What you provide likely will depend on commercial item justification

# Commercial item pricing

- Catalog or Market prices
  - For same or similar items
- Managing the discussion
  - Precise description of data provided and its source and reliability
  - Provision of cost data is last resort, even if not certified

## Benefits of Commercial item Contracting for Contractors

- Less onerous contract requirements
- Easier to administer
- Compliance risk reduced
- Greater subcontracting opportunities
- But . . . Still Some Risk
  - False Claim and Statements
  - Compliance Obligations

# GSA Federal Supply Schedule (FSS) contracts

- Federal, state, and local government buyers spent almost \$45 billion through GSA Schedule Contracts and VA Schedule Contracts in FY2016
- Very broad range of products and services; e.g.:
  - Information technology equipment, software, and services
  - Pharmaceutical products
  - Medical devices
  - Professional consulting services
  - Professional engineering services
  - Solutions for law enforcement and security
  - Office products and supplies
  - Facilities maintenance and management
  - And more!

# GSA schedule contracts



- GSA is the lead procurement agency
  - Delegation of procurement authority to VA for medical supplies and equipment
  - Veterans Health Care Act of 1992 – Section 603: the VA Pricing Program
- GSA establishes long-term “schedule” contracts with pre-negotiated prices and terms and conditions
- Contracts open Government-wide (and beyond)
  - “Cooperative Purchasing” (products and services available to State and Local government entities)
- GSA and VA MAS contracts often preferred contracting vehicle



**VA** | U.S. Department  
of Veterans Affairs

## GSA schedule contracts

- GSA Schedule contracts limited to “commercial items” under the FAR definition (FAR 2.101)
- Program not appropriate for non-commercial items such as R&D work

## GSA schedule contracts

- Streamlined “simplified ordering procedures” for federal customers
- In general, ordering agencies need not:
  - Seek further competition
  - Synopsise the requirement
  - Make a determination of fair and reasonable pricing (exception = DoD)





# GSA schedule contracts

- Ordering mechanics:
  - Agency issues individual Task Order (TO) or Delivery Order (DO) to the MAS contractor
  - DO/TO references the MAS Contract Number
  - No separate negotiations of terms and conditions
    - Ok to include additional terms in “best interest” of Government, so long as no conflict with MAS terms
    - Ok to offer additional discount on prices

## GSA schedule contracts

- On-line resources at <http://gsa.gov>
- GSA Vendor Support Center  
<http://vsc.gsa.gov/>
- GSA E-Library  
<http://www.gsaelibrary.gsa.gov/ElibMain/home.do>
- VA FSS Schedule Website  
<http://www.fss.va.gov/>

# Compliance “hot button” risk areas



## Commercial Sales Practices (CSPs)

- Requirements:
  - Mandatory contractor pricing and sales and discount disclosures
  - Disclose by customer and customer type
  - CSP-1 Form before initial contract award and with each 5-year contract extension
  - Pricing information must be “current, accurate, and complete”

# Commercial Sales Practices (CSPs)

- Key concepts
  - GSA's and VA's tool for negotiating pricing for the Schedule contract
  - Contractor discloses in substantial detail its discounts and other concessions granted to all customers
    - CSP for all Special Item Numbers (SINs)



# Commercial Sales Practices (CSP) Chart

| Column 1 -<br>Customer | Column<br>2 -<br>Discount | Column 3 –<br>Quantity/<br>Volume | Column 4 – FOB<br>Terms<br>(Designation or<br>Origin) | Column 5 –<br>Concessions<br>(Including<br>Prompt Pay) |
|------------------------|---------------------------|-----------------------------------|---|--|
|                        |                           |                                   |   |  |
|                        |                           |                                   |   |  |

# Commercial Sales Practices (CSP)

- “Customer” = all purchasers except the federal government
  - OEMs, VARs, state and local government agencies, distributors, educational institutions, national accounts, consumers, dealers
- “Discount” – any reduction to published or unpublished catalog prices (GSAR 552.212-70(a)); includes:
  - Rebates
  - Quantity/volume discounts
  - Purchase option credits
  - Any other T&Cs that reduce the end user’s overall acquisition cost for the product or service
- “Concession” – any benefit, enhancement or privilege (other than a “discount”) that reduces overall acquisition costs or encourages the customer to consummate a purchase (GSAR 552.212-70(a)); includes:
  - Freight allowances
  - Extended warranties
  - Extended price guarantees
  - Free installation
  - Bonus goods



## Commercial Sales Practices (CSP)

- You must understand your sales transaction data in order to properly prepare CSPs
- Sales transaction data often does not match contract pricing and discount and pricing policies and procedures
- “Best practices” is to use sales transaction data for date range of 12 months prior to CSP date



## Commercial Sales Practices (CSP)

- Understanding sales transaction data
  - What are “standard” discounts?
  - What are range and frequency of “non-standard” discounts?
  - What are average discounts by customer and customer type?
  - Different ways of describing discounts (ranges, maximum, maximum at various percentiles, average, weighted average)

## Commercial Sales Practices (CSP)

- Standards for MAS contract pricing:
  - GSA/VA must make “fair and reasonable” pricing determination (FAR Subpart 15.4)
  - Negotiating objective begins at MFC pricing
  - Most Favored Customer (also known as Tracking Customer and Customer of Comparability) pricing not required where sales data demonstrates that MFC is not appropriate

## Commercial Sales Practices (CSP)

- Distinguishing your MFC :
  - Volume commitments
  - Less favorable non-price T&Cs
  - Customer relieves you of tasks you perform for GSA customers
  - Customer purchase history
  - Other factors



## Commercial Sales Practices (CSP)

- Proposed Basis of Award (BOA) customer(s) may be identified in CSP submission
  - Negotiated
- Keep BOA customers as narrow as possible
  - Customers vs. customer groups
    - Avoid “all commercial customers”!
  - Individual contracts if your customers are mostly Government
  - Different BOA allowed for each item and SIN

## Commercial Sales Practices (CSP)



- Selecting proposed BOA
  - Will have to justify if you don't proposed MFC customer categories for BOA
  - Systems must be capable of tracking all “discounts” and “concessions” granted to BOA customers
  - Propose a BOA that you can track using existing systems and processes
    - Expressly exclude from application of the Price Reduction Clause ad hoc discounts and concessions that you cannot reasonably track

## Commercial Sales Practices (CSP)

- CSP preparation and submission:
  - Review internal pricing policies and procedures
  - Review contracts
  - Review raw sales data
  - Talk to sales people/account teams
  - Keep a copy of “due diligence” efforts (in case of audit)

# Price Reductions Clause (PRC)

- On-going obligation to GSA/VA
- Price reductions triggered if:
  - Reductions in commercial price list
  - Discounts to BOA customers that “disturb” the BOA-GSA/VA relationship
    - Important to understand the relationship and what constitutes a triggering event!
    - Use CSPs and Final Proposal Revision (FPR) to define what triggers PRC, negotiate alternative PRC compliance mechanisms (e.g., average discount monitoring)
    - If PRC is triggered, contractor must reduce GSA/GSA Schedule contract price on “same date” and for “same duration” as the triggering discount

# Price Reductions Clause (PRC)

- Risk areas
  - Failure to monitor BOA sales transactions
  - Reliance on outdated or inaccurate pricelists
  - Untrained sales and order entry staff
  - Poor communication between sales, contract management, and finance





# Transactional Data Reporting (TDR)

- Final rule implementing pilot program:  
10/13/2016

| Schedule | Description                                   | SINs  |
|----------|---|---|
| 58 I     | Professional Audio/Video                      | All   |
| 72       | Furnishings & Floor Coverings                 | All   |
| 03FAC    | Facilities Maintenance & Management           | All   |
| 51V      | Hardware Superstore                           | All   |
| 75       | Office Products/Supplies                      | All   |
| 73       | Food Service, Hospitality, Cleaning Equipment | All   |
| 70       | Information Technology                        | 132-54, 132-55,<br>132-32, 132-33,<br>132-34, 132-8 |
| 00CORP   | Professional Services Schedule (PSS)          | Services  |

# TDR

- Requires contractors to submit monthly reports detailing transaction-level data on sales to federal customers of items on the Schedule
  - 11 data elements to submit
  - Format options
- No PRC clause (no tracking of BOA customer)
- No CSPs.... BUT
  - Not required to provide or maintain CSPs. However, contracting officers have the option of requesting additional data to make fair and reasonable price determination
- Challenges:
  - Configuring reports
  - Complex items and special terms and conditions

# Industrial Funding Fee (IFF)

- 0.75% fee for GSA
- 0.5% fee for VA (except 1% for 2 schedules (services) 621I and 621II)
  - based on dollar value of sales under the contract charged to ordering agencies
- Contractors remit to GSA or VA on quarterly basis
- Problem areas:
  - Identifying GSA/VA schedule orders in order entry system
  - Ensuring accurate data entry by sales and operations



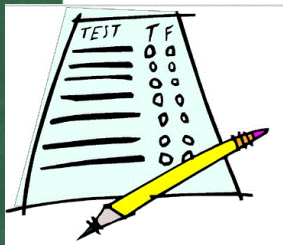


## Trade Agreements Act (TAA)

- Waives BAA and opens procurement to end products from “designated countries”
- TAA applies to all MAS contracts
  - And all orders under a MAS contract, regardless of order value
- Absolute prohibition on acquisition of end products and services from “non-designated” countries (e.g., China, Malaysia, India)
  - Unlike the BAA, there is no unreasonable cost exception!

# Trade Agreements Act (TAA)

- Rule of origin
  - Country in which article was “substantially transformed” into a new and different article
    - Yes = manufacturing processes complex and meaningful
    - No = assembly minimal or simple
    - Difficult test to apply, fact-specific
- U.S. Customs And Border Protection (CBP) has authority to make binding country of origin determinations for purposes of the TAA



## Trade Agreements Act (TAA)

- Risk areas:
  - “Substantial transformation” challenging to apply
  - Spares and ancillary parts
  - Changes in supply chain
  - Multiple countries of origin

## TAA Unique Compliance Risks for VA Schedule Contracts

- Difficulty with the Active Pharmaceutical Ingredient (“API”)
- The VHCA requires manufacturers of covered drugs to offer them for sale on the FSS contract as a condition of participation in Medicaid
  - Classifications “ineligible” for TAA
  - Offer on the VA FSS
- VA view – it is the responsibility of the manufacturer to correctly classify the offered products

## Other TAA issues - VA

- Determination of unavailability or inefficient supply of pharmaceuticals
- Risk of product shortfalls
- Non-FSS purchasing agreements
- Prime Contracts



# Audits

- Types of audits and reviews
  - Pre-award audits
  - Post-award audits
  - IFF audits
  - Contractor Assistance Visits (CAVs)
- Audit Risks
  - Proposal pricing disclosures/defective pricing
  - PRC monitoring
  - TAA compliance
  - Labor qualifications
  - IFF payments



# Enforcement mechanisms

- Mandatory disclosure
- False Claims Act
- Suspension and debarment
- Contract termination
- Past performance reviews and ratings



## How to minimize risk

- Full disclosure! Make sure CSPs are current, accurate, and complete
- Carefully define BOA customer and PRC triggering events
- Track sales to BOA customer(s)
- Monitor supply chain; maintain country of origin certifications
- Implement a robust compliance program
  - Policies and procedures
  - Training
  - Audits/reviews



## QUESTIONS?

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# THE UNIQUE WORLD OF GOVERNMENTAL INTELLECTUAL PROPERTY: WHO HAS RIGHTS TO WHAT?

**John McCarthy**  
**Karen Hermann**  
**Jon Baker**

## Overview

- Rights in Technical data and computer software
- Patent Rights
- Government IP issues in transactions

## Rights in Technical Data and Computer Software - Rights Allocation

- Contractor gets title!
- USG gets a license
- General categories of government license rights in computer software & technical data
  - Unlimited rights
  - Government purpose rights (DoD Only)
  - Restricted rights (computer software) / Limited rights (technical data)
  - Specifically negotiated rights

## Unlimited Rights

- USG has the right to do whatever it wants with the software/tech data
  - *E.g.*, Right to publish in The New York Times
- USG can grant third parties rights as well



## Limited Rights in Technical Data

- May be reproduced or used by the USG
  - The USG may not give computer software to competitors
- May not be disclosed outside the USG or used for manufacture
- FAR Exception (FAR 52.227-14, Alt. II)
  - Be aware of other permitted uses listed in the contract!
- DFARS Exceptions (DFARS 252.227-7013(a)(14))
  - Emergency repair
  - To USG support contractor
  - To foreign government if in the interest of the U.S.
  - Subject to certain restrictions & contractor notification

## Restricted Rights in Computer Software

- USG may:
  - Use a computer program with one computer at one time
    - May not be accessed, at one time, by more than one terminal or CPU
    - May not be time shared
  - Transfer to another USG agency computer
  - Make copies for safekeeping (archive), backup, or modification purposes
  - Modify computer software
  - Generally may not disclose to competitors
    - Permit service contractors to use computer software to diagnose/correct deficiencies, or to modify to respond to urgent tactical situations
    - Disclose to contractors for emergency repair and overhaul
- FAR 52.227-14; DFARS 252.227-7014(a)(15)

## Government Purpose Rights

- DFARS concept only
- Right to use within the USG without restriction
- Right to authorize others to use for any USG purpose
  - Primarily for reprocurement purposes
- Expire after a period of years and become unlimited rights



## Determining the USG's License



- *Was the data first produced in performance of the contract?*



- *Did the USG pay for the development?*

# General Rules: Determining When the USG Gets Unlimited Rights in Technical Data

*Civilian (FAR)*

- First produced in performance of USG contract, irrespective of funding

*DoD (DFARS)*

- Item, component or process developed exclusively with USG funds
- Tech data created exclusively with USG funding where contract does not require development, manufacture, construction, or production of items, components, or processes

*Civilian & DoD*

- Other specific categories, *e.g.*, form, fit & function data; manuals or instructional and training materials for installation, operation, or routine maintenance or repair

# General Rules: Determining When the USG Gets Unlimited Rights in Computer Software

*Civilian  
(FAR)*

- First produced in performance of USG contract, irrespective of funding

*DoD  
(DFARS)*

- Developed exclusively with USG funds
- S/W documentation required to be delivered under the contract
- Corrections or changes to s/w or documentation furnished by USG

## General Rules: Determining When the USG Gets Limited Rights in Technical Data / Restricted Rights in Noncommercial Computer Software

*Civilian  
(FAR)*

- Not developed in performance of USG contract; and
- Developed at private expense

*DoD  
(DFARS)*

- Item, component, process or software developed exclusively at private expense
- Tech data created exclusively at private expense where contract does not require development, manufacture, construction, or production of items, components, or processes

## General Rules: Determining When the USG Gets Government Purpose Rights in Technical Data & Noncommercial Computer Software

*Civilian  
(FAR)*

- N/A

*DoD  
(DFARS)*

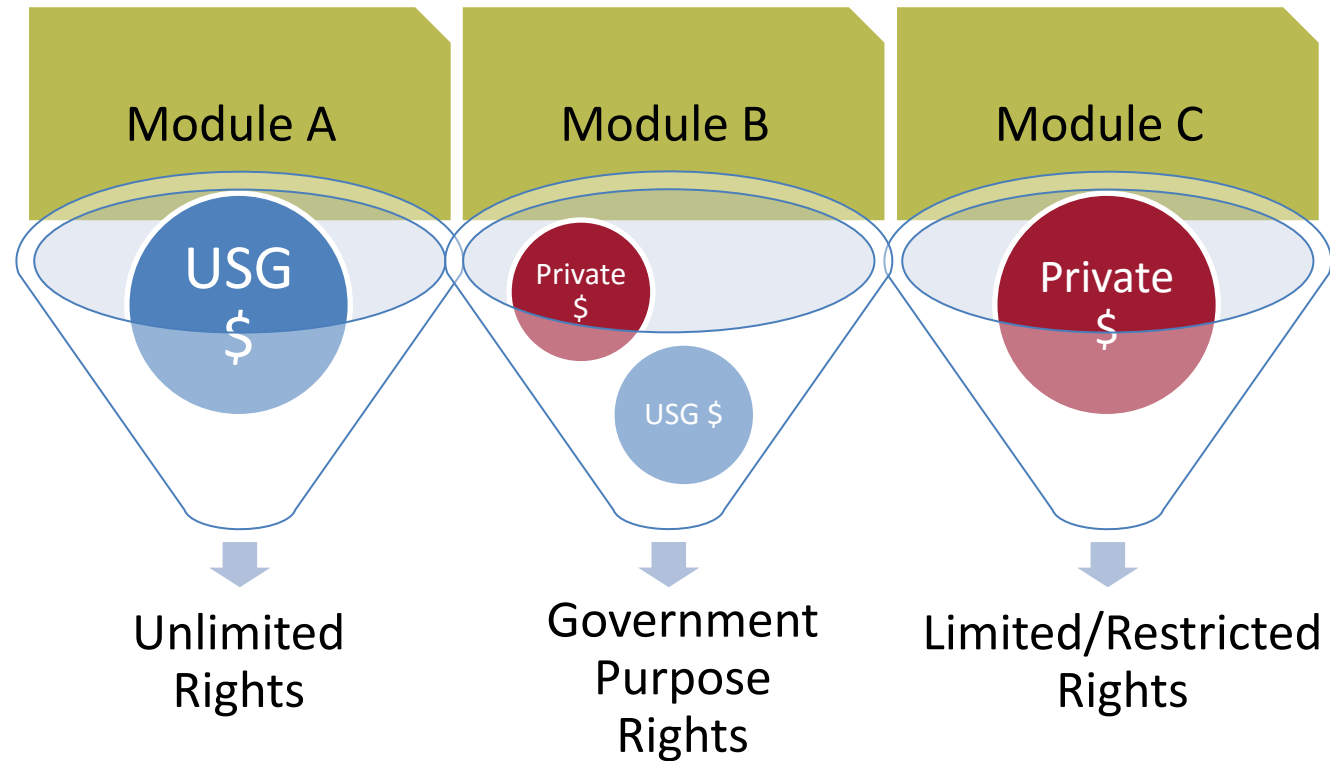
- Item, component, process, or software developed with mixed funding, *i.e.*, some USG & some private/indirect funding
- Tech data created with mixed funding where contract does not require development, manufacture, construction, or production of items, components, or processes



## Private Expense Determination

- Developed exclusively at private expense
  - FAR silent, but DFARS informative
  - “development was accomplished entirely with costs charged to indirect cost pools, costs not allocated to a government contract, or any combination thereof” DFARS 252.227-7013(a)(8), 252.227-7014(a)(8)
- Developed exclusively at U.S. Government expense
  - Direct contract charges
- Segregability
  - Private expense determinations should be made at the lowest practicable level (*e.g.*, software subroutine)
  - Must segregate in proposals what is developed at private expense
  - If you cannot segregate, then → mixed funding, GPR under DFARS, unlimited rights under FAR
- For fixed price contracts, if costs exceed fixed price, additional costs not considered for rights allocation

# Private Expense Determination



## When is an Item, Component, or Process “Developed”?

- Why do I care?
- An item, component, or process exists and is workable
- The item or component must have been constructed or the process practiced
- Workability is generally established when the item, component, or process has been analyzed or tested sufficiently to demonstrate to reasonable people skilled in the applicable art that there is a high probability that it will operate as intended

DFARS 252.227-7013(a)(7)

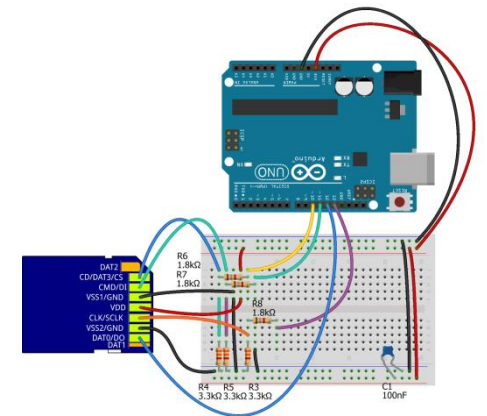
## When is Software “Developed”?

- Computer program (*e.g.*, object code)
  - Successfully operated in a computer and tested
    - To demonstrate to reasonable persons skilled in the art
    - Program can reasonably be expected to perform its intended purpose
- Computer software (*e.g.*, source code)
  - No operation required
  - Only “tested or analyzed”
- Computer software documentation
  - Written in any medium

DFARS 252.227-7014(a)(7)

## Examples of “Developed”

- *Applied Devices Corp., B-187902, 77-1 CPD ¶ 362*
  - Breadboard of a radar set deemed developed
  - Subsequent government funds to convert to a manufactured item did not give government unlimited rights
- *Dowty Decoto, Inc. v. Dep’t. of the Navy, 883 F.2d 774 (9<sup>th</sup> Cir. 1989)*
  - Aircraft “repeatable holdback bars” achieved workability prior to government funded improvements improved performance

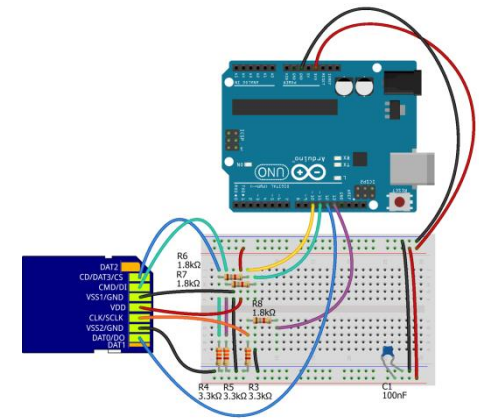


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## Subcontractor Rights

- Subcontractors entitled to the same protections as prime contractors



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## Traps for the Unwary

- Marking Requirements
- Maintaining Records
- Other Data Rights Clauses

## Notice/Marking

- Must provide notice and mark **all** data exactly as required or risk a grant of unlimited rights to the government
  - Unlabeled data is unlimited rights data
- Proposal must include table identifying what data/software is being delivered with other than unlimited rights



## Marking Requirements – Noncommercial Computer Software

- Contractor may only assert restrictions on the USG's rights to use, modify, reproduce, release, perform, display, or disclose computer software by marking the deliverable software or documentation subject to restriction
- Exception: the “combat” scenario

## Marking Practical Pointers for Contractors

- Mark the software/tech data you are delivering to the USG
  - Mark when software/technical data is created
- Use the required FAR/DFARS labels
  - Do not get creative
- Have a gate keeper for communications with the USG
  - Avoid direct Contractor engineer to USG engineer electronic or paper correspondence

## Data Assertions Table

- Proposal must include table identifying what data/software is being delivered with other than unlimited rights. For example (DoD procurement):

| Description          | Asserted Rights           | Basis of Assertion                                 |
|----------------------|---------------------------|--|
| Computer Program X.1 | Restricted Rights         | Developed exclusively at private expense           |
| Drawing No. 2        | Limited Rights            | Component developed exclusively at private expense |
| Specification No. 7  | Government Purpose Rights | Component developed with mixed funding             |

## Validation of Marking Requirements

- USG may require contractors to provide data to justify restrictive markings
  - Failure to respond may provide a basis for questioning restrictions
  - May result in government unilaterally modifying an asserted mark
- FAR 52.227-14(e); DFARS 227.7103-13

# Government Challenge Procedures

- Pre-challenge request for information
- Challenge must
  - Must be in writing
  - Must provide basis for the challenge
- The Contractor is required to respond within 60 days providing justification for the marking
- The Contracting Officer may
  - Extend the time for a response
  - Request additional supporting documentation
- The Contracting Officer must issue a final decision
- USG will honor the asserted restriction during any appeal of that final decision
- USG deals directly with subcontractors/suppliers in challenging such restrictions

## Maintaining Records

- Contractors need to maintain an accounting system to track what is:
- Developed in the performance of a contract
- Developed exclusively at private expense
- DFARS 252.227-7019(b):
- “The Contractor shall maintain records sufficient to justify the validity of any markings that assert restrictions on the Government's rights to use, modify, reproduce, perform, display, release, or disclose computer software delivered or required to be delivered under this contract and shall be prepared to furnish to the Contracting Officer a written justification for such restrictive markings in response to a request for information . . . .”

# Maintaining Records - Practical Pointers

- Upfront planning required -- Define scope of each development effort, whether in-house or under contract and confirm no overlap between IR&D and contract work
  - Design modifications – must use the same analysis
- Track the development effort from a technical standpoint to make sure that it stays consistent with the original charter
- Maintain separate charge accounts for each new development effort and maintain traceability between the charge accounts and the technical documentation
  - Put charge codes on technical data/software when created
- Retain the development records (technical and accounting)
  - Exempt from document destruction policy

## Other Data Rights Clauses

- Beware of other data rights clauses, such as:
  - FAR 52.227-17, Rights in Data – Special Works
  - Reach-Back Clauses:
    - FAR 52.227-16, Additional Data Requirements
    - DFARS 252.227-7027, Deferred Ordering of Technical Data or Computer Software
  - Agency-specific clauses, for example:

DATA RIGHTS. The Government has unlimited rights to all documents/material produced under this contract. All documents and materials, to include the source code of any software and associated documentation produced under this contract shall be Government owned and are the property of the Government with all rights and privileges of ownership/copyright belonging exclusively to the Government. The Contractor shall not use or sell these documents and materials without written permission from the KO. The Contractor shall not use materials supplied by the Government for any other purpose. The materials shall be the sole property of the Government. This right does not abrogate any other Government rights.



## Other Special Data Rights Clauses – Practical Pointers for Contractors

- Review IP clauses before submitting proposal or signing contract/task order/modification
- Consider taking exception to the special clause
  - Ask the USG/Prime to delete them
  - Where appropriate, argue that FAR or DFARS does not require incorporation of the clause
  - Consider explaining how incorporation of special clause will impact contract administration and/or cost
  - Consider proposing alternative or custom clauses

## Other Considerations

- License Rights vs. Delivery
- Specifically Negotiated Rights
- Commercial items/commercial computer software

## License Rights vs. Delivery

- License  $\neq$  Right to Require Delivery
- Delivery governed by contract requirements
  - Negotiate delivery requirements carefully (*e.g.*, source code)
- Carefully control delivery of computer software and technical data
  - Deliver only what is required
  - For example, if contract only requires delivery of object code and instruction manuals, do not deliver source code
- Can get additional compensation for additional delivery requirements
- Beware of reach-back clauses

## Specifically Negotiated Rights

- USG is not tied to standard FAR & DFARS rights allocation
- May negotiated rights other than “standard” rights
- But at minimum: Limited/Restricted Rights
- Must include license agreement as part of the contract

## Commercial vs. Noncommercial

- Contractors often want their products to be deemed commercial items
- Why:
  - Rights grant is generally more narrow
    - FAR/DFARS requirements may be waived
    - Standard commercial license terms often apply

## Commercial Item Definition

- Multiple ways to qualify as a “commercial item” – FAR 2.101
- Most common definition:
  - Any item, other than real property
    - of a type customarily used by general public for nongovernmental purposes, AND
    - sold, leased, or licensed to the general public OR offered for sale, lease, or license

## Rights in Technical Data Relating Commercial Items

- Compliance with the FAR and DFARS requirements may be excused
  - Including the marking requirements
- USG Rights
  - Some limited right to negotiation

## Rights in Commercial Computer Software

- USG generally acquires rights under license customarily provided to the public
- Contractor not required to provide USG information not generally provided to the public
- USG gets only the rights stated in the license
- If USG needs additional rights – must negotiate

FAR 12.212



## Commercial Items – Practical Pointers for Contractors

- Identify commercial items in proposal
  - If possible get USG concurrence
- Have a standard commercial license for technical data and computer software
- Use the commercial license
  - Must be slightly tailored for USG, e.g.:
    - Choice of law
    - Disputes
    - Indemnification

## Commercial Items – Practical Pointers for Contractors

- Standard FAR and DFARS Clauses
  - If possible, avoid use of the FAR/DFARS “Commercial Item” clauses
    - FAR 52.227-19 Commercial Computer Software License
    - DFARS 252.227-7015 Technical Data – Commercial Items
  - License grants inconsistent with most commercial licenses

# Trends in USG Approach to Commercial Items

- Increased emphasis in acquiring rights in technical data & computer software
  - Often allocation of rights in technical data computer software is an evaluation factor
  - VA Governing Law Clause
- Commercial licenses under increased scrutiny
  - GSA proposed rule identifies 15 unenforceable commercial terms, e.g.:
    - Definition of contracting parties
    - Contract formation
      - No click wrap licenses
      - No website license
      - Attach all licenses to contract
    - Automatic renewals of term-limited agreements
    - Future fees or penalties
    - Unilateral termination or modification by supplier
    - State/foreign law governed contracts
    - Confidentiality of agreement terms
    - Control of infringement actions
- More challenges to data rights markings

## Technical Data & Computer Software – Summary

- Complex set of rules – not intuitive
- Need to actively manage data rights
- Consider central oversight of development
- When in doubt, ask questions before:
  - Submitting a proposal
  - Executing the contract
  - Delivering the data/software

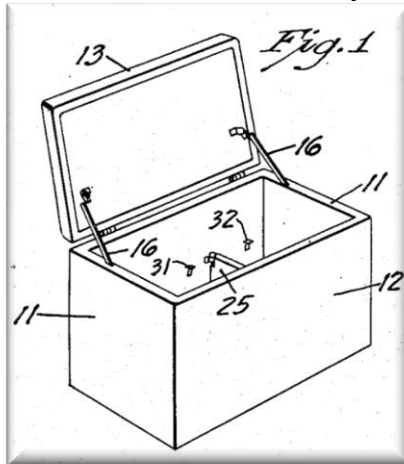
## Patent Rights

- Background & Definitions
- Allocation of Rights to Subject Inventions
- Procedural Requirements for Perfecting Title
- Infringement

# Background

## Data Rights

- Right to the embodiment of the idea (e.g., drawing, software)
- Disclosure not required



## Patent Rights

- Right to the idea
- Disclosure generally required
- Right to exclude others (see 35 U.S.C. § 271)



## “Subject Invention”

- Subject Invention is any invention of the contractor *conceived or first actually reduced to practice* in the performance of work under a USG contract” (FAR 27.301)

## FAR Allocation of Rights to Subject Inventions

- Two core issues:
  - Who gets the title to subject inventions?
  - What rights does the other party get?
- Allocation of rights defined by the applicable patent rights clause in the USG contract



# FAR Allocation of Rights to Subject Inventions

- Contractor's right to elect to retain title (most agencies)
  - Contractor may elect to retain title to subject inventions. FAR 52.227-11(b)(1); DFARS 252.227-7038(b)(1).
  - If Contractor does not elect to retain title, USG gets the title and contractor only gets a non-exclusive license.
    - FAR 52.227-11(b)(2); DFARS 252.227-7038(b)(1).
- Some narrow exceptions to Contractor's right to elect to retain title
- Dept. of Energy and NASA generally requires large businesses to obtain a waiver in order to retain title to subject inventions

## FAR Allocation of Rights to Subject Inventions

- USG license rights when contractor retains title
  - Minimum: Nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced for, *or on behalf of, the USG* throughout the world
  - May have additional rights to sublicense to any foreign government or international organization to effectuate treaties or international agreements

## FAR Allocation of Rights to Subject Inventions

- USG's right to receive title
  - USG has right to receive title if:
    - Contractor has failed to disclose in a timely manner
    - Contractor has not elected to retain rights
    - Contractor has failed to pursue filing and prosecuting a patent

# FAR Allocation of Rights to Subject Inventions

- USG’S “march-in rights”
  - Where contractor acquires title, USG can require contractor to license, or USG may license to others itself:
    - If contractor has failed to take adequate steps for practical application
    - To alleviate health or safety concerns
    - To meet requirements for public use
    - To meet domestic production preference

FAR 27.302(f)

## FAR Allocation of Rights to Subject Inventions

- Contractor's license rights if USG takes title:
  - Revocable, nonexclusive, royalty-free license
  - Extends to domestic subsidiaries and affiliates
  - Includes right to sublicense
  - Transferable only with CO approval
  - May be revoked or modified by the USG to achieve expeditious practical application
- But Contractor receives no license if it fails to disclose subject invention and USG takes title

# Government IP Issues in Corporate Transactions

- Sale of Government Contractors involve unique IP issues
  - IP Rights of Contractor
    - Impairment of those rights
  - USG rights
  - Other risks
- Due diligence by buyer
- Preparation by seller

## Government IP Issues in Corporate Transactions – Due Diligence

- What were the contracting agencies?
- Unique IP provisions
  - Government ownership/restrictions on use
- Patents
  - Key patents
  - Processes in place?
  - Processes followed?
- Tech Data/Computer Software
  - Key tech data/computer software
  - Processes in place?
  - Processes followed?
- Seller reps
- Determine impact of issues on value

## Government IP Issues in Corporate Transactions – Seller Side

- IP Audit
  - Identify assets
  - Identify issues
- Assemble/Update records
- Correct problems
- Maximize value
- Risks going forward



## QUESTIONS?

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# CYBERSECURITY FOR CONTRACTORS

**Evan Wolff**

**Paul Rosen**

**Kate M. Growley (CIPP/US)**

## Today's Curriculum

- Introduction to Cybersecurity
- Cyber Contracting Clauses and Provisions
- Information Sharing Arrangements
- Responding to Incidents

# Introduction to Cybersecurity

- Overviewing the threat environment
  - Nation state actors
  - Economic espionage
  - Insider threats
    - Malicious and negligent
  - A word about ransomware

# Introduction to Cybersecurity

- Key cybersecurity concepts
  - Goals: Confidentiality v. Integrity v. Availability
  - Methods: Administrative v. Technical v. Physical
  - Multi-stakeholder approach
    - This is not just an IT issue!
  - Managing up and down the supply chain
    - Security is all about the lowest common denominator.

# Introduction to Cybersecurity

- Key cybersecurity standards
  - NIST = National Institute of Standards & Technology // SP = Special Publication
  - NIST SP 800-53 Rev. 4
    - Security standard for federal agency systems
    - Applicable when acting as an extension of your customer
  - NIST SP 800-171 Rev. 1
    - Security standard for contractor systems with federal information
    - Applicable when using your own systems to handle customer information

# Cyber Contracting Clauses and Provisions

- Common cyber clauses
  - FAR 52.204-21 (JUN 2016), *Basic Safeguarding of Covered Contractor Information Systems*
  - Mandatory in all contracts
  - Requires protection of “Federal contract information” residing on their information systems
  - Requires protection via 17 controls pulled from NIST SP 800-171

# Cyber Contracting Clauses and Provisions

- Common cyber clauses
  - DFARS 252.204-7012 (OCT 2016), *Safeguarding of Covered Defense Information and Cyber Incident Reporting*
  - Requires protection of “covered defense information”
  - Requires protection via all 110 controls in NIST SP 800-171



# Cyber Contracting Clauses and Provisions

- Common cyber clauses
  - DFARS 252.204-7012 (OCT 2016), *Safeguarding of Covered Defense Information and Cyber Incident Reporting*
  - Also requires reporting of incidents affecting either “covered defense information” or “operationally critical support”
  - Also requires subcontractor flowdowns when applicable

# Cyber Contracting Clauses and Provisions

- Common cyber clauses
  - Pending FAR clause focused on “controlled unclassified information”
  - Expected to largely mirror DFARS Safeguarding Clause
  - Expected to be proposed in the next few months

# Cyber Contracting Clauses and Provisions

- Like DoD, many agencies have their own supplemental cyber clauses
  - Homeland Security → “HSAR”
  - State Department → “DSAR”
- And the customer can set a higher floor
  - Read your SOW/PWS!
  - But don’t be afraid to push back.

## Information Sharing Arrangements

- Defense Industrial Base (DIB)  
Cybersecurity Information Sharing  
Program
- Information sharing & analysis centers  
(ISACs)
- Information sharing & analysis  
organizations (ISAOs)

## Responding to Incidents

- Investigations
  - Internally led
  - Led by your customer (or their delegate)
- Notifications
  - Mandatory and voluntary
- Engaging with law enforcement
- Remediation and after-action reviews

## QUESTIONS?

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# CLAIMS, CHANGES, & TERMINATIONS

**Chris Haile**

**Tully McLaughlin**

**Sharmistha Das**

## Agenda:

- **Contract Changes**
- Claims Administration and Procedure
- Terminations



## Contract Changes

- Administration of Changes
- Cardinal Changes
- Duty to Proceed
- Government Authority
- Constructive Changes

# Administration of Changes

- The Standard “Changes” Clauses
- Formal Modifications
  - Mutual Agreement / “Bilateral”
  - Unilateral changes by the Government

# Administration of Changes

- Standard “Changes” Clauses
  - 52.243-1 Fixed Price
  - 52.243-2 Cost Reimbursement
  - 52.243-3 Time & Materials / Labor Hours
  - 52.243-4 Construction

# Administration of Changes

## FAR 52.243-1

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

- (1) 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.
- (2) Method of shipment or packing.
- (3) Place of delivery.

# Administration of Changes

## FAR 52.243-1 (Cont'd)

(b) If 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.

- Note: Equitable adjustment of price should include both cost and profit

# Administration of Changes

## FAR 52.243-1 (Cont'd)

(c) The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.

\* \* \*

(e) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

## Cardinal Changes

- Changes clause allows changes “within the general scope” of the contract
- Does not allow a “cardinal change”







# Cardinal Changes

- Other terms of the Changes Clause may also come into play
- Consider:
  - Nature of the work
  - Relative cost / disruption
  - Terms & Conditions
  - Quantities
  - Schedule

## Cardinal Changes

- Cardinal Changes and the duty to proceed
  - 52.233-1 and 52.233-1 (Alt. I)
  - “arising under” vs. “arising under or relating to”

# A Contractor's Duty to Proceed

## Disputes clause (52.233-1) –

“The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.”

# A Contractor's Duty to Proceed

- In early decisions, a “cardinal change” was deemed a material breach, the resulting dispute was not seen as “arising under the contract,” and the contractor was not obligated to perform.
- See *Alliant Techsystems, Inc. v. U.S.*, 178 F.3d 1260, reh’g denied, 186 F.3d 1379 (1999) (change to option delivery schedule rendered exercise ineffective, but contractor was required to perform under Disputes clause because option change was not a cardinal change).
- Many contracts now contain the alternate “all disputes” clause. FAR 52.233-1, Alternate I (disputes “relating to the contract”).

# Government Authority

- Know who has authority to direct changes
- FAR 43.102(a)
  - Only contracting officers acting within the scope of their authority are empowered to execute contract modifications . . . . Other Government personnel shall not—
    - (1) Execute contract modifications;
    - (2) Act in such a manner as to cause the contractor to believe that they have authority to bind the Government;  
or
    - (3) Direct or encourage the contractor to perform work that should be the subject of a contract modification.

## Constructive Changes

- Where the Government changes the contract but won't admit it
- The challenge is to identify these early and then respond in the right way

## Constructive Changes

- To protect the company's interests it is critical to:
  - Identify the change promptly
  - Put the Contracting Officer on notice
  - Demand (or reserve right to) more money and time

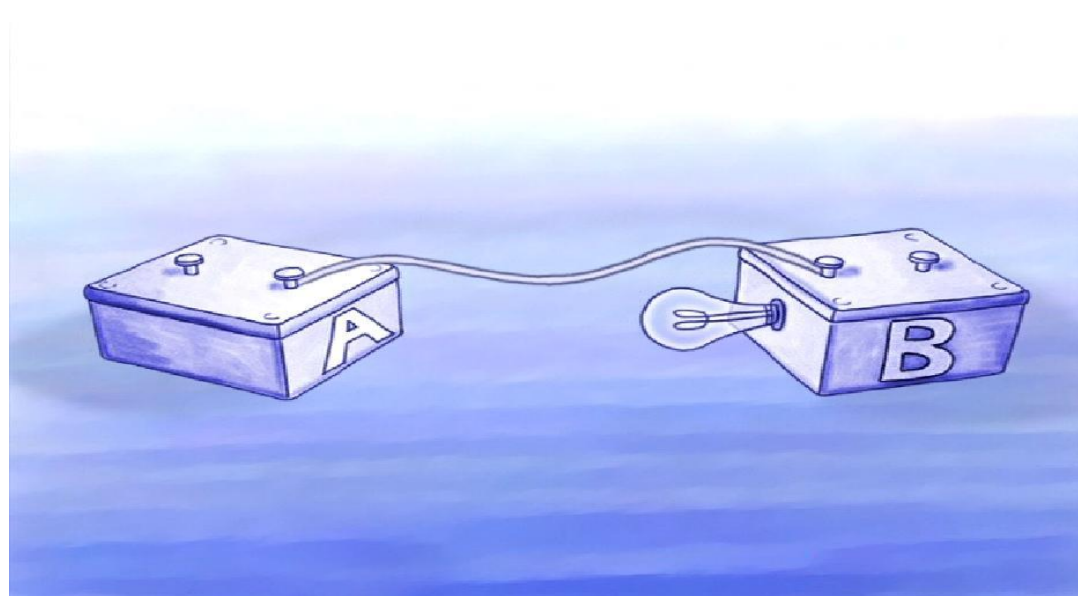


# Constructive Changes

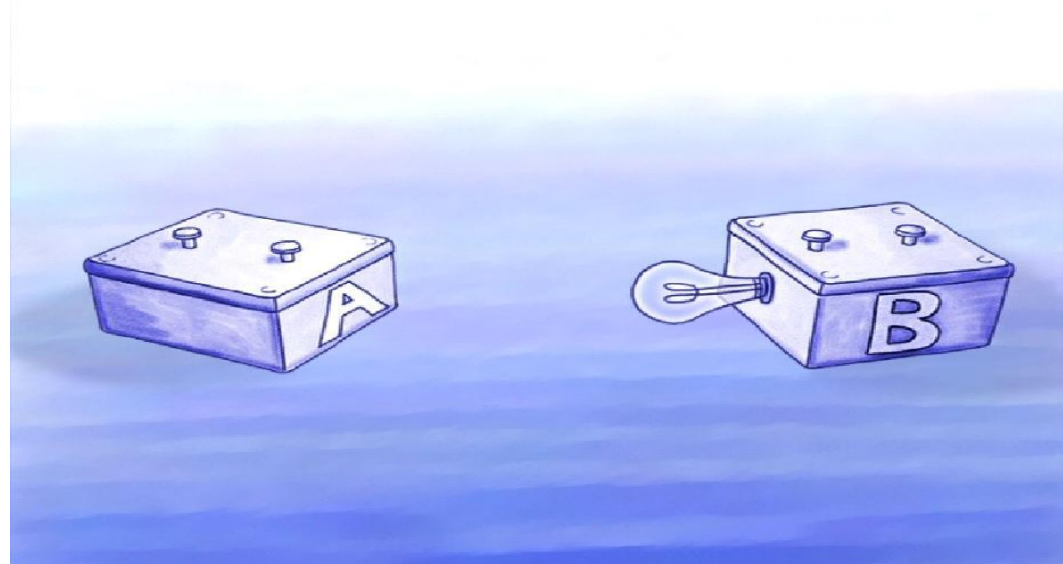
- Four Basic Types:
  - Changes to Express Contract Terms
  - Defective Specifications
  - Interference
  - Failure to Cooperate

# Changes to Express Contract Terms

- Government says contract requires Box A and Box B connection



- You say it doesn't



# Defective Specifications

- Govt specs tell how to build, but design doesn't work
- Government bears the risk that its specifications are defective, not the Contractor
  - *US v. Spearin*, 248 U.S. 132 (1918) - “[I]f the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications.”
- Note: Contractor can't have known this was a problem before bidding

# Defective Specifications

- Before making changes to Government specs (even improvements):
  - Notify the CO
  - Get CO direction
  - Document all communications

# Interference

- Where the Government's actions interfere with your ability to perform the contract
- May occur where there are design specs or where there are performance specs

## Interference

- Do not just quietly follow the COTR instruction
- Tell the CO of the demand and that it is a change to the contract
- Tell the CO of cost/schedule impacts
- Request formal CO direction before proceeding
- Reserve rights to recovery
- Document all communications

# Interference

Other common types of interference:

- Over inspection
- Disruption of work
- Failure to reasonably respond (e.g., approvals)
- Failure to cooperate
  - e.g., fail to disclose relevant information, not providing promised facilities

## Constructive Acceleration

- Where you deserve more time to complete performance, but the government won't allow it
- Generally occurs in conjunction with other changes



## More Changes

1. Commercial Item Changes
2. Delays
3. Differing Site Conditions
4. Deductive Changes

# Commercial Item Changes

- **FAR 52.212-4(c)**
  - Requires all change to be with bilateral agreement
  - What if CO directs unilateral change regardless?

# Contract: Delays

- **FAR 52.242-17, *Government Delay***
  - Any CO action or inaction
  - That affects *any* part of Contract performance
  - And increases costs or affects schedule
- Notify the CO within 20 days of CO in/action
- Document everything
- Only get costs + overhead (profit excluded)

# Deductive Changes

- Permissible if “in the general scope of the contract”
- downward equitable adjustment to the extent of the savings to the contractor due to the deletion
- Generally priced based on how much the deleted work “would have cost”
- Can be viewed instead as a partial termination for convenience

## Documentation of Changes/Delays

- **Key Actions up front:**
  - Timely recognition of the change
  - Prompt notification of Contracting Officer
  - Get CO direction
  - Reserve claims for money and time
  - Document all communications

## Documentation of Changes/Delays

- **Support for Recovery**
  - Understand the original contract requirements
  - Document the Government actions / inactions
  - Identify / track the impacts
    - Direct effects
    - Indirect effects

# Documentation of Changes/Delays

## Example Direct Effects

- Labor / Overhead
- Material
- Subcontractor Costs
- Rework
- Other Costs

## Example Indirect Effects

- Delays
- Constructive Acceleration
- Disruption

# Documentation of Changes/Delays

## Tracking the Costs

- Change Order Accounting Clauses
  - apply to formal changes
- Constructive Changes are harder to track
  - often late recognition
  - consider charge numbers once identified
  - estimates may be needed
- KEY = Early identification and coordination



## Agenda:

- Contract Changes
- Claims Administration and Procedure
- Terminations

# Presenting an REA

- Request for Equitable Adjustment
  - No prescribed format in FAR
  - Case law provides further guidance
  - Written demand
  - Seeking as a matter of right
    - Payment of money
    - Adjustment of contract terms
    - Other relief
  - REA “Certification” for DoD Contracts
    - DFARS 252.243-7002
    - Short: Good Faith...Accurate...Best of Knowledge/Belief



## Presenting a Claim: Basic Elements

- Formal “claim” must be made
  - Written demand
  - Submitted to the Contracting Officer
  - Seeking as a matter of right
    - Payment in a sum certain
    - Adjustment of contract terms
    - Other relief
  - Certification if over \$100K
- A claim is NOT
  - A routine invoice for payment

## Presenting a Claim: Basic Elements

- Types of costs
- Actuals vs. Projections
  - Effects of claim may be ongoing
  - Need a cut off date between past and future (project for future)
- Accuracy
  - False Claims Act

## Presenting a Claim: Basic Elements

- Request for Contracting Officer’s “final decision” – implied or explicit
  - the government’s decision on a contractor’s claim
  - the government’s claim against a contractor
- Certification if claim exceeds \$100,000
  - Correctable if defective
  - Revisions permitted
  - Authorized signature

# Presenting a Claim: Certification

- For claim over \$100K – certification
  - “I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the Contractor.” FAR 52.233-1

# Presenting a Claim: Certification

- Potential False Claims Act liability
  - 31 U.S.C. § 3729 – knowingly presenting a false or fraudulent claim for payment or approval (specific intent not required)
    - Preponderance of evidence
  - 41 U.S.C. § 7103(c) – CDA anti-fraud provision for misrepresentation of fact or fraud
    - Preponderance of evidence
  - Forfeiture of Fraudulent Claims Act - 28 U.S.C. § 2514.
    - Clear and convincing evidence
  - See *Daewoo Engineering & Construction Co. v. United States*, 557 F.3d 1332 (Fed. Cir. 2009) – REA without support

# Presenting a Claim: Statute of Limitations

- Six years after accrual of claim
  - “‘Accrual of a claim’ means the date when all events that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to accrue some injury must have occurred. However, monetary damages need not have been accrued.” FAR 33.201.



# REAs & Claims: Common Elements

- **Objectives:**
  - Create a compelling, believable, and well supported presentation that cannot be undercut by
    - The known facts
    - The facts you don't know but can *anticipate*
- **Entitlement**
  - Description of original requirements and how the Government changed the nature of the work
- **Quantum**
  - Impact of changes, and documentation

## REAs & Claims: Common Elements

- Executive Summary
- Contract Requirement
- Government direction, action or inaction that caused you to delay, accelerate, or disrupt performance
- What you did
- What is the cost
- Legal analysis

## REAs & Claims: Common Elements

- An indexed and tabbed appendix containing supporting material
  - Citations to relevant Contract clauses
  - Correspondence/communications
  - Evidence of incurred costs
  - Computations, estimates, and projections (if ongoing)
  - Other materials as appropriate



## REA and Contract Disputes Act “Claim”: Differences?

- Differences between an REA and a “Claim” under the CDA
  - What are the differences?
  - Why are these differences important?
  - How do these differences impact your approach?

## REA vs. Contract Disputes Act Claim

- Key differences between CDA claim and REA
  - Timing of CDA Claim
    - Assertion of claim
    - Government response to claim
    - Appeal of final decision
  - Interest
  - Cost allowability

# CDA Claims v. REAs

|                          | <u>CDA Claims</u>  | <u>Requests for Equitable Adjustments</u>  |
|--------------------------|--|--|
| <u>Format</u>            | <ul style="list-style-type: none"> <li>• Written demand</li> <li>• Seeking relief as a right: sum certain, adjustment of contract terms, or other relief in dispute</li> <li>• Certification required if over \$100k</li> </ul>  | <ul style="list-style-type: none"> <li>• Written demand</li> <li>• Seeking payment of money, adjustment of contract terms, or other relief</li> <li>• DoD contracts require a watered-down REA certification.</li> </ul> |
| <u>Timing</u>            | <ul style="list-style-type: none"> <li>• Contractor/Govt – Claim within 6 years of accrual</li> <li>• Govt – Final decision within 60 days or set firm date for decision</li> <li>• Contractor – Appeal the Final Decision within 90 days (to Board) or 12 months (to COFC)</li> </ul> | <ul style="list-style-type: none"> <li>• No time limits</li> <li>• <i>[Don't forget to convert the REA into a claim before the 6-year Statute of Limitations expires!]</i></li> </ul>                                    |
| <u>Interest</u>          | <ul style="list-style-type: none"> <li>• Interest begins from date of claim submission.</li> </ul>   | <ul style="list-style-type: none"> <li>• No interest.</li> </ul>   |
| <u>Cost Allowability</u> | <ul style="list-style-type: none"> <li>• Costs of claim preparation and litigation are generally unallowable.</li> </ul>   | <ul style="list-style-type: none"> <li>• Costs of REA preparation and settlement negotiations are allowable as “contract administration” costs.</li> </ul>   |

# Claims and Disputes

- The submission of a claim initiates the “disputes” process
- “Disputes clause” implements the Contract Disputes Act by inclusion in contract. Far 52.233-1

# Disputes

- Claim must be made by contractor or Government
- Contracting Officer makes final decision on claim
  - Contractor has the right to appeal the final decision
- Contract Disputes Act applies to all disputes arising under or related to a contract



# Disputes: Role of Contracting Officer

- Negotiated settlement is encouraged
- Binding authority to settle
  - Before or after appeal to BCA
  - Limited if appeal to Court of Federal Claims
  - No authority to settle or pay fraudulent claim
- Final decision required
  - Within 60 days of claim unless extended for claims over \$100,000
    - If > \$100,000 then within 60 days CO must either
      - Issue decision, or
      - Set a firm date for the decision - must be a “reasonable” time or may be a “deemed denial” allowing appeal

# Disputes: Final Decision

- » CO Final Decision – Form and Content
  - Must be in writing
  - Must address substance of claim
  - Must state the reasons for the decisions reached
    - Scope of decision is the basis for the scope of the appeal of the decision
  - Should “inform” the contractor of its rights, e.g., right to appeal decision, 41 U.S.C. § 7103(e)
    - 90 days to BCAs
    - 1 year to Court of Federal Claims
- » CO Final Decision – Final unless appealed

## Disputes: Litigation

- Appeal under the disputes clause to the Board of Contract Appeals or to the Court of Federal Claims
- Election binding, subject to consolidation of related claims
- Timing for Appeal
  - 90 days to Board of Contract Appeals
  - 1 year to Court of Federal Claims

## Disputes: Board v COFC

- Time to file the appeal (Board 90 days; Court 12 months)
- Availability of fraud counterclaims and Forfeiture of Fraudulent Claims Act (Board No; Court Yes)
  - But beware affirmative defenses at board
- Precedent on relevant issues
- Relative expertise (Boards specialized forums)
- Perceived independence from agency (Court)
- Formality of procedures (Board No; Court Yes)
- Opposing Counsel (Board agency; Court DOJ)
- Cost
- Speed to decision
- Likelihood of using ADR later / simultaneously

# COFC v. Boards of Contract Appeals

|   | <u>Court of Federal Claims</u>  | <u>Boards of Contract Appeals</u>   |
|---|---|---|
| <u>Timeline</u>                         | <ul style="list-style-type: none"> <li>• 12 months after receipt of final decision</li> </ul>   | <ul style="list-style-type: none"> <li>• 90 days after receipt of final decision</li> </ul>   |
| <u>Length of cases</u>                  | <ul style="list-style-type: none"> <li>• Average is 3 years</li> </ul>  | <ul style="list-style-type: none"> <li>• Average is 1 year</li> </ul>   |
| <u>CO's Ability to Settle</u>           | <ul style="list-style-type: none"> <li>• No.</li> </ul>   | <ul style="list-style-type: none"> <li>• Yes.</li> </ul>  |
| <u>Judges</u>                           | <ul style="list-style-type: none"> <li>• Article I court</li> <li>• 16 judges, serving 15-year terms, and an additional 10 active senior judges</li> <li>• Single judge decides case</li> </ul> | <ul style="list-style-type: none"> <li>• Article I Tribunal</li> <li>• Experienced judges</li> <li>• Single judge presides over admission of evidence, but decisions made by 3-judge panel</li> </ul> |
| <u>Who Litigates on Behalf of Govt?</u> | <ul style="list-style-type: none"> <li>• Department of Justice</li> </ul>   | <ul style="list-style-type: none"> <li>• Agency Lawyers</li> </ul>  |
| <u>ADR</u>                              | <ul style="list-style-type: none"> <li>• Yes, voluntary and several types.</li> </ul>   | <ul style="list-style-type: none"> <li>• Yes, voluntary and several types.</li> <li>• Some may aid in ADR before issuance of final decision.</li> </ul>   |

## Standard of Review of CO Decision

- Explicitly De Novo at the Court of Federal Claims 41 U.S.C. § 7104(b)
- Parties start with “clean slate” before the Boards
  - 41 U.S.C. § 7103(e) provides that any findings of fact by the CO are not binding in any subsequent proceeding

# Review of Board Decisions

- Appeal within 120 days of receipt of decision  
41 U.S.C. § 7107(a)(1)
  - Standard of Review
    - Legal issues: de novo
    - Questions of fact:
      - “the decision of the agency board on a question of fact is final and conclusive and may not be set aside unless the decision is -
      - (A) fraudulent, arbitrary, or capricious;
      - (B) so grossly erroneous as to necessarily imply bad faith;
      - or
      - (C) not supported by substantial evidence.”
- 41 U.S.C. § 7107(b)(2)

## Review of Court of Federal Claims

- Appeal within 60 days of entry of Court of Federal Claims Judgment - 28 U.S.C. § 2107
- Standard of Review
  - Legal issues: de novo
  - Questions of fact: “clearly erroneous” FRCP 52(a)



# Appealing the CO Final Decision

**Supreme Court of the United States**

(certiorari)

**The Court of Appeals for the Federal Circuit**

Appeal by contractor or  
Government agency head  
with approval of Attorney  
General

**Board of Contract  
Appeals**

**ADR**

**Court of Federal  
Claims**

90 days from  
receipt of decision

Only  
contractor may  
appeal

12 months from  
receipt of decision

**Contracting Officer's Final Decision**

## Agenda:

- Contract Changes
- Claims Administration and Procedure
- Terminations

## Termination for Convenience

- Not common in the commercial market
- Gives the Government broad authority to terminate without cause
- Limits contractor's recovery to
  - Costs incurred
  - Profit on work performed
  - Costs of preparing termination settlement proposal

# Termination for Convenience

- When the government wants – except for bad faith
- No-cost settlement versus termination for convenience where
  - Contractor amenable
  - No government property
  - No debts due the government
- No termination where the price of the undelivered portion is less than \$5,000
- If the same item is under contract with both large and small business, preference for continuing performance with the small business
- Can be partial termination

# General Procedure

- Notice of Termination
  - In writing
  - By the Contracting Officer
  - Provide
    - Effective date of termination
    - Scope of termination
    - Any special instructions
- After notice of termination, termination contracting officer responsible

# Contractor Obligations Upon Notice

- Stop work as specified in the notice
  - Note that for partial termination, contractor is obligated to continue the unterminated work
- Discontinue placing further orders on the terminated portion of the contract
- Notify subcontractors
  - Provide termination notices
  - Assure that scope of subcontractor termination is consistent with the prime contract termination
- Notify employees

# Contractor Obligations Upon Notice

- Notify the TCO of any special circumstances that preclude the stoppage of work
- Continue performance of unterminated portion of the contract
  - Promptly submit REA for impact of termination on unterminated portion of the contract
- Settle outstanding liabilities in connection with termination
- Promptly submit termination settlement proposal

# Contractor Obligations Upon Notice

- Inventory
  - Segregate and identify inventory allocable to the terminated subcontract
  - Assess the status of the inventory
    - Title
    - Condition
  - Protect and preserve the inventory pending disposition
  - Prepare inventory schedule and submit to the TCO
  - Dispose of inventory as directed by the TCO



# WARN Act

- Covered Employers - 100 or more employees
- Triggering Event – Plant Closing or layoff of 50 or more employees / 33% of workforce at site
- Requirement – 60-day advance notice (or pay in lieu of notice) to impacted employees, bargaining representative, state dislocated worker unit, chief local elected official
- Timing – 90-day rolling period for employee calculation
- Penalties – compensation and benefits for violation period up to 60 days; \$500/day for failure to notify officials
- Exceptions – unforeseen business circumstances; natural disaster
- “Mini WARN Acts” – States have separate WARN requirements

# Termination Preparation/Tips

- Work with Government to Minimize Termination Impact
  - Timing of contract termination
  - How much notice will be provided for each phase
  - Government employment of contract employees
    - How many jobs insourced
    - When jobs will be posted
    - Process for application/interview process
- Other Statutory Obligations
  - FLSA/state wage payment laws
  - COBRA notices
  - ADEA/OWBPA requirements

## Termination for Convenience – Cost-Reimbursement Contracts

- Recovery of costs incurred in performance
- Continuing costs
- Settlement costs
- Percentage of the fee equal to the percentage of completion of work contemplated under the contract (excluding subcontract effort included in subcontractors' termination proposals), less previous payments for fee.

# Termination for Convenience – Commercial Items Contracts

- FAR Part 12.4 / 52.212-4(I)
- Payments to Contractor:
  - “percentage of the contract price reflecting the percentage of work performed prior to the notice of termination”
    - Compare: Part 49 (work delivered and accepted)
    - *TriRAD Techs. Inc.*, ASBCA No. 58855 (Feb. 23, 2015)
  - “Reasonable charges . . . that have resulted from the termination”
    - Does not require compliance with CAS or contract cost principles
    - Can be demonstrated using the contractor’s “standard record keeping system”
    - FAR Part 49 provisions are only “guidance”
- Non-standard termination provisions

## Termination for Convenience

- FAR cost principles and case law can inform extent of negotiated settlement (including commercial item contracts, *SWR, Inc.*, ASBCA No. 56708, Dec. 2014)
  - Loss of useful value
  - Initial Costs
  - Subcontractor claims

# Terminations for Default

- Grounds for T for D
- Notice rules & responses
- Establishing the record before and after notice
- Potential consequences
- Contractor recovery & potential liability
- Appeals/conversion to T4C

# Grounds for Default Termination

- Examples
  - Repudiation
  - Failure to deliver or proceed
  - Severe progress problems
  - Defective product
  - Failure to comply with other contract provisions
- FAR 49.402-3 lists factors agency must consider before termination, but highly discretionary
- Decision will be upheld if basis existed at time of termination even if not listed in termination notice

## Cure Notice

- T for D may be improper if written cure notice not issued, or if termination based on ground not mentioned in cure notice
- Cure period of 10 days
- Not required if
  - Performance schedule has expired or fewer than 10 days remain on contract
  - Futile – e.g., repudiation
- Response - cure or give “adequate assurance”
- Gov’t must fully evaluate response



# Show Cause & Termination Notices

- Show Cause
  - If T for D is deemed appropriate, show cause notice is encouraged, but not mandatory.
  - No required response period
  - Issuance of show cause notice after due date does not impact gov't's right to T for D for failure to timely deliver
- Termination Notice
  - Grounds for default, liability for excess procurement costs, right to appeal
  - Failure to comply with formal FAR requirement not fatal to T for D unless contractor prejudiced

# Establishing the Record

- Before notice
  - Be alert to customer dissatisfaction
  - Diligently address perceived or actual performance issues
  - Fully document delay & performance issues
  - For issues relating to differing contractual interpretations, consider getting legal involved early
- After cure notice
  - Timely, complete response
  - Provide proof deficiency is cured or give “adequate assurance” of performance

# Consequences of T for D

- Severe impact
  - Contract harm
    - Gov't not liable for costs of unaccepted work
    - Return progress, partial, or advance payments
    - Excess reprocurement costs
    - Liquidated damages
  - Broader issues - Reputational/past performance, possible debarment
- T for D = species of forfeiture
  - Gov't held to “strict accountability in using this sanction”

# Recovery and Potential Liability

- Recovery
  - *Service & construction* - Payment for work properly performed prior to termination
  - *Supplies* – no right to recover cost for supplies not accepted by gov't
  - No recovery for anticipated profit
- Potential liabilities
  - Excess costs of reprocurement or completion
    - Same or similar supplies, actually incurred excess costs, acted reasonably to minimize excess costs
  - Other rights and remedies provided by law or contract

# Appeals and Conversion

- CO can reinstate if doing so would be advantageous to the gov't
- Appeals - COFC or Boards
  - Agency counsel or DoJ? Timing? Process/expense?
- Not arbitrary, based on a judgment on the merits, consideration of the alternatives, free from outside influence
- Conversion to termination for convenience
  - Permits recovery of costs incurred (but still not anticipated profit unless termination was in bad faith)
  - Removes reputational stain

# QUESTIONS?

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