

GovCon 101: Terms and Conditions

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Who Is This Person?

- Partner in the Government Contracts and Global Trade Practice Group at McCarter & English LLP
- Experience representing clients of all sizes in complex, high-profile “bet the company” matters
- Routinely assists in negotiation of terms and conditions at both the prime and subcontractor level
- Significant experience in REAs, claims and litigation

Today's Agenda

- Negotiating terms and conditions with the Federal Government
- Terms and conditions for commercial products and services
- Subcontract terms and conditions
- Working with terms and conditions after award
- Disputes and issues of contract interpretation

NEGOTIATING TERMS AND CONDITIONS WITH THE FEDERAL GOVERNMENT

Roles & Responsibilities

Contracting Officer

- Authority to enter into, administer, or terminate contracts
- May bind Government only to the extent of the authority granted to them
- Responsible for ensuring performance and compliance with terms

Contracting Officer's (Technical) Representative

- Assists in the (technical) monitoring or administration of a contract
- **DOES NOT HAVE THE AUTHORITY TO BIND THE GOVERNMENT**
 - Cannot direct the contractor to perform work outside the scope of the contract
 - Critically important to understand limitations of the CO(T)R

Anatomy of a Government Contract: Uniform Contract Format

Part I – The Schedule

- A. Solicitation/contract form
- B. Supplies or services and prices/costs
- C. **Description/specifications/statement of work**
- D. Packaging and marking
- E. Inspection and acceptance
- F. Deliveries or performance
- G. Contract administration data
- H. **Special contract requirements**

Uniform Contract Format (cont'd)

Part II – Contract Clauses

I. Contract Clauses

Part III – List of Documents Exhibits, and Other Amendments

J. List of attachments

Part IV – Representations and Instructions

- K. Representations, certifications, and other statements of offerors or respondents
- L. Instructions, conditions, and notices to offerors or respondents
- M. Evaluation factors for award

Sounds Good, Where Do I Sign?

Not so fast...

Read **CAREFULLY**

Section H

“Special Contract Requirements”

- Room for creativity = room for error
- Typically ad hoc requirements drafted by contracting officer/procuring activity
- Sometimes added FAR clauses

Section I

- Contract Clauses
 - Typically a list, some in full text
 - CRITICAL to review before deciding whether to bid
 - Know what you are getting into
 - Pay attention to clauses unique to Government contracts – for example, termination for convenience
 - Look carefully for internal inconsistencies, “checked” clauses that should not be there, etc.
 - Beware the “Christian Doctrine”

TERMS AND CONDITIONS FOR COMMERCIAL PRODUCTS AND SERVICES

“Other Commercial Practices”

“It is a common practice in the commercial marketplace for both the buyer and seller to propose terms and conditions written from their particular perspectives. The terms and conditions prescribed in this part seek to balance the interests of both the buyer and seller. These terms and conditions are generally appropriate for use in a wide range of acquisitions. **However, market research may indicate other commercial practices that are appropriate** for the acquisition of the particular item. **These practices should be considered for incorporation into the solicitation and contract if the contracting officer determines them appropriate** in concluding a business arrangement satisfactory to both parties and not otherwise precluded by law or Executive order.” FAR 12.213

Tailoring of Clauses for the Acquisition of Commercial Products and Commercial Services

“The... clauses established in this subpart are intended to address, to the maximum extent practicable, commercial market practices for a wide range of potential Government acquisitions of commercial products and commercial services. However... **contracting officers may, within the limitations of this subpart... tailor... the clause at 52.212-4, Contract Terms and Conditions- Commercial Products and Commercial Services, to adapt to the market conditions for each acquisition.**” FAR 12.302(a).

Tailoring of Clauses for the Acquisition of Commercial Products and Commercial Services (cont'd)

What may not be tailored?

1. Assignments;
2. Disputes;
3. Payment (except as provided in subpart 32.11, Electronic Funds Transfer);
4. Invoice;
5. Other compliances;
6. Compliance with laws unique to Government contracts; and
7. Unauthorized obligations.

FAR 12.302(b).

SUBCONTRACT TERMS AND CONDITIONS

What Is a Subcontract in the U.S. Supply Chain? Things to Think About

- There is no privity with the Government
- It is a product of negotiation between the parties
- It is constrained only by mandatory flow-downs
- Think of it in two parts: negotiated terms and FAR and FAR Supp. flow-downs
- Commercial item suppliers have very limited mandatory flow-downs
- Flow-downs can have extended reach
- It can take many forms

A Must – a Negotiated Agreement

Alternatives are all bad

- Starting work before definitive agreement
- Competing forms
- Email exchanges
- Attaching the Prime Contract

Negotiating Subcontract Terms & Conditions

Five Tips for Negotiating Subcontracts

1. Start the process early

- As part of the teaming agreement
- As early as possible while "honeymoon" atmosphere exists

2. Complete the negotiation prior to initiating work

- Leverage is significantly altered once work begins
- UCC "Battle of the Forms" and initiation of work
 - You could end up with an enforceable contract with different terms and conditions than you expected

Negotiating Subcontract Terms & Conditions (cont'd)

3. Know when to take exception

- Evaluate the practical importance to the particular contract of the issues presented by a clause
- Try to argue only over important issues
 - “Keep your powder dry...”

4. Can you prevail if you object?

- Are you willing to "walk"?
- Is the clause a "deal breaker" for the other side?
- Is the language "boilerplate" or specially drafted for your subcontract?
- Has the clause been proposed to and accepted by other Subcontractors?
- Are the objectionable terms susceptible to differing interpretations?

Negotiating Subcontract Terms & Conditions (cont'd)

5. Know what can be negotiated and what cannot

- Know the FAR System mandatory clauses – *i.e.*, socioeconomic; environmental; enforcement; ethics; technical data; etc.
- Know which clauses the prime needs based on clauses in the prime contract – Changes, Inspection, Default, Progress Payments, Government Property, Warranty, etc.
- Consider carefully before taking exception to these "mandatory" or "necessary" clauses, but do not hesitate to take exception to contractor adopted changes to the standard clauses

Flow-Down Clauses

- Required flow-downs vs. discretionary flow-downs
- Some cannot be flowed down
e.g., Disputes Clause
- Some are to protect the prime's interests
e.g., termination, stop work, suspension, changes, warranty, DPAS, and IP rights clauses
- Often conditioned on contract type, type of work to be performed and total anticipated contract value

Flow-Downs and Commercial Products and Services

- Flow-downs for Commercial Products and Services – Limited by FAR and DFARS (listed in FAR 52.212-5(e)(1), FAR 52.244-6(c)(1)) and DFARS 252.224-7000) plus “a minimal number of additional clauses necessary to satisfy . . . Contractual obligations”
- FAR 12.504 and DFARS 212.504 lists laws that are not subject to subcontracts for commercial items at any tier. E.g., validation of proprietary data restrictions and rights in technical data
- Some exemptions listed in clauses themselves

WORKING WITH TERMS AND CONDITIONS AFTER AWARD

Performance Management – Why Compliance Matters

It matters because...

- Federal contracts contain a long list of clauses demanding transparency, audit rights and investigative avenues
- Contractors performing contracts with, collectively, many hundreds of complex federal regulations
- Compliance failures can result in:
 - Missed captures/opportunities
 - Rejected goods, rejected invoices, schedule delays, increased inspection and audits, contract termination
 - Negative performance evaluations (CPARS)
 - Negative publicity; impacted employee morale
 - Mandatory disclosure requirements and related investigations
 - Civil or criminal False Claims Act liability, Suspension and Debarment
- All of this can be the result of your actions, or the actions of teammates, suppliers, and subcontractors

DISPUTES AND ISSUES WITH CONTRACT INTERPRETATION

Why Is Interpretation Important?

- “Many contract disputes arise because different people attach different meanings to the same words and conduct.” Restatement (Second) of Contracts, §2 (1981), comment b, Manifestation of Intention
- It depends on what your definition of “is” is...
- Most government contract disputes that go all the way to a Board of Contract Appeals or to the Court of Federal Claims are about contract interpretation

When Interpretation Occurs

- Acquisition planning
- Contractor bid/proposal preparation
- Government evaluation and selection for award
- Contract performance

Interpretation is Constant!

The parties interpret their contracts every day when they perform

The Interpretation Dispute Process

- Determine Contract Formation
- Determine Contract Content
- Apply the Principles of Contract Interpretation
 - Intrinsic Evidence
 - Extrinsic Evidence
- Apply Contra Proferentem

Classic Interpretation Issues

- The meaning of individual words and phrases
- The resolution of conflicting parts of the contract
- Tie-breaking ambiguous contracts

Disputes - Claims

What is a “claim”?

“Claim” means a **written demand** or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other **relief arising under or relating to the contract**.

However, a written demand or written assertion by the contractor seeking the payment of money exceeding \$100,000 is not a claim under 41 U. S. C. chapter 71, Contract Disputes until **certified** as required by the statute. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by written notice to the contracting officer as provided in 33.206(a), if it is disputed either as to liability or amount or is not acted upon in a reasonable time. FAR 2.101.

What Can Be the Subject of a Claim?

Money!

Work performed in excess of contract requirements

Non-monetary

Schedule extension

Interpretation of specification

Reformation of contract

Contracting Officer Authority to Resolve Claims

FAR 33.210 – Contracting Officer’s Authority

COs are authorized, within the limitations of their warrants, to decide or resolve all claims arising under or relating to a contract

COs authorized to use ADR

Authority to decide or resolve claims does not extend to:

- Claim for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle or determine; or
- Any claim involving fraud

Contracting Officer's Final Decision (COFD)

FAR 33.211 – Contracting Officer's [Final] Decision

When a claim cannot be settled by mutual agreement, Contracting Officer shall issue a final decision that conforms with the requirements of this clause

Final decisions must include instructions for appealing the decision

Decisions must be issued within statutory time limits

- For claims of \$100,000 or less, 60 days after receiving a written request from contractor that a decision be issued within 60 days
- For claims greater than \$100,000, 60 days after receiving a certified claim
 - If decision will not be issued within 60 days, CO shall notify the contractor, within that period, of the time within which a decision will be issued
 - Government gets one shot to extend the deadline – after that, the claim is deemed denied and contractor can appeal

Concept Check #1

You can never negotiate the terms of a contract with the Federal Government.

- A. True
- B. False

Concept Check #1

You can never negotiate the terms of a contract with the Federal Government.

B. False

Concept Check #2

Contracts for commercial products/services should contain all the same FAR/DFARS clauses as contracts for non-commercial products/services.

- A. True
- B. False

Concept Check #2

Contracts for commercial items should contain all the same FAR/DFARS clauses as contracts for non-commercial products/services.

B. False

Concept Check #3

Prime contractors have complete discretion to decide which FAR/DFARS clauses to flow down to subcontractors.

- A. True
- B. False

Concept Check #3

Prime contractors have complete discretion to decide which FAR/DFARS clauses to flow down to subcontractors.

B. False

Questions?



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