۲

About t Preface	the Editors the Authors	xxi xxiii xli
Acknou	vledgments	xliii
CHAP	TER 1	
Introd	uction	1
James F	F. Nagle	
I.	Introduction	1
	A. Governing Law	2
	B. Statutes	3
	C. Regulations	3
	D. Individuals	8
	E. Forums for Dispute Resolution	9
	F. Agencies	10
II.	Conclusion	11
CHAP	TER 2	
Sealed	Bidding	13
Todd H		
James F	e e	
-	1. Gilchrist	
Ι.	Introduction	13
II.	Sealed Bidding	15
III.	Responsiveness	16
IV.	Responsibility	20
V.	Bid Mistake	24
VI.	Conclusion	26
CHAP	TER 3	
Compe	etitive Negotiation	27
	th M. Gill	
James E	E. Moye	
-	ph Darr	
I.	Introduction	27
	A. What Is Competitive Negotiation?	27
	B. Historic Acquisition Reform	28

۲

۲

۲

II.	Source Selection Processes and Techniques	30
	A. Best Value Continuum	30
	B. Trade-off Process	31
	C. Special Procedures for Cost-Reimbursement Contracts	
	for Construction	33
	D. Lowest Price Technically Acceptable Source Selection Process	34
III.	Solicitation and Receipt of Proposals and Information	35
	A. Distribution of Advance Notices and Solicitations	35
	B. Inspection of Work Site and Examination of Data	35
	C. Request for Proposals—The Solicitation	36
	D. Two-Phase Design-Build Procedures	41
	E. Submission, Modification, Revision, and Withdrawal of Proposals	42
	F. Amendment and Cancellation of the Solicitation	43
IV.	Source Selection	43
	A. Source Selection Objective	43
	B. Source Selection Responsibilities	44
	C. Proposal Evaluation	45
	D. Clarifications and Award without Discussions	52
	E. Communications with Offerors before the Competitive Range	
	Is Established	54
	F. Competitive Range	54
	<i>G. Exchanges with Offerors after Establishment of the</i>	
	Competitive Range	56
	H. Oral Presentations	60
	I. Proposal Revisions	61
	J. Source Selection Decision	61
V.	Past Performance Information	62
	<i>A.</i> What Is Past Performance Information?	63
	B. Sources of Past Performance Information and Prior Responsibility	
	Determinations	63
	C. Uses of Past Performance Information on a Particular Procurement	66
VI.	Pre-award, Award, and Post-award Notifications and Debriefings	80
	A. Notices to Unsuccessful Offerors	80
	B. Debriefings	81
VII.	Mistakes	83
СНАРТ	TER 4	
Archite	ect-Engineer Contracting	85
Jaimee I	L. Nardiello	
I.	Introduction	85
II.	The Architect-Engineer (A-E) Selection Process	87
	A. Lack of Price Competition	87
	B. Insight into the QBS Process	87
	C. The Design Professional Contract and Scope of Services	88
III.	Particular Issues in A-E Contracts	91

۲

iv

۲

## Contents

	<ul><li><i>A.</i> Site Investigation and Geotechnical Reporting</li><li><i>B.</i> Building Information Modeling and Integrated Project Delivery</li></ul>	91
	in Government Contracts	93
IV.	Guidelines for the Government Cost Estimate	94
1	A. DOT Guidance	94
	B. The Public Building Service Design and Construction Cost	51
	and Schedule Management Policy (Guide)	95
V.	Construction Phase Services	96
v.		96 96
	A. Construction Phase Services by the Design Professional	90 97
<b>X</b> 7 <b>T</b>	B. Construction Management Services	97
VI.	Government Claims against the Design Professional—	00
<b>X</b> 7 <b>T T</b>	Cost Recovery Programs	98 101
VII.	Conclusion	101
CHAPT		
	ate Delivery Systems: Design-Build, At-Risk	
	uction Management, and IDIQ Contracts	103
	C. Loulakis	
	P. McLaughlin	
	Thompson	
I.	Introduction	103
II.	Design-Build	103
	<i>A. Historical Overview of Design-Build on Federal Projects</i>	104
	B. Details of the Clinger-Cohen Act	106
	C. Design-Build Disputes on Federal Contracts	109
III.	At-Risk Construction Management	132
	A. Framework for At-Risk Construction Management	132
	B. Which Federal Agencies Are Using CM/GC?	133
	C. State Use of CM/GC	137
	D. Case Law Discussing CM Rights and Obligations	137
IV.	Indefinite-Delivery and Indefinite-Quantity Contracts	139
	A. The Federal Acquisition Streamlining Act of 1994 and	
	Current ID/IQ Contract Requirements Implemented in	
	the Federal Acquisition Regulation	139
	B. The "Back and Forth" in Congress on Task Order Bid	100
	Protest Jurisdiction	144
		144
		151
	the Claims Process	151
CHAPT		1==
	l Bid Protests	155
Adam k	0	4==
Ι.	Introduction	155
II.	History and Background of Bid Protest Forums	155
	A. Agency-Level Protests	155

A. Agency-Level Protests

v

	B. GAO Protests	156
	C. Federal Court Protests	157
III.	Procedural Guide to Federal Bid Protests	160
	A. Agency-Level Protests	160
	B. GAO Protests	164
	C. COFC Protests	181
CHAP	TER 7	
	ole of the Contracting Officer and Other Unique Issues	
	vernment Contracting	199
	l A. Branca	
	P. Silberman	••••
I.	The <i>Christian</i> Doctrine	200
II.	The Authority of Officials to Bind the Government	204
	A. Actual Authority	204
	B. Ratification	205
	C. Implied Authority	205
III.	<i>D. Apparent Authority</i> Conflicts of Interest	206
111.		207 207
	A. Government Employees' Personal Conflicts of Interest	207 208
IV.	B. Organizational Conflicts of Interest	208
1 V.	The Government's Duty of Good Faith	212
	<ul><li><i>A.</i> Implied Duty of Good Faith and Fair Dealing</li><li><i>B.</i> Metcalf and the Clarification of the Duty</li></ul>	212
	<i>C.</i> Kiewit-Turner: <i>A Win for the Contractor under the</i>	213
	Metcalf Standard	214
	D. Post-Kiewit-Turner	214
	E. Conclusion	217
V.	Past Performance Evaluations	219
۷.	Tast l'enormance Evaluations	219
CHAP		
Chang		225
	Mancini	205
1.	Introduction	225
	A. Overview	225
тт	B. History of the Changes Clause	227
II. III.	The Clause Issuing the Change Order	229
111.	0 0	231 231
	A. The Contracting Officer B. Ungutherized Actions of Construment Penrocentations	231
	<ul><li>B. Unauthorized Actions of Government Representatives</li><li>C. Actions by Representatives of the Contracting Officer</li></ul>	252
	and Other Government Officials	233
IV.	Scope of Changes	233
1 V.	<i>A.</i> The Timing and Form of Change Orders	234
		201

۲

۲

V.	Equitable Adjustment	242
	A. The Equitable Adjustment in Price	242
	B. The Equitable Adjustment in Time	243
	C. Processing the Formal Change Order	244
VI.	Constructive Changes	246
	A. Elements of a Constructive Change Order	247
	B. Types of Constructive Changes	248
VII.	Notice Requirements	262
	A. Government Knowledge of the Basis of Claim	264
	B. Claim Considered on the Merits	265
	<i>C. Failure to Notify Not Prejudicial</i>	265
	D. The Contractor's Duty to Perform Changed Work	266
VIII.	Value Engineering	267
CHAP	TER 9	
Differ	ing Site Conditions	271
	G. Gavin	
Daniel	J. Donohue	
Brian I	P. Waagner	
I.		271
II.	Common Law Background	272
	A. The Common Law Rule	273
	B. Superior Knowledge	273
	C. Fraud and Misrepresentation	274
	D. Consequences of the Common Law Rule	275
III.	The Differing Site Conditions Clause and	
	Its Requirements	275
	A. Origin of the Differing Site Conditions Clause	275
	B. The Differing Site Conditions Clause	276
	C. The Site Investigation Clause	277
	D. The Physical Data Clause	279
IV.	Practical Issues in Differing Site Conditions Cases	280
	A. Notice	280
	B. The Condition Must Predate the Contract	282
	C. The Condition May Be Natural or Man-Made	282
	D. The Condition Must Be "At the Site"	284
	E. Interpretation of "Differing Materially"	285
V.	Proving a Type I DSC Claim	286
	A. Requirement for "Indications" in "Contract Documents"	286

Contents

Changes outside the General Scope of the Contract

The Intended Scope of Work

В.

С.

vii

238

239

۲

Types of Contract Indications

В.

۲

289

292

293

۲

VI.	Proving a Type II DSC Claim	295
	<i>A.</i> Requirement That the Site Condition Be Unknown	296
	<i>B. Requirement That the Site Condition Be Unforeseeable</i>	297
	<i>C. Requirement That the Condition Be Unusual</i>	297
СНАРТ		
	tion, Acceptance, and Warranties	299
Steven 1		
I.	Introduction	299
II.	Inspection Clauses	301
	A. Inspection of Construction	301
	B. CQC Contract Specifications	303
	C. Other Applicable Provisions	306
III.	Inspection Rights and Duties	307
	A. Government's Right—But Not Duty	307
	B. Government Inspections: Time, Place, and Manner	308
	C. Government Punch Lists	309
	D. Government Inspectors: Conduct and Authority	310
	E. Government Waiver	312
IV.	Who Pays the Cost?	312
	A. Initial Inspections	312
	B. Inspection and Constructive Changes	315
	C. Government Inspection Delays	323
V.	Nonconforming Work: Government Rights	324
	A. Government Notice of Rejection	324
	B. Contractor Opportunity to Cure Deficiencies or Defects	325
	C. Economic Waste Issues	325
	D. Credits of Deductive Changes	325
VI.	Government Acceptance	326
	<i>A.</i> Who Has Authority to Accept the Work?	326
	B. When and Where Does Acceptance Occur?	326
	C. How Does Acceptance Occur?	327
	D. What Are the Consequences of Acceptance?	327
VII.	Exceptions to the Finality of Acceptance	328
	A. Latent Defects	328
	B. Fraud and Gross Mistakes Amounting to Fraud	328
	C. Warranties	329
VIII.	False Claims Exposure	332
IX.	Conclusion	332
СНАРТ	"ER 11	
	nt and Contract Funding	333
	n Lange	000
I.	Introduction	333
II.	Progress Payments	333

viii

۲

۲

#### Contents

۲

		G.	SBA Mentor-Protégé Program
		Н.	Department of Transportation
			Enterprise Program
		Ι.	The Buy American Act and th
		J.	Wage Rate Requirements (Con
			(Davis-Bacon Act)
		К.	Service Contract Labor Stand
			(Service Contract Act)
	IV.	Cor	nclusion
bra59316_00_fm_i-xliv.indd	9		

۲

III.	Prompt Payme	ent	337
	A. Proper Inv		337
	B. Disputed I		338
	,	Due Date under Construction Contracts	339
	D. Payment D		340
		erest and Length of Payment	340
		inancing Payments	340
		yment to Subcontractors and Suppliers	341
		nt Overpayments	342
IV.	Assignment of	1 0	343
		Assignments	343
		nt for a Valid Assignment	344
		nment's Right to Set Off Assigned Payments	345
		s of the Parties	345
V.		imitations on Funding	346
VI.	Government S	Setoff and Debt Collection	348
	A. Common L	aw and Statutory Right of Setoff	348
	B. FAR Debt	Collection Procedures	349
СНАРТ	ED 17		
		in Government Contracting	355
	R. Stephens	In Government Contracting	555
Tim Ma	,		
Lori An	v		
	Introduction		355
II.		ionality of Affirmative Action Programs	355
		meters of Race-Based and	000
		sed Programs	356
III.		onomic Contracting Programs	361
		iness Contracting Programs	361
		Il Disadvantaged Business Program	365
		ess Development Program	366
		wned Small Business and Economically	
		aged, Women-Owned Small Business Programs	369
		sabled Veteran-Owned Small Business Programs	373
		y Underutilized Business Zone (HUBZone)	375
		or-Protégé Programs	377
		it of Transportation's Disadvantaged Business	
	Enterprise		380
		merican Act and the Buy America Regulations	383
		Requirements (Construction) Statute	000
	(Davis-Bac		389
		ontract Labor Standards Statute	220
		ontract Act)	391
IV.	Conclusion		395

Chapter	· 13	
Termin	nation for Convenience	397
Joseph I	D. West	
Lindsay	M. Paulin	
I.	Introduction	397
II.	The Right to Terminate for Convenience	397
	A. Corliss and the Absolute Right to Terminate	397
	B. Torncello's Limit to Convenience Terminations	398
	C. Krygoski and the Impact of the Competition in Contracting	
	Act on Convenience Terminations	400
III.	The Parties' Rights and Duties upon Termination	
	for Convenience	401
	A. Duties of the Government	401
	B. Duties of the Contractor	404
IV.	Monetary Recovery	407
	A. Negotiated Settlements	407
	B. Settlements by Contracting Officer (Unilateral) Determination	408
	C. Profit and Loss	415
V.	Partial Terminations for Convenience	417
	<i>A.</i> Partial Termination for Convenience versus Deletion of Work by	
	Change Order	418
VI.	Conclusion	420
v 1.	Conclusion	120
۷1.	Conclusion	120
CHAPT		120
СНАРТ		421
CHAPT <b>Termir</b>	TER 14	
CHAPT <b>Termir</b> William	TER 14 <b>nation for Default</b> E. Franczek	
CHAPT <b>Termir</b> William	TER 14 nation for Default	
CHAPT <b>Termin</b> William Michael	TER 14 <b>nation for Default</b> E. Franczek L. Sterling The Standard for Default	421
CHAPT <b>Termin</b> William Michael	TER 14 <b>nation for Default</b> E. Franczek L. Sterling The Standard for Default A. Historical Background	<b>421</b> 421
CHAPT <b>Termin</b> William Michael	TER 14 <b>nation for Default</b> E. Franczek L. Sterling The Standard for Default A. Historical Background B. Comparison to Commercial Contracts	<b>421</b> 421 421
CHAPT <b>Termin</b> William Michael	TER 14 <b>nation for Default</b> E. Franczek L. Sterling The Standard for Default A. Historical Background B. Comparison to Commercial Contracts	<b>421</b> 421 421 422
CHAPT <b>Termin</b> William Michael	TER 14 <b>Pation for Default</b> E. Franczek L. Sterling The Standard for Default A. Historical Background B. Comparison to Commercial Contracts C. Nature of Default Termination D. Current Clauses	<b>421</b> 421 421 422 423
CHAPT <b>Termin</b> William Michael	TER 14 <b>nation for Default</b> E. Franczek L. Sterling The Standard for Default A. Historical Background B. Comparison to Commercial Contracts C. Nature of Default Termination	<b>421</b> 421 421 422 423 423
CHAPT <b>Termin</b> William Michael	TER 14 <b>Pation for Default</b> E. Franczek L. Sterling The Standard for Default A. Historical Background B. Comparison to Commercial Contracts C. Nature of Default Termination D. Current Clauses E. Functions of the Standard Clause F. Conversion into Convenience Termination	<b>421</b> 421 422 423 423 423 424
CHAPT Termin William Michael I.	<ul> <li>TER 14</li> <li>Tex 14</li> <li>E. Franczek</li> <li>L. Sterling</li> <li>The Standard for Default</li> <li>A. Historical Background</li> <li>B. Comparison to Commercial Contracts</li> <li>C. Nature of Default Termination</li> <li>D. Current Clauses</li> <li>E. Functions of the Standard Clause</li> <li>F. Conversion into Convenience Termination</li> <li>Default for Failure to Timely Perform</li> </ul>	<b>421</b> 421 422 423 423 424 428
CHAPT Termin William Michael I.	<ul> <li>TER 14</li> <li>Tex for Default</li> <li>E. Franczek</li> <li>L. Sterling</li> <li>The Standard for Default</li> <li>A. Historical Background</li> <li>B. Comparison to Commercial Contracts</li> <li>C. Nature of Default Termination</li> <li>D. Current Clauses</li> <li>E. Functions of the Standard Clause</li> <li>F. Conversion into Convenience Termination</li> <li>Default for Failure to Timely Perform</li> <li>A. The Government Right to Terminate for Untimely Performance</li> </ul>	<b>421</b> 421 422 423 423 423 424 428 430
CHAPT Termin William Michael I.	<ul> <li>TER 14</li> <li>Tex for Default</li> <li>E. Franczek</li> <li>L. Sterling</li> <li>The Standard for Default</li> <li>A. Historical Background</li> <li>B. Comparison to Commercial Contracts</li> <li>C. Nature of Default Termination</li> <li>D. Current Clauses</li> <li>E. Functions of the Standard Clause</li> <li>F. Conversion into Convenience Termination</li> <li>Default for Failure to Timely Perform</li> <li>A. The Government Right to Terminate for Untimely Performance</li> <li>B. The Effect of Substantial Completion</li> </ul>	<b>421</b> 421 422 423 423 424 428 430 430
CHAPT Termin William Michael I.	<ul> <li>TER 14</li> <li>Tex for Default</li> <li>E. Franczek</li> <li>L. Sterling</li> <li>The Standard for Default</li> <li>A. Historical Background</li> <li>B. Comparison to Commercial Contracts</li> <li>C. Nature of Default Termination</li> <li>D. Current Clauses</li> <li>E. Functions of the Standard Clause</li> <li>F. Conversion into Convenience Termination</li> <li>Default for Failure to Timely Perform</li> <li>A. The Government Right to Terminate for Untimely Performance</li> <li>B. The Effect of Substantial Completion</li> <li>Default for Failure to Make Progress</li> </ul>	<b>421</b> 421 422 423 423 424 428 430 430 431
CHAPT Termin William Michael I.	<ul> <li>TER 14</li> <li>Tex for Default</li> <li>E. Franczek</li> <li>L. Sterling</li> <li>The Standard for Default</li> <li>A. Historical Background</li> <li>B. Comparison to Commercial Contracts</li> <li>C. Nature of Default Termination</li> <li>D. Current Clauses</li> <li>E. Functions of the Standard Clause</li> <li>F. Conversion into Convenience Termination</li> <li>Default for Failure to Timely Perform</li> <li>A. The Government Right to Terminate for Untimely Performance</li> <li>B. The Effect of Substantial Completion</li> <li>Default for Failure to Make Progress</li> </ul>	<b>421</b> 421 422 423 423 424 428 430 430 431 434
CHAPT Termin William Michael I.	<ul> <li>TER 14</li> <li>The standard for Default</li> <li>E. Franczek</li> <li>L. Sterling</li> <li>The Standard for Default</li> <li>A. Historical Background</li> <li>B. Comparison to Commercial Contracts</li> <li>C. Nature of Default Termination</li> <li>D. Current Clauses</li> <li>E. Functions of the Standard Clause</li> <li>F. Conversion into Convenience Termination</li> <li>Default for Failure to Timely Perform</li> <li>A. The Government Right to Terminate for Untimely Performance</li> <li>B. The Effect of Substantial Completion</li> <li>Default for Failure to Make Progress</li> <li>A. The Government Right to Terminate for Failure to Make Progress</li> <li>B. Traditional versus Modern View</li> </ul>	<b>421</b> 421 422 423 423 424 428 430 430 431 434
CHAPT Termin William Michael I.	<ul> <li>TER 14</li> <li>The Standard for Default</li> <li>E. Franczek</li> <li>L. Sterling</li> <li>The Standard for Default</li> <li>A. Historical Background</li> <li>B. Comparison to Commercial Contracts</li> <li>C. Nature of Default Termination</li> <li>D. Current Clauses</li> <li>E. Functions of the Standard Clause</li> <li>F. Conversion into Convenience Termination</li> <li>Default for Failure to Timely Perform</li> <li>A. The Government Right to Terminate for Untimely Performance</li> <li>B. The Effect of Substantial Completion</li> <li>Default for Failure to Make Progress</li> <li>A. The Government Right to Terminate for Failure to Make Progress</li> <li>B. Traditional versus Modern View</li> <li>C. Construction versus Supply Contracts</li> </ul>	421 421 422 423 423 424 428 430 430 430 431 434 434 434
CHAPT Termin William Michael I.	<ul> <li>TER 14</li> <li>The Standard for Default</li> <li>E. Franczek</li> <li>L. Sterling</li> <li>The Standard for Default</li> <li>A. Historical Background</li> <li>B. Comparison to Commercial Contracts</li> <li>C. Nature of Default Termination</li> <li>D. Current Clauses</li> <li>E. Functions of the Standard Clause</li> <li>F. Conversion into Convenience Termination</li> <li>Default for Failure to Timely Perform</li> <li>A. The Government Right to Terminate for Untimely Performance</li> <li>B. The Effect of Substantial Completion</li> <li>Default for Failure to Make Progress</li> <li>A. The Government Right to Terminate for Failure to Make Progress</li> <li>B. Traditional versus Modern View</li> <li>C. Construction versus Supply Contracts</li> </ul>	421 421 422 423 423 424 428 430 430 430 431 434 434 434 434 436

х

S

IV.	Contractor's Duty to Proceed	440
	A. Failure to Proceed versus Anticipatory Repudiation	440
	B. Exceptions to Duty to Proceed	441
V.	Defense of Excusable Delay	443
	A. Foreseeability	443
	B. Subcontractor Delay	444
	C. Proving Excusable Delay	444
	D. Enumerated Excusable Delays	446
	E. Unenumerated Excusable Delays	451
	F. Contractor Notice Requirements	452
VI.	Defense of Government-Caused Delays	453
	A. Delayed Government Approval	453
	B. Delayed Contract Award	454
	C. Delayed Payment	454
	D. Delayed Approval of Subcontractors	456
	E. Constructive Changes	456
	<i>F.</i> Overinspection	456
	G. Defective Specifications and Impossibility	459
VII.	Waiver of Completion Date	460
	A. Forbearance versus Waiver	460
	B. Waiver after Completion Date	461
VIII.	Excess Costs of Reprocurement	463
	A. The Requirement	463
	B. Calculating Excess Costs	467
	C. Government Completion of Work	468
	D. Challenging Assessment of Excess Costs—Fulford Doctrine	469
IX.		469
	A. Damages for Breach of Contract	470
	B. Deferred Payment Agreements	470
	C. Cost-Reimbursement Contracts	471
	D. Nonresponsibility Determinations	471
Х.	, ,	472
	A. Assessment of Liquidated Damages	472
	B. Enforceability	473
	C. Contractor Defenses	474
XI.	Contractor Appeals Challenging Default Terminations	475
	Conclusion	476
СНАРТ	TER 15	
	ble Adjustments and Claims	477
Laurenc		
	P. Silberman	
I.	Introduction	477

II. Requests for Equitable Adjustment 477

۲

۲

۲

xi

۲

III.	Claims	480
111.	<i>A.</i> The Contract Disputes Act of 1978	480
	B. The FAR Definition of a "Claim"	481
	<i>C.</i> Requirements for Raising Claims as Defenses	485
	D. Interest on Claims	486
	E. Claim versus Request for an Equitable Adjustment	487
	F. Certification	487
	G. Timeliness Requirements	491
	H. The CO's Final Decision	492
СНАРТ	FER 16	
Litigat	ing with the Federal Government	495
Paul A.	Varela	
	' M. Suga	
	. Dugdale	
	Introduction	495
II.	Forums in Which to Pursue a Claim	495
	A. The Court of Federal Claims	495
	B. Boards of Contract Appeals	496
III.	Implied Contracts	497
	Six-Year Limitation on Appeals	498 498
V. VI.	Time to Appeal Binding Election of Forum and Engementation of Claims	498 500
VI. VII.	Binding Election of Forum and Fragmentation of Claims Prehearing Procedures	500 501
V 11.	A. Rules of Procedure and Discovery	501
	B. Appeal File	502
	C. Motions Practice	503
VIII.	The Hearing	503
V 111.	<i>A.</i> Accord to Be Given the Contracting Officer's Final Decision	503
	B. The Judges	504
	C. Senior Deciding Group/Full Board Consideration	504
	D. Conduct of the Trial or Hearing	505
	E. Bifurcation	506
	F. Hearing Location	506
	G. Trial Lawyers	507
	H. Time to Receive a Decision	507
	I. Accelerated and Simplified Procedures	508
IX.	Selection of Forum	508
Х.	Getting Paid	509
XI.	Attorney's Fees and Expenses	510
	A. Requirements for Recovery	510
	B. Net Worth and Size Limits	512
	C. Prevailing Party	513
	D. The Government's Position Was Not	
	Substantially Justified	514

xii

۲

۲

	Contents	xiii
	E. No Special Circumstances	515
	<i>F. Timely Application</i>	516
	<i>G.</i> Recoverable Fees and Expenses	518
	H. Partial Success	521
XII.	Appellate Review of a Board or Court Decision	521
	A. Time to Appeal	521
	B. Standard of Review	521
XIII.	Binding Precedent	522
XIV.	0	522
СНАРТ	'ER 17	
	tive Dispute Resolution	523
	L. Bastianelli, III	
Lori An	n Lange	
Susan E	0	
I.	Introduction	523
II.	Negotiation	523
	A. Negotiating with the Government	523
	B. Timing of Negotiation	525
III.	Alternative Dispute Resolution Act	525
	A. Authority to Use ADR	525
	B. Timing of ADR	526
	C. Confidentiality	527
	D. The Neutral	528
IV.	Types of Government ADR	529
	A. Arbitration	529
	B. Mediation	531
	C. Mini-trial	532
	D. Dispute Resolution Board	532
V.	ADR at the Boards of Contract Appeals	533
	A. The Armed Services Board of Contract Appeals (ASBCA)	533
	B. The Civilian Board of Contract Appeals (CBCA)	534
<b>X</b> 7 <b>T</b>	C. Perceived Advantages and Disadvantages of ADR at the Boards	535
VI.	ADR at the Court of Federal Claims	536
VII.	ADR at the Government Accountability Office in	50(
	Bid Protest Disputes	536
СНАРТ		
	ve Specifications—Impracticability/Impossibility	
	ormance	537
Robert H		
Arnie B		E07
I.	The Government's Construction Contract Specifications	537 520
	A. Types of Specifications	538 545
	<i>B. Distinguishing among the Types of Specifications</i>	545

۲

۲

۲

II.	The Allocation of Risk between the Government and				
	Its Contractors for Defective Construction Contract				
	Specifications and Drawings	547			
	<i>A</i> . The Government's Implied Warranty of Its Design Specifications	547			
	B. When the Implied Warranty Does Not Apply	560			
III.	Recovery for the Government's Defective Specifications	565			
	A. Elements and Burden of Proof	565			
	B. Government Defenses to Recovery for Breach of the				
	Implied Warranty of Specifications	568			
IV.	Impossibility and Impracticability of Performance	571			
	<i>A.</i> The Doctrines of Impossibility and Impracticability	571			
	B. Assumption of Risk	579			
V.	Conclusion	582			
СНАРТ	<sup>-</sup> ER 19				
Delay,	Suspension of Work, Acceleration, and Disruption	583			
-	D. Ness				
I.	Basic Delay Concepts	583			
II.	Critical Path Delays versus Use of Available Float				
	or Slack Time	583			
III.	Categories of Delay	584			
	A. Excusable Delay	585			
	B. Compensable Delay	587			
	C. Unexcused Delay	589			
IV.	Suspension of Work	591			
	A. Directed Suspension of Work	592			
	B. Constructive Suspension	593			
	C. Notice Requirements for Suspension of Work	594			
	D. Changes versus Suspension of Work	594			
V.	Additional Delay Concepts and Issues	595			
	A. The Right to Finish Early	595			
	B. Concurrent Delays	597			
	C. Apportionment of Project Float (Who Owns the Float?)	601			
VI.	Proving Delays	603			
	A. Need for Realistic and Accurate CPM Analysis	603			
	B. Total Time Method	607			
	C. Impacted As-Planned Method	607			
	D. Collapsed As-Built Method	609			
	E. Time Impact Analysis and Windows Analysis	610			
VII.	Acceleration	614			
	A. Directed Acceleration	614			
	B. Constructive Acceleration	615			
VIII.	Disruption: Loss of Labor Efficiency	618			

۲

۲

Contents	
----------	--

CHAPT	TER 20	)	
Pricing	, of C	laims	625
Stephen	B. Sh	apiro	
Dirk D.	Haire		
I.	Intro	oduction	625
II.	Func	lamental Principles of Contract Pricing	625
		General Rule of Damages	625
		Proof of Adjustment	626
		False Claims	628
III.		e Methods of Calculation	629
		Actual Cost Method	629
		Cost Estimates	630
		Total Cost Method	632
		Modified Total Cost Method	633
		Equitable Adjustment	633
		"Jury Verdict" Method	635
IV.		ents of Construction Damages	636
		Labor Costs	636
		Equipment Costs	648
		Material Costs	656
		Field Office Overhead/General Conditions	
		and Home Office Overhead	659
		Profit	659
		Interest	660
		Additional Bond Premiums	660
		Attorney's Fees and Legal Costs	660
<b>T</b> 7		Cost Principles	661
V.		ellaneous Pricing Issues	661
		Deductive Modifications	661
	В.	Variations in Estimated Quantities	661
CHAPT	TER 21	1	
Overhe	ead Co	osts	663
John M	arshall	Cook	
W. Step	hen D	ale	
Richard	F. Sm	ith	
I.	Intro	oduction	663
	<i>A</i> . <i>A</i>	Applicable FAR Provisions	664
		FAR Supplements	665
		Contract Limitation of Overhead Clauses	665
	D. (	Other Sources	668
II.	Reco	very of Project Overhead Costs on Equitable	
	Adju	stments and Claims	668

۲

۲

۲

xv

	A. Methods to Price Project Overhead	670
	B. Full Recovery of Project Overhead	672
III.	FAR Restriction on Project Overhead Costs Recovery-	
	The Requirement to Select and Use a Single Method	674
	A. M.A. Mortenson Co.	674
	B. Caddell Construction Co., Inc.	677
	C. Impacts of Mortenson and Caddell	678
IV.	Recovery of Home Office Overhead	679
	A. Home Office Overhead Increases Resulting from Delay	680
	B. Evaluating Home Office Overhead	681
	C. Evolution of the Eichleay Formula	682
	D. The Eichleay Elements in Practice	686
	E. Criticism of the Eichleay Method	693
V.	Cost-Reimbursement Contracts	694
	A. Types of Cost-Reimbursement Contracts	695
	B. Allowable, Reasonable, and Allocable	695
	C. Cost Limitation Provisions	699
	D. Other Cost Principles	702
VI.	Conclusion	703
СНАРТ		
	itracting	705
	ce M. Prosen	
I.	Subcontractors	705
	A. Definition of "Subcontractor"	706
	<i>B.</i> What Law Controls	707
II.	Government Control over Subcontracting	710
	A. Government Consent to Subcontractors/Subcontracts	710
	B. Award of Subcontracts	714
	C. Government-Directed Subcontractors	714
	D. Subcontractor Listing Requirements	715
	E. Subcontractor Responsibility Determinations	715
	F. Small and Disadvantaged Business Requirements	715
III.	Formation of Subcontracts	716
	<i>A.</i> Offer and Acceptance of Subcontractor's Bid	717
	B. Effect of Subcontractor Mistakes	718
	C. Failure to Comply with All Material Terms of the Solicitation	719
	D. Bid Expiration	719
IV.	Bid Protests by Subcontractors	720
V.	Flow-Down Clauses	721
	A. Impact of Flow-Down Clauses on Subcontractor's	
	Rights against the Government	721
* **	B. Mandatory Flow-Down Clauses	722
VI.	Payment	723
	A. Progress Payments	724

۲

9/15/17 5:05 PM

۲

xvi

۲	

	В.	Prompt Payment Act	724
	С.	Mechanic's Liens	726
	D.	The Miller Act	726
	Ε.	Material Breach of Contract for Nonpayment	729
VII.		ims and Disputes	731
	А.	Lack of Privity between the Subcontractor and	
		Government—Enter the Severin Doctrine	731
	В.	Implied Contracts between the Government and	
		the Subcontractor	736
	С.	Certification of Subcontractor Claims by	
		Prime Contractor	737
	D.	The Small Business Act 8(a) Program	738
VIII.	Coi	nclusion	739
CHAP			<b>E</b> 41
		ds in Federal Contracting	741
Kathlee			741
I.		quirements for Bid, Performance, and Payment Bonds	741
	A.	Bid Bonds	742
		Performance Bonds	743
TT	C.	Payment Bonds	744
II.	-	eration of Bid Bonds under Federal Law	746
	A.	Technical Requirements: Form over Substance	746
	B.	Responsibility of the Bid Bond Surety in Event of Default	750
TTT	С.	Defenses of Surety to Claims under Bid Bond	751
III.	-	eration of Performance Bonds in Event of Default	753
	A.	Declaration of Default	753
	В.	<i>Obligations and Options of Surety in Event of</i>	752
	C	Declaration of Default	753
	С.	<i>Claims of Surety against the Government under a</i>	7/1
	D	Takeover Agreement	761
	D.	Government's Right of Setoff against the Surety	762
	Ε.	Damages Recoverable by the Government under	760
	F.	Performance Bonds Defenses of Surety to Declaration of Default	762 764
IV.			764 765
1 V.	. *	eration of Payment Bonds in Event of Default Parties Covered by Payment Bonds	765
	А. В.		763
		Notice Requirements	
	С. D.	Limitations of Actions	771 774
	D. E.	Venue and Jurisdiction Issues	//4
	E.	Impact of Arbitration Clauses on Miller Act	776
	Г	Payment Bond Claims	776 777
	F.	Claims Generally Covered	777
	G.	Claims Generally Not Covered	782
	Н.	Other Payment Bond Defenses	783

۲

۲

۲

СНАРТ	'ER I	24	
The Fal	se C	Claims Act	793
Barbara	<i>G. V</i>	Verther	
Meredit	hR.	Philipp	
Kevin P	Gill	liland	
I.	Inti	roduction	793
	А.	History of the False Claims Act	794
	В.	Overview of the FCA	795
II.	The	e Seven Deadly Sins under the False Claims Act	796
	А.	False or Fraudulent	797
	В.	Materiality	799
	С.	Presenting a Claim	800
	D.	Acting Knowingly	802
	Ε.	Damages under the FCA	804
	<i>F</i> .	Relief from Retaliatory Actions	805
III.	Pro	cedural Requirements for FCA Actions	806
	А.	Qui Tam Actions	806
	В.	Asserting an FCA Action	806
	С.	Recovering under an FCA Action	808
IV.	Cor	nmon FCA Actions in Government Construction Cases	809
	А.	Presenting False Invoices and Applications for Payment	809
	В.	Falsely Representing Small or Minority Business Status	817
	С.	Falsely Representing Compliance with Contract Requirements	820
	D.	Falsely Representing Compliance with Federal Statutes	821
	Ε.	Failure to Provide the Government with Discounts Given to Non-	
		governmental Entities	823
	<i>F</i> .	Mislabeled, Substandard, or Improperly Substituted Materials	824
	G.	Bid Rigging	824
V.	Def	enses against Allegations of FCA Violations	825
	А.	Knowledge of the Contractor	825
	В.	The Claim Is Not False	827
	С.	The Claim Is Not Material	828
	D.	The Complaint Is Not Pled with Sufficient Particularity	829
	Ε.	Public Disclosure Bar and First-to-File Bar	831
VI.	Avo	biding FCA Liability	831
	А.	Compliance Programs	832
	В.	Self-Reporting FCA Violations	832
	С.	Maintaining Relationships and Documentation	833
VII.	Cor	nclusion	834

xviii

۲

۲

Contents
----------

CHAP	TER 25	
Introd	Introduction to Overseas Federal Construction Projects	
David	B. Wonderlick	
Christo	pher M. Burke	
Rae D.	Mueller	
I.	Procurement and Prime Contracting	836
	A. Military Agencies	836
	B. Civilian Agencies	836
II.	Unique Features of OCONUS Construction Contracts	837
	A. Subcontracting	838
	B. Labor and Material Procurement	838
III.	Performance	840
	A. Bonding	840
	B. Code Requirements	841
IV.	Foreign Corrupt Practices Act	
	A. Anti-bribery Provisions	842
	B. Accounting Provisions	845
	C. The Yates Memo	846
	D. Self-Reporting Pilot Program	848
V.	Dispute Resolution	849
	A. International Arbitration	849
	B. Administrative Bodies	850
Table	of Cases	853
Index		943

۲

bra59316\_00\_fm\_i-xliv.indd 19

۲

۲

xix