
CHAPTER I

Introduction

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I. Introduction

Contracting with the federal government is like dancing with a gorilla. With very few exceptions, you dance the way the gorilla wants you to dance and if you don't do what the gorilla wants, things can get very ugly very quickly.

The U.S. government spends over \$400 billion a year on its contracting. This is spread over supplies, services, construction, research, and development. Even if the prime contract is not a construction contract, very often it will have construction aspects that will result in the award of a construction subcontract. A construction subcontract under a supply or services contract still must adhere to many of the same federal contracting requirements plus those that apply solely to federal construction contracting.

Contractors must never forget that, in conducting business with the government, they are dealing not only with an enormously large and wealthy contracting party, but also with a sovereign entity. For that reason, things that would be considered perfectly acceptable in private contracting might be criminal acts in federal contracting. One prime example is gratuities. In private contracting it is routine, even expected and encouraged, to take customers out to lunch, or to send them gifts. In federal contracting, at the very least, such actions would be considered impermissible gratuities if not outright bribes. Puffing up one's qualifications in order to win the contract might be considered commonplace in private contracting, but in federal contracting, it could constitute a false statement under 18 U.S.C. § 1001.

Contractors should be aware that, when they get involved in government contracting, the government wears many hats. Quite often the government will clearly and undeniably delay or make more expensive the costs of performing the contract, but the contractor's remedies are severely limited. In one case, for example, the contractor was performing work in the Washington

Navy Yard in the District of Columbia. The contractor had a schedule to meet under a fixed-price contract. Unfortunately, the Secret Service had ordered the contractor off the site and sealed the area because President George H.W. Bush would be visiting the Navy Yard, where the construction was occurring. Neither the contractor nor the agency had authority to refuse the Secret Service's order. The contractor thus left the site and returned after the presidential visit. During the interim, the contractor still had to pay its workers and still had to incur the costs of owning or renting equipment.¹ The contractor submitted a claim to the contracting officer and it was denied.

The contracting officer did not dispute that the delay was excusable, because it was beyond the control and without the fault or negligence of the contractor. Therefore, the contractor was entitled to a time extension under the Excusable Delay clause of the contract, FAR 52.249-10(c). The problem was that this was an act of the government in its sovereign capacity, not its contractual capacity. Accordingly, it did not fall under the Changes clause of the contract, nor any of the other remedy-granting clauses. The contractor received a time extension but no money. This same result occurs if the contractor's performance under its fixed-price contract is made more expensive or longer because of new regulations issued by the Environmental Protection Agency or any other department or agency.

It is important, therefore, that people in the construction industry have an appreciation of the governing rules, the government officials they are most likely to deal with, and the forums to which grievances may be taken.²

A. Governing Law

Federal contracts are normally subject only to federal procurement law comprising federal contracting statutes and regulations, as interpreted by the U.S. Court of Appeals for the Federal Circuit, the U.S. Court of Federal Claims, the Boards of Contract Appeals, and the U.S. Comptroller General. Sometimes it will be necessary to review state laws such as those regarding warranties under a state's Uniform Commercial Code.

Though federal law does not typically apply to subcontracts, it can be adopted by the prime and the subcontractor so that both the prime contract with the government and the subcontract are governed by the same body of law.³ This does not, however, give a federal court subject-matter jurisdiction over a dispute between the prime and subcontractor.

1. Mergentime Corp., ENG BCA No. 5765, 92-2 BCA ¶ 25,007.

2. For a more detailed explanation of this subject, see James F. Nagle, *HOW TO REVIEW A FEDERAL CONTRACT AND RESEARCH FEDERAL CONTRACT LAW* (2d ed. 2000).

3. *See id.*

B. Statutes

Procurement statutes are spread throughout the U.S. Code. The main statutes are in Title 41, Public Contracts, but if you deal with military agencies such as the Army Corps of Engineers, many of those statutes are included in Title 10 dealing with the Armed Forces. The two main statutes involved in federal contracting are the Armed Services Procurement Act of 1947⁴ and the Federal Property and Administrative Services Act of 1949.⁵ These old statutes are still very current. Whenever Congress issues a new government contracts statute, it amends those two 1940s-era statutes. For example, the Truth in Negotiations Act,⁶ which requires the submission of cost or pricing data on large-dollar-value contracts, and which is often called the Defective Pricing Statute, is codified in both Title 10 and Title 41. Similarly, the Competition in Contracting Act, which mandates full and open competition in government contracts, is codified in 10 U.S.C. § 2304 and 41 U.S.C. § 253. The Federal Acquisition Streamlining Act,⁷ which created a major overhaul of federal contracting in the mid-1990s, is codified at numerous places throughout the U.S. Code.

Besides these comprehensive procurement statutes, Congress will often enact specific requirements in the public laws that authorize programs or appropriate monies for the particular federal agency. For example, the budget for the Army Corps of Engineers or the General Services Administration may well contain paragraphs stating that no money of the funds appropriated under that public law can be used except in a particular method that Congress wants to impose.

C. Regulations

Obviously, federal contractors must comply with the applicable statutes, executive orders, and regulations. Fortunately, the federal government, unlike many other large owners, has published a publicly available compilation of the rules that must be followed. This compilation is known as the Federal Acquisition Regulation (FAR).

The FAR is at Title 48 of the Code of Federal Regulations, Chapter 1. Actually, Title 48 in its entirety is often referred to as the FARS—the Federal Acquisition Regulatory System—because whereas the FAR itself is Chapter 1, many agencies have issued their supplements to the FAR and these are scattered throughout the rest of Title 48. Chapter 2 of Title 48, for example, contains the Defense Federal Acquisition Regulatory Supplement—the DFARS. Chapter 9 contains the Department of Energy Acquisition Regulatory Supplement—the DEARS. The supplements are discussed in more detail later in the chapter.

4. 10 U.S.C. §§ 2301–2314.

5. 40 U.S.C. §§ 251–260.

6. 41 U.S.C. §§ 3501–3509.

7. Pub. L. No. 103-355.

The FAR came into existence on April 1, 1984. It was an attempt by the government to make uniform the contracting practices of the federal agencies so that, for example, the contract procedures and the contract itself for the Agriculture Department would not be radically different from a contract for the Department of the Army. In fact, the contracts would look amazingly similar.

The FAR comprises 53 different parts that are chronologically designed to walk the reader through the contracting process from initial planning to termination. Its 53 parts are grouped into eight subchapters. The parts that seem particularly important for construction contractors are set out in the following paragraphs.

Subchapter A is General. The first part, the Introduction, deals with how the FAR is put together. Part 2, Definitions, defines such important individuals as the contracting officer and agency head, plus terms that permeate the process. Part 3 is Improper Business Practices and Personal Conflicts of Interest. In this part, guidance is given on such issues as anti-kickback rules, buying in, and so on. Part 4, Administrative Matters, explains how the contracting office is supposed to keep its contract files and how long the parties must keep records after the contract is complete.

Subchapter B is Competition and Acquisition Planning. Part 5, Publicizing Contract Actions, explains how the government goes about notifying prospective bidders and offerors of its planned contracts. Part 6 is Competition Requirements. The government will normally try to achieve full and open competition on all of its buys. This part explains how that is achieved, what the exceptions are, and how they can be accomplished.

Part 9 is Contractor Qualifications. It is here where the government explains the concept of contractor responsibility and also discusses one of the ultimate sanctions that it has against the contractor, that is, debarment and suspension. Part 11 is Describing Agency Needs. In this part, the government describes its method of specification writing, which includes functional, performance, design, and brand name or equal specifications.

Part 12, Commercial Items Acquisition, deserves special mention. Government officials now have a way to cut through much of the traditional red tape that permeated government contracting. In the mid-1990s, Congress discovered that many contractors avoided doing business with the federal government because of all the rules, regulations, and standards imposed. Congress thus enacted the Federal Acquisition Streamlining Act, which put a greater emphasis on buying commercially. It expanded the definition of what was a commercial item to include services.

Although the definition does not use the word "construction," many agencies and many contracting officers view certain construction work, such as painting or roofing, as services traditionally sold in the commercial marketplace. If a contracting officer attempts to procure construction services as a commercial item, he does not need the volumes of rules and regulations that are associated with standard contracting. Instead, the agency may use FAR

Part 12, which provides for a simplified process involving very few standard clauses and specific provisions. These are stripped down to the essentials: for example, the Changes clause becomes the Changes sentence.

Subchapter C is Contracting Methods and Contract Types. Historically, Part 14, Sealed Bidding, was the most important part. This is the traditional method by which the government would award construction contracts. However, the importance of Part 14 has diminished in recent years as the government moves more and more to awarding contracts by negotiation through the Request for Proposal (RFP) process. Competitive negotiation is addressed in Part 15. Parts 16 and 17 deal with types of contracts and special contracting methods. This is where the reader should go to learn the details for a firm-fixed-price contract, a cost-plus-incentive-fee contract, an options contract, a requirements contract, or an indefinite-delivery indefinite-quantity (IDIQ) contract.

Subchapter D is Socio-Economic Programs. Part 19 focuses on small business programs including small business subcontracting, small disadvantaged business contracting, and HUBZone (Historically Underutilized Business Zone) contracting. Part 22 is Application of Labor Laws to Government Acquisitions. The most important subparts here are those dealing with the Davis-Bacon Act, Subpart 22.4, and the subpart dealing with equal employment opportunities, Subpart 22.8.

Included within Subchapter D is Part 25, Foreign Acquisition, which deals with the Buy American Act. Subpart 25.2, Buy American Act—Construction Materials, applies to contracts for the construction, alteration, or repair of any public building or public work in the United States. It is essential that contractors become familiar with this subpart. Contracting for the federal government often requires certifications that the contractor will comply with the Buy American Act and use only domestic material in the performance of the contract. Contractors often overlook this requirement and bid jobs expecting to be able to use cheaper foreign material. Once they have been awarded a contract at a set price, they are then horrified to learn that their cheaper substitutes will not be accepted. Instead, they must use more expensive domestic materials. Worse yet, they have already installed the foreign materials and are required to rip them out or to substantially reduce their contract price and possibly face criminal prosecution.

Subchapter E is General Contracting Requirements. The most important part in this subchapter for construction contractors is Part 28, Bonds and Insurance. This part describes the regulations regarding the Miller Act requirement for performance and payment bonds and also bid bonds. Contractors must study this part regarding these requirements and such substitutes as individual sureties, letters of credit, and so on.

In Part 31, Contract Cost Principles and Procedures, the government describes the costs that are allowable on cost-reimbursement contracts or on modifications for many types of fixed-price contracts. Often a contractor

incurs costs that are required in business, and recognized by its bank and by the Internal Revenue Service, yet discover that the contracting agency will not pay for them. Prime examples are interest on borrowings and advertising.

In Part 32, Contract Financing, the government describes its process for progress payments and for the requirements of the Prompt Payment Act. This part also explains its invoicing and debt-collection process.

Part 33 is Protest, Disputes, and Appeals. This vital part explains how and where disappointed bidders may file protests regarding the award of a contract. It is also this part that describes the disputes process in which a contractor that feels it is entitled to more money or more time from the government may pursue its claim.

Subchapter F is Special Categories of Contracting. The part here that is most important is Part 36, Construction and Architect-Engineer Contracts. This part, only about 20 pages, should be carefully reviewed by anyone engaged in construction contracting with the federal government. It discusses particular requirements for forming the construction contract, and then explains in detail the two-phase design-build procedures in Subpart 36.3. Subpart 36.5 describes the unique clauses that are required or suggested in government construction contracts. Many of these will be familiar to contractors, such as the Differing Site Conditions clause or the Site Investigation and Conditions Affecting the Work clause. Others, however, may require special scrutiny, such as the Material and Workmanship clause, or the Permits and Responsibilities clause.

Subpart 36.6 specifically deals with architect-engineer services and contains a variety of clauses that require review. Subpart 36.7 deals with standard and optional forms for contracting for construction, architect-engineer services and dismantling, demolition, or removal of improvements.

Subchapter G, Contract Management, deals with the administration of an awarded contract and should be carefully reviewed by anyone embarking on the performance of a government contract. The part that should be thoroughly examined is Part 43 dealing with Contract Modifications. This part covers how the government modifies its contract on the basis of any of the modification clauses, such as the Changes clause, the Differing Site Conditions clause, or any of the Government Delay of Work clauses.

Part 44 deals with subcontracting and addresses how a government prime contractor should subcontract. Depending on the size and type of the prime contract, the prime contractor may have to get the contracting officer's approval before awarding subcontracts. Moreover, the contracting officer may want to review the subcontract form itself or the subcontracting method the prime plans to use. The contracting officer also may need to know if there is sufficient competition, if all the appropriate clauses flowed down, or if the prime is subcontracting too much of the work.

Part 45, Government Property, imposes requirements on the contractor to properly identify, preserve, protect, account for, and dispose of that property.

These requirements may apply where the government has furnished property such as equipment for the contractor to use during construction, or if the contractor has bought property that either temporarily during the performance of the contract or permanently at the end of the contract is to be government property.

Part 46, Quality Assurance, explains how the government will inspect and accept the work of the contractor; it also specifies any warranties that will be required. Part 49 deals with termination of contracts and explains how the government will terminate contracts for convenience or for default.

Subchapter H is Clauses and Forms. Part 52 is Solicitation Provisions and Contract Clauses. Provisions essentially apply only before the contract is awarded; clauses may apply both before and after the contract is awarded. The FAR is logically set out. All the provisions and clauses are in FAR 52.2. The next two digits will refer back to the part dealing with the substance of the clause. For example, since FAR Part 49 deals with terminations, all of the government's termination clauses will be in Section 52.249. That number will then be followed by a dash and another number, which will identify the specific applicable clause. For example, 52.249-10 is the default clause for fixed-price construction contracts.

Section 52.301 is the matrix. This lists all the solicitation provisions and contract clauses that will be required (R), required when applicable (A), or optional (O) in all the various types of contracts the government awards. Readers of this book should specifically reference those clauses that are required under FP CON (Fixed-Price Construction) contracts or CR CON (Cost-Reimbursement Construction) contracts. They may also want to review the clauses under T&M (Time and Material) or LH (Labor Hour) contracts or IND DEL (Indefinite-Delivery) contracts.

This matrix has particular importance because of a doctrine in federal contracting known as the *Christian* doctrine. The *Christian* doctrine came out of the case *G.L. Christian & Associates v. United States*,⁸ in which the government awarded a construction contract but neglected to include a Termination for Convenience clause even though it was required by the applicable regulation at the time. The court ruled that if a clause was required to be in the contract by regulation having the force and effect of law and represented a fundamental procurement policy, it would be incorporated into the contract by operation of law despite its physical omission from the contract. The *Christian* doctrine is discussed in detail in Chapter 7.

FAR 53 is a list of all the standard forms used in government contracting. They are all contained in FAR 53.301. FAR 53.301 will be followed by a dash and then the clause number. For example, a contractor who wanted to locate

8. 160 Ct. Cl. 1, 312 F.2d 418, *reh'g denied*, 160 Ct. Cl. 58, 320 F.2d 345, *cert. denied*, 375 U.S. 954 (1963).

Standard Form 1442 (Standard Form 1442, Solicitation, Offer and Award (Construction, Alteration or Repair)) would go to FAR 53.301-1442.⁹

Many agencies have issued their own supplements to the FAR. These supplements are not intended to contradict or overrule the FAR, unless a statute unique to that agency authorizes such special requirements. Rather, the supplements are designed to implement agency-specific forms, clauses, or procedures. As an example of the multiple layers of regulations that may apply to a single contract, if you have a contract with the Army you should review not only the FAR and DFARS, but also the AFARS, the Army Federal Acquisition Regulation Supplement. All of the agencies will follow the same numbering system as the FAR. Thus, if you wanted to see if there are any special Navy requirements on construction contracts, you would look at Part 36 of the Navy supplement.

D. Individuals

The contractor will deal with a variety of individuals. The most important one is the contracting officer, who is the person who speaks for the government in its contracting capacity. Contracting officers are specifically delegated authority to bind the government contractually. This binding authority, often called the contracting officer's "warrant," is a Standard Form 1402, Certificate of Appointment. The Standard Form 1402 may list limits on the contracting officer's authority. For example, an individual may have a contracting officer's warrant but it is limited to \$5 million, so he is not authorized to bind the government on any contracts over \$5 million. Contractors are on notice of any limit on the contracting officer's warrant. It behooves a contractor to make sure that it is dealing with an individual, even a contracting officer, who is acting within the scope of his authority.

There are various types of contracting officers. The procuring contracting officer (PCO) is the main contracting officer. When the FAR mentions "contracting officer," it refers to the PCO. PCOs award the contract and retain their authority throughout the process. They may delegate some authority to an administrative contracting officer (ACO) (some agencies, especially the Navy, refer to this individual as an ROICC, resident officer in charge of construction). This individual might be the daily interface at the construction site with the contractor and he speaks on behalf of the PCO as long as he acts in accordance with the authority delegated by the PCO. A termination contracting officer (TCO) will be appointed if a termination for convenience or default becomes necessary. These matters are very complex and often a specially trained contracting officer will be appointed to oversee the process.

9. See Nagle, *supra* note 2, for a detailed breakdown as to what information is required to be placed in each block on this form and where else in the contract such information will relate.

Besides the contracting officer, there are a variety of other officials with whom the contractor will come in contact. It is important to understand their roles and the powers they possess and do not possess. The contracting officer's representative (COR), sometimes called the contracting officer's technical representative (COTR), is designated by the contracting officer as his representative in certain technical areas. For example, the inspector or the government engineer may be specifically designated the authority to approve submittals or accept work. Normally, the contracting officer will send a letter designating a named individual as his representative, but the letter will emphasize that the representative does not have the right to change the contract in any way that entitles the contractor to more money or more time. However, as will be discussed elsewhere in this book, the COR is frequently the focal point when the issue of constructive changes occurs.

To foster the role that small businesses play in federal contracting, each contracting agency, at its procurement offices, has officials known as Small and Disadvantaged Business Utilization Specialists (SADBUs) who will work with the contracting officer and the Small Business Administration (SBA) to ensure that contracts are properly set aside for small businesses or that subcontracting opportunities are identified for small businesses.

E. Forums for Dispute Resolution

When contractors litigate with the federal government, they are suing the sovereign. One cannot sue the sovereign unless the sovereign has waived its sovereign immunity. On federal contracts, the government has waived its immunity under the Contract Disputes Act,¹⁰ although the waiver is limited and actions may only be brought in the Agency Board of Contract Appeals or U.S. Court of Federal Claims.

The highest court that deals specifically with government contracts is the U.S. Court of Appeals for the Federal Circuit. The only appeal from that court is to the U.S. Supreme Court, which rarely will take a government contract case. Normally, there is no constitutional issue involved nor is there any split between the circuits because all contract matters will eventually be funneled through the Court of Appeals for the Federal Circuit. The U.S. Court of Appeals for the Federal Circuit came into existence in 1982. It succeeded the U.S. Court of Customs and Patent Appeals and the U.S. Court of Claims. The U.S. Court of Claims had been in existence for approximately 120 years. It was an Article III court. Its decisions have been adopted by the U.S. Court of Appeals for the Federal Circuit and are binding upon the U.S. Court of Federal Claims and the Boards of Contract Appeals.

10. 41 U.S.C. §§ 601 *et seq.*

The lineage of the U.S. Court of Federal Claims is more confusing. It is not an Article III court, but an Article I court. The old U.S. Court of Claims, the Article III court, had two levels, the judges' level, which was composed of the Article III judges, and a commissioners' level. The commissioners actually heard the cases and issued a recommended decision that the judges were free to adopt or reject. When the Court of Appeals for the Federal Circuit was created in 1982, the judges of the U.S. Court of Claims were transferred and became the judges of the U.S. Court of Appeals for the Federal Circuit. Basically, the commissioners of the old U.S. Court of Claims became the judges of what was originally called the U.S. Claims Court.

The U.S. Claims Court was eventually renamed the U.S. Court of Federal Claims to avoid confusion with the old U.S. Court of Claims, the Article III court. Obviously, however, many people still confuse the two.

That explanation is still probably as clear as mud, but the result is this: the present day U.S. Court of Federal Claims is not an Article III court, and has never been an Article III court. The judges of the Court of Federal Claims are appointed by the President and confirmed by the Senate and sit for 15 years. They are not employees of the individual agencies. The court's decisions are not binding on the Boards of Contract Appeals (nor are the Boards of Contract Appeals decisions binding on the Court of Federal Claims), but both the Boards and the Court of Federal Claims are bound by decisions of the Court of Appeals for the Federal Circuit and its predecessor court, the U.S. Court of Claims.

Protests occur quite often. Because it is dealing with public monies, the government has a formalized protest process to ensure that federal money is spent in accordance with the law. Protests will be covered in more detail in Chapter 6, but the protest forums are the agency itself, the U.S. Government Accountability Office (GAO), and the Court of Federal Claims. The GAO, headed by the Comptroller General of the United States, is the primary forum for protests.

F. Agencies

Besides the contracting agency itself, there are other federal departments, agencies, and offices that substantially affect federal contracting.

The federal government actively encourages the use of its contracting process to foster a variety of socioeconomic goals. One of the most important of these goals is the use of small businesses in federal contracting, as either prime contractors or subcontractors. The agency tasked to further this goal is the SBA. The SBA intersects with the federal contracting process through FAR Part 19. Contracting officers frequently will set aside contracts specifically for small businesses, which are defined under the North American Industry Classification System (NAICS), compiled by the Department of Commerce.

If there is an issue of whether a business is small under this classification, the SBA will make the determination.

Federal contractors will deal with two other important agencies from the Department of Labor (DOL), the Occupational Safety and Health Administration, which issues safety and health standards, and the Wage and Hour Division, which issues wage determinations under the Davis-Bacon Act. The Davis-Bacon Act (which will be discussed in Chapter 12) affects how, and how much, the contractor pays its employees.

Another DOL office that government contractors should be aware of is the Office of Federal Contracts Compliance Programs (OFCCP). This is the office charged with ensuring that the contractor not only does not discriminate but also engages in affirmative action. The requirements of this program are set forth in FAR 22.8. The OFCCP will conduct investigations to ensure that the contractor is eligible for continued government contracts.

II. Conclusion

This is obviously a brief overview of an enormously complicated subject. Ideally, we hope it has served to introduce the reader to the people, the rules, the concepts, the forums, and the entities that the remaining chapters will deal with in detail.