

PCI's Executive Exchange 2023: The Government As A Customer

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An Unusual Customer

- The U.S. Government is a sovereign power, and sovereigns have different interests and powers than we do as individuals
- Because of this fundamental difference, a U.S. Government contract presents situations and risks that are not seen in commercial contracts
- In today's program, we will take a look at some of the major differences between the two worlds

Starting Point

- U.S. Government contracts are contracts of adhesion, *i.e.*, the parties are not going to negotiate everything from scratch—contractors are expected to accept the Government's terms and conditions

The U.S. Government

Legislative

Executive

Judicial

- Separate but equal
- Each Federal agency has its own peculiar characteristics
- A contractor must have employees or consultants who are not only familiar with Government contracting in general, but also the particular agency you are targeting

The Ground Rules

- The world of Government contracting is heavily affected by statutes and regulations
- Some deal with socio-economic issues that would not be present in a commercial contract (*e.g.*, small business subcontracting, clean air, clean water, drug-free workplace, drug-free workforce, affirmative action)
- We will explore these statutes in our next session
- To implement these statutes, the Executive Branch issued the Federal Acquisition Regulation—the “FAR”

Key Players

- The **Contracting Officer**--arguably the most important player of all
- Only the C.O. can bind the Government contractually
- The C.O. is vested with broad discretion, which makes challenging a C.O.'s decision very difficult
- Every C.O. has a "warrant" delineating their authority
- Other Government personnel (*e.g.*, CORs, lawyers, auditors, program managers, QC officials) may act like they have contracting authority, but it is usually a safe bet they don't

Cardinal Rule

- The risk of dealing with an unauthorized Government employee is on the contractor
- For people who have been trained to believe that the customer is always right, this can present problems

Protests and Disputes

- FAR Part 33 contains detailed regulations outlining how disappointed competitors can challenge a procurement agency's decisions—these are called **bid protests**
- The protest process can be expensive and time-consuming, but it is a fact of life in Government contracting
- Once a contract is awarded, the regulations provide detailed procedures for how a contractor and the Government can process **disputes** that arise during the course of contract performance—but the “Disputes” clause that governs the process makes it clear that the contractor must follow the C.O.'s orders even if it disagrees with them

Types of Contracts

- Under the FAR, the Government has the ability to award several different types of contracts (FAR Part 16)
- In general, the firm-fixed-price type of contract poses the *most* risk for a contractor and a cost-plus-fixed-fee contract poses the *least* risk
- But that is not to imply that a cost-reimbursement contract does not impose any risk
- In terms of risk, all other contract types fall between these two types
- It is essential that a contractor understand the type of contract it is competing for and what that will mean for purposes of pricing and performance

Changes

- One of the most important powers the Government has is the ability—the unilateral power-- to order changes to the contract
- This power is not unlimited, but it is very broad
- If the Government does order a change, the contractor is entitled to seek an **equitable adjustment** in the price and the delivery schedule
- Disputes involving the “Changes” clause are probably the most common type of dispute, and that includes something called a **constructive change**
- We will cover the “Changes” clause in depth in a later session

Audits

- It is possible that your contract will confer audit rights on the procurement agency
- These audits can take place at any time during contract performance and up to three years after **final payment**
- In order to survive these audits, a contractor must have an approved accounting system and must **document** all of its incurred costs
- In addition to the procurement agency's audit rights, the Comptroller General, who heads the Government Accountability Office (GAO), may also have audit rights

Compliance

- Government contracts impose certain compliance obligations on a contractor
- In some cases, contractors must have a Code of Conduct and they have an affirmative obligation to report certain improper conduct to the Government
- In addition, when contractors make statements (*e.g.*, certifications, claims, invoices) to the Government, they are subject to civil and criminal penalties under the False Claims Act
- The Government also has the power to **suspend** or **debar** contractors it deems unfit

Termination

- The Government has the *unilateral power* to terminate contractors either for default or for “the convenience of the Government”
- **Default termination** is one of the most serious and damaging things that can befall a contractor and will be a black mark on that contractor’s record for three years
- A **convenience termination** does not adversely affect a contractor’s reputation, but it does present its own challenges
- We will cover terminations in a later program

Commercial Item Contracts

- In the mid-1990s, Congress enacted legislation that give rise to the concept of commercial item contracting
- The idea was to make the world of Government contracting less unattractive to commercial vendors
- Since that time, the use of commercial contracting has exploded
- If a company is able to call a product or service commercial, it can avoid many of the burdensome aspects of the Government contracting process

Fighting Fire With Fire

- The U.S. Government has a structured and organized approach to administering its contracts
- Successful contractors employ contract administrators who are knowledgeable and experienced in the U.S. Government contracting process, and they are key players on their contract teams

Questions?

About the Instructor

Tim Sullivan



Tim Sullivan has spent 45 years in the Government contracting world. He is a co-founder of the Public Contracting Institute, has lectured and written on Government contracting topics, both nationally and internationally, since 1983. He has dealt with the full range of Government contracting issues and has successfully litigated both bid protests at the GAO and the U.S. Court of Federal Claims and contract claims before the boards of contract appeals and the U.S. Court of Federal Claims.

Tim spent his last 19 years of practice as a partner at Thompson Coburn LLP, where he chaired the Government Contracts Group. Tim is widely acclaimed for his lectures on contract negotiations. Tim earned a bachelor of arts degree from the University of Michigan and his Juris Doctor degree from Georgetown University Law Center, where he was a member of the Georgetown Law Journal. Tim also served as a counterintelligence agent for the U.S. Army and as a contract negotiator for the Central Intelligence Agency.