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Contract Administration

Session One

ISSUES IN CONTRACT ADMINISTRATION

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- Procurement consultant and retired government contracts attorney.
- Author of eight books including *The 100 Worst Government Mistakes in Government Contracting*,; *The 100 Worst Mistakes in Government Contracting* (with Jason D. Morgan), and *Elements of Government Contracting*.
- Published articles include “10 Big Mistakes in Government Contract Bidding,” “10 Big Mistakes in Government Contract Administration,” “Incorrect Government Advice – Whom Should You Heed” and “The Ten Big Mistakes Made by Small Businesses and New Government Contractors.”
- Has taught government contracts courses for the Public Contracting Institute, Federal Publications Seminars, LLC, the George Washington University Law School, the University of Maryland and numerous military, aerospace and information technology contractors



Agenda

- **Government v. Commercial Contracting**
- **Authority of Government Players**
- **Changes**
 - **Constructive Changes**
 - **Equitable Adjustments**
- **Delays**
- **Inspection and Acceptance**

Government vs Commercial Contracting



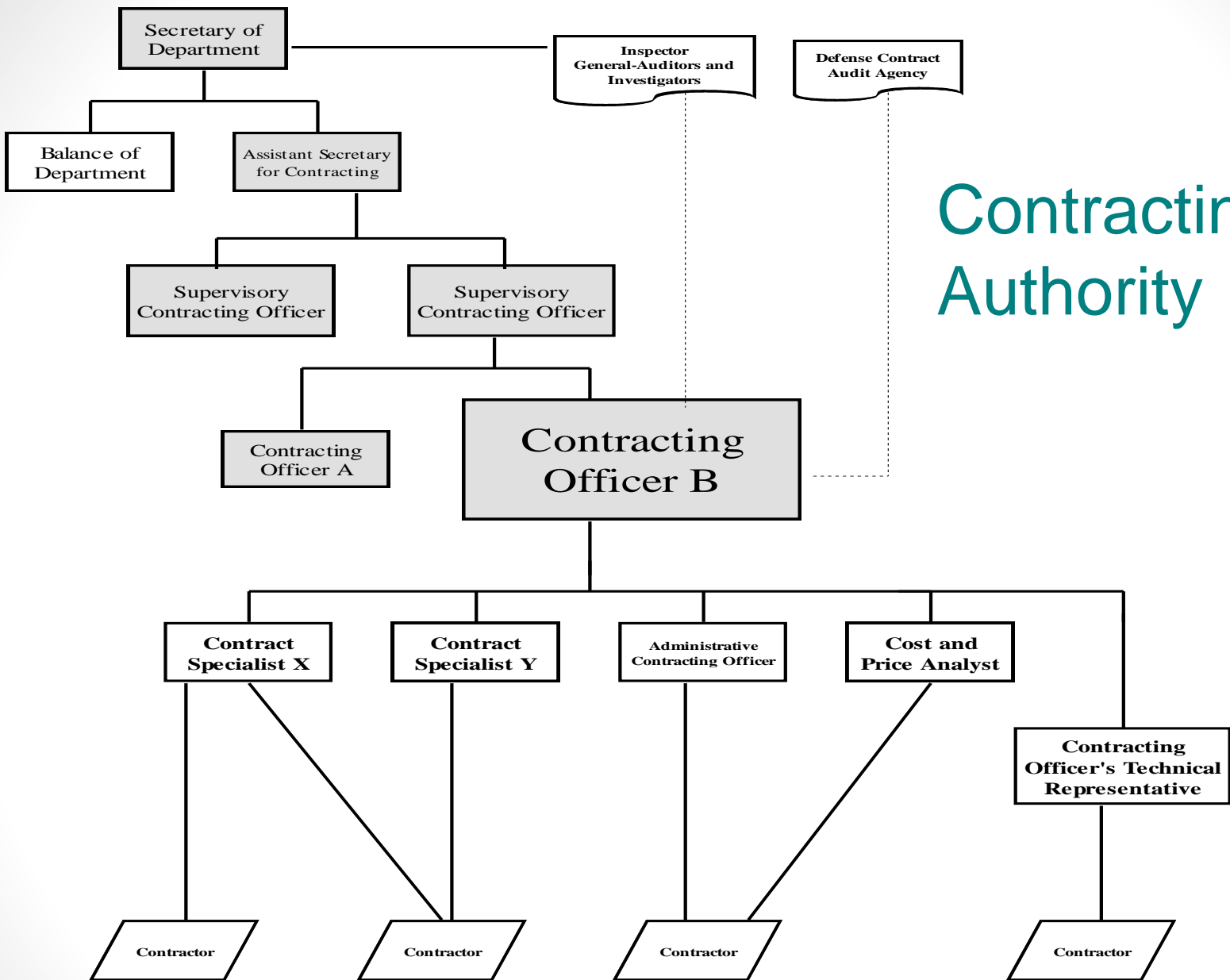
- Laws, regulations, contract provisions favorable to Govt. - e.g., Unilateral changes, T/C, CO authority
- Competition: Level field
- Cost Accounting Rules
- Public Policy/Compliance rules (gratuities/kickbacks)
- Audits, Enforcement powers



- Commercial laws even-handed – bilateral changes, no T/C, apparent authority
- “I can hire my brother.”
- Doesn’t use cost contracts
- “You scratch my back, I’ll scratch yours” (unless contracts forbid)
- Limited to civil lawsuits

Who Has Contracting Authority?

- **Doctrine of Apparent Authority in Commercial Contracting is not applicable**
- Federal Acquisition Team (FAR 1.102-3, -4)
- Types of Contracting Officers
 - CO and PCO (same)
 - ACO and Contract Administration Office (“CAO”)
 - TCO
- Other members of CO’s Team (No authority to bind government)
 - Contract Specialists
 - COR/COTR
 - QA
 - Inspectors
 - Cost & price Analysts
 - Auditors
 - IG
- Standards of Ethical Conduct for Executive Branch Employees (5 CFR Part 2635)



Contracting Authority

FAR Limitations on Contracting Authority

- **A Contract Specialist, COR, COTR or ACO has no authority to change price, quality (specifications), quantity or delivery schedule.**

A new DOD guide for CORs states this and other limitations clearly (applies to COR, COTR or ACO):

CORs do NOT have the authority to:

- 1) Make any agreement with the contractor that obligates public funds
- 2) Make commitments that affect the price, quality, quantity, delivery or any other term or condition of the contract
- 3) Encourage or permit the contractor to perform any work beyond or outside the scope of the contract
- 4) Interfere with contractor's management of its employees, including "supervising" or directing the work of the employees
- 5) Order or accept supplies or services not expressly required by the contract
- 6) Allow Government Furnished Property accountable under one contract to be used under another contract
- 7) Discuss any information that may give one contractor an advantage in future procurements
- 8) Direct the contractor to begin work prior to contract award date
- 9) Issue Oral or written instructions to the contractor to start or stop work
- 10) Negotiate **ANY** change to the terms of the contract. Any change to price, quantity or delivery schedule or location must be provided to the contracting officer.

Changes

FAR Part 43



CHANGES – BASIC THEORY

Government can make in-scope changes unilaterally.*

- ◆ Gives Government flexibility when its needs change, without needing to award new contract
- ◆ Provides fair compensation to contractor, who is entitled to “equitable adjustment” if its cost or time increases.
- ◆ Important difference from commercial contracts
- Sample Clauses
 - Fixed Price: FAR 52.243-1
 - Cost-Reimbursement: FAR 52.243-2
 - T&M: FAR 52.243-3
 - Construction: FAR 52.243-4
 - Commercial Items: FAR 52.212-4 – allows only bilateral changes.

Changes -- Fixed Price (**Aug 1987**)

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.
- (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.
- (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....

Changes Scenario

- The CO is managing a fixed price supply contract for delivery of 10,000 widgets. The program office finds the widgets “user friendly” and wants the CO to order 10,000 more widgets. Can the CO do so under the existing contract, which has the standard Changes clause?
 - A) Yes, if it is at the same price (which has previously been determined to be “fair and reasonable.”)
 - B) Yes, if the contracting officer determines that doing so is in the best interested of the United States.
 - C) No – it would be considered a “cardinal change,” outside the scope of the contract.
 - D) Maybe – it depends whether the original RFP contemplated potential increases in the procurement volume.
- What if program wants 20,000 more items?
- Suppose a competitor learns that Government has used Changes clause as authority to modify the contract, and objects. What would be the competitor’s argument?

SCOPE OF THE CHANGE



- Changes Clause allows changes “within the scope of the contract.”
- Government cannot unilaterally change terms and conditions (e.g. payment terms, warranties, type of contract)
- Does not cover “Cardinal” changes.
- Protester perspective: Is the field of competition significantly altered?
 - Should offerors have anticipated change?
 - Would competitors have bid differently had it been aware of possible new work?
- Awardee perspective: Is changed contract the work for which parties originally bargained?
 - Was it “within the contemplation of the parties?”
- Consider changes to quantity or function, cost, RFP language.

FORMAL (“DIRECTED”) CHANGES

- Government and contractor discuss need for change.
- Contractor submits “change proposal.”
- Government reviews proposal, accepts or initiates negotiation.
- If agreement, bilateral modification is executed.
- If parties cannot reach agreement Government may issue unilateral change order.
- Contractor has a duty to proceed, but should reserve its right to submit request for equitable adjustment.
- Contractor must perform if directed to do so by Contracting Officer, even if in dispute.



CONSTRUCTIVE CHANGES

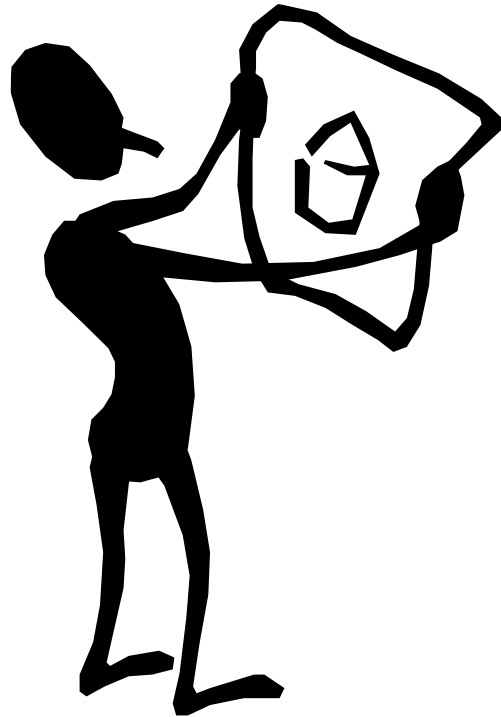
- Government actions or failure to act are treated as “constructive” changes rather than breaches of contract (as they would be in a commercial contract).
- Contracting officer does not issue directed change, BUT
- Government action (or failure to act) increases contractor’s costs (or time).
 - Contractor should monitor performance and cost so that it can identify constructive change at time of action or failure to act.
 - Sometimes, however, constructive change is recognized only later, when performance is over budget or behind schedule.

NOTIFICATION OF CHANGES

- Contractor must notify Government of change in timely manner.
 - Notification of Changes clause (e.g., FAR 52.243-1(c))
 - Gives Government opportunity to reconsider whether it wants extra work, before you go at risk and spend money.
 - Dispute is easier to resolve before money is spent.
 - If no timely notice, Contractor may lose right to equitable adjustment.

CONSTRUCTIVE CHANGES

- Example:
 - Contracting Officer
“misinterprets” specification



Scenario – Marvin Construction

- October 18: Air Force awards Marvin contract to paint and refurbish 265 houses at Robins Air Force Base. Contract requires Marvin to complete initial house (exemplar), for government approval, to establish workmanship standards before working on other houses.
- December 6: Marvin prepared and painted exemplar, and CO inspects it. CO reserves decision, but Marvin is eager to get to work. CO and Malone agree that Marvin can work on carports while CO reviews exemplar.
- Late December through June: Marvin completes work on carports and starts working on houses. CO does not object, and pays Marvin's invoices until June.
- CO and Marvin ultimately disagreed on meaning of contract requirement to sand "bare spots." Marvin's interpretation ("bare" means "bare") required sanding of 15% of surface area. When CO said this was unacceptable, Marvin asked whether exemplar standard had changed, and interpretation of "bare spots." CO did not respond until June.

Scenario – Marvin Construction

- June 15: CO sends letter, saying he never accepted exemplar, that "bare" includes peeled paint (even where surface is not exposed), and that no further payments would be made until Marvin took acceptable corrective action. (Marvin had already completed 70% of work using exemplar as workmanship standard.)
- Marvin insisted that its work complied with the contract because it met the exemplar standards, refused to re-perform its previous work, which would have involved removing the paint already applied, and sanding virtually 100% of the surface area instead of the 15% Marvin sanded when relying on the exemplar as its workmanship standard.
- November 9: Government terminated Marvin's contract for default.

Scenario - Marvin Construction

- Marvin appealed its termination for default. What result?

A) Marvin loses, because it did not follow the Contracting Officer's direction.

B) Marvin loses, because it mis-interpreted the meaning of "bare spots."

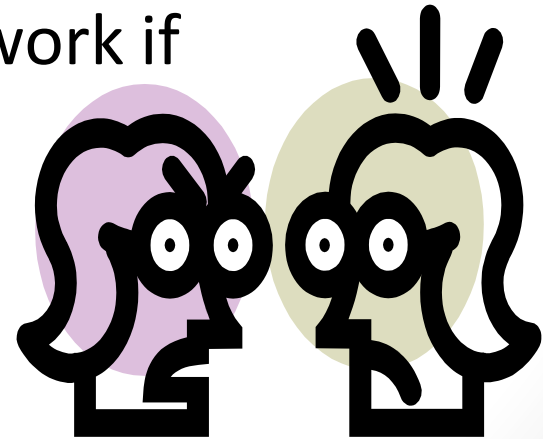
C) Marvin loses, because it applied standards (from the exemplar) that had not been approved by the Contracting Officer.

D) Marvin wins, because it correctly interpreted the meaning of "bare spots."

E) Marvin wins, because the Government breached its duty of good faith and fair dealing.

Scenario

- Contracting officer asks you to perform work that you believe is not required by contract
- You say “it’s a change.”
- Contracting officer says, “no it’s not. Do it, or I’ll terminate you for default.”
- You can’t afford to perform this work if you aren’t going to get paid for it
- What do you do?



Scenario

Result of Claim


Do You
Perform?

YOU WIN


YOU LOSE

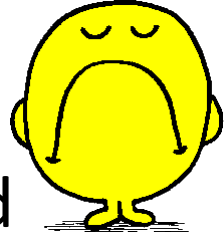
Yes:

Perform and
get paid 

| Perform but
| don't get paid 

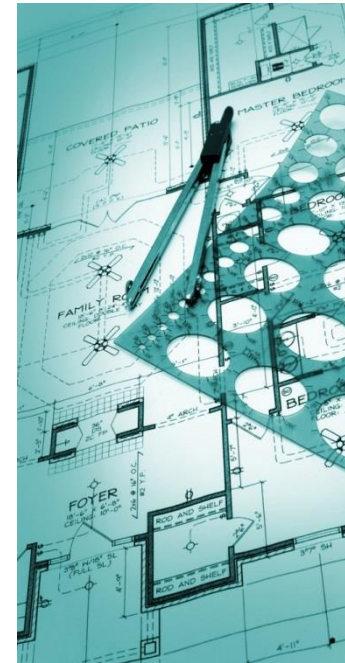
No:

Don't perform
and no revenue
T4D is converted
to T4C 

| Don't Perform
| and no revenue
| T4D and assessed
| procurement costs 

DEFECTIVE SPECIFICATIONS

- Requires:
 - Government provides defective specifications, drawing, etc.
 - Contractor relies on government-furnished specifications
 - Defect caused increase in costs/time
- Implied warranty of specifications
 - Ambiguous
 - Unduly restrictive



DEFECTIVE SPECIFICATIONS

Types of Specifications

- Design
- Performance (harder to argue breach of warranty)
- Purchase Description (“Brand name or equal”)
- Composite

DIFFERING SITE CONDITIONS

- Construction contracts
- Contractor encounters latent/subsurface conditions that differ materially from
 - Site conditions specified in contract (Type I)
 - Site conditions ordinarily found in that area (Type II)
- Contract must promptly notify Government, and is entitled to equitable adjustment



CONSTRUCTIVE CHANGES – OTHER TYPES

- Government failure to cooperate
 - Failure to assist
 - Failure to prevent interference by other KR's
 - Overzealous inspection
 - Delay in approval process
- Superior knowledge
 - Government has knowledge that is vital
 - Government knows that contractor does not have this knowledge
 - Government fails to disclose to contractor

CONSTRUCTIVE CHANGES – OTHER TYPES



- Constructive Acceleration
 - Government accelerates schedule
 - Government delay accelerates schedule
 - Excusable delay accelerates schedule
 - And Contractor's costs are increased (not a given)
- Changed inspection requirements
- Impossibility, mistake (who bears risk?)
- Delay and Disruption
- Equitable adjustment for wage determinations that increase minimum wages

CHANGES CLAUSE IN SUBCONTRACTS

- Changes Clause is not a mandatory flowdown, but
- Prime Contractor “must” include it in subcontract, for business reasons
 - What if Government unilaterally changes specifications, and change affects subcontract specifications?
 - Subcontract notification period should fit within prime contractor’s 30-day notice period.
- Subcontractor must accept Changes clause
 - Subcontractor can limit Prime’s unilateral right to make changes to situations where Government has unilaterally directed change (that affects subcontract).
 - Subcontractor can resist giving Prime right to make unilateral changes to subcontract for Prime’s own benefit.
 - Note: Similar situation with respect to Termination for Convenience Clause

Subcontracting Scenario

- During negotiations of subcontract, the prime proposes an exhibit that flows down every FAR clause in the prime contract. The subcontractor doesn't think that some of the clauses should be in the subcontract. What would be the best practice?
- A) Subcontractor gives in and accepts all clauses – after all, the prime is the boss.
- B) The parties engage in clause-by-clause negotiation.
- C) The subcontractor refuses to execute a subcontract if there are some clauses that it cannot perform or is unwilling to accept.

EQUITABLE ADJUSTMENTS

- Difference between what it would have reasonably cost to perform the work as originally required and what it reasonably cost to perform the work as changed, plus profit/overhead.
- Include direct costs, indirect costs and profits
- Does not include consequential damages
- Do not re-price the entire Contract!!!
 - Compare to partial termination for convenience.
- Contractor has burden of proving its costs.
- Issues can involve impact costs, delay and disruption, and unabsorbed overhead.

Government and Contractor Delays

FAR Parts 42 and 49



GOVERNMENT DELAYS

- **Stop Work – Supply/Services – FAR 52.242-15**
 - Within 90 days, CO must either cancel stop work or terminate the contract
- **Suspension of Work – Construction – FAR 52.242-14**
 - Duration – period of time CO deems appropriate
- **Government Delay of Work – Fixed Price Supplies/Services - 52.242-17**
 - Operates to settle claims arising from delays caused by CO act/failure to act.



CONTRACTOR DELAYS

“The Note From Home”

- Excusable delay – contractor needs to avoid Termination for Default or Liquidated Damages (FAR 52.249-8(c), (d))
- Delay MUST be:
 - Beyond control **AND** without fault or negligence
 - Of both contractor and Subcontractors/Suppliers at any tier

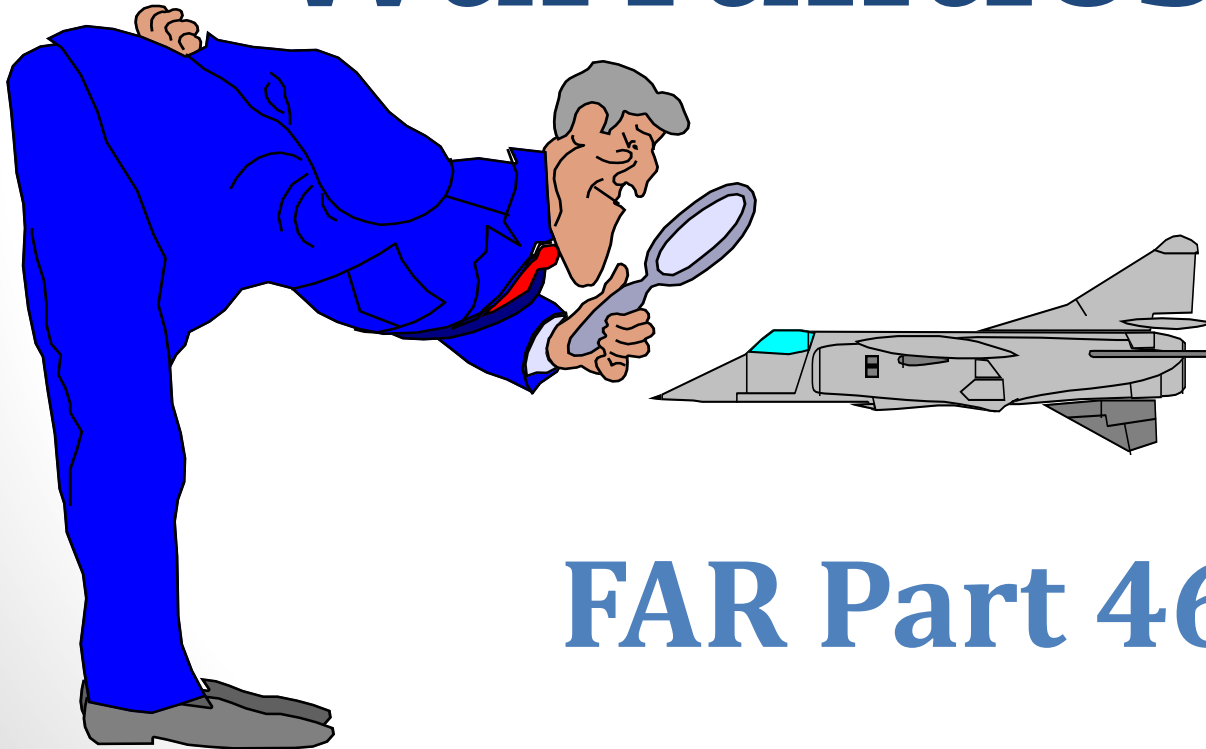
CONTRACTOR DELAYS

“The Note From Home”

- Examples:
 - Acts of God?
 - Labor Issues?
 - Were other suppliers available?
 - Did contractor mitigate damages?
 - Unusually Severe Weather?
- Was excusable delay the actual cause of late performance?
- Remedy: Contractor gets more TIME!!!



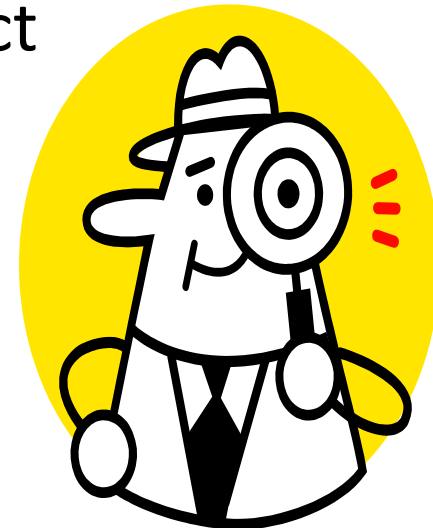
Inspection, Acceptance and Warranties



FAR Part 46

INSPECTION/TEST STANDARDS

- Must measure only what is required in contract.
- Tests may be specified in the contract
 - Presumed reasonable
 - May government change contract specified tests?
- What if there is no specified test?
 - Deliverable by contractor?



INSPECTION/TEST STANDARDS

- Inspection - consider
 - Content – pencils vs. submarines?
 - Intended use
 - Standard industry practice
- Government may test at own expense (at contractor facilities), or
- Contractor provides quality control system (which Government may audit, inspect).

INSPECTION CLAUSE

Remedies depend on WHEN defective items delivered:

- Delivered before required delivery date (RDD)
 - Reject nonconforming supplies
 - Require correction at no increase in price
 - Accept at reduced price
 - May not terminate for default (T4D) - Why?

Delivered On RDD

- Reject and allow correction within reasonable time
- Accept at reduced price
- T4D without substantial compliance
- If substantially compliant:
 - Must allow correction
 - No increase in price
 - Reasonable time to correct

SUBSTANTIAL COMPLIANCE

Must meet all 5 elements!

- On time performance
- Good faith belief item complies
- Minor defect/deficiency
- Correctable within reasonable time
- Time not of the essence

Postpones a termination for default (T4D)

- Contractor MUST still correct deficiencies or else the government may still T4D.

Tradeoff for government:

- Is work “suitable for intended purpose”?
- Would it cost too much to fix v. gain realized?
- This should be a “business decision.”

If Contractor Won't Fix It Within Reasonable Time?

- Repair or replace
 - In-house
 - By separate contract
 - Charge the contractor
- Accept at reduced price
- T4D (with same choices)



Delivered After RDD

- Reject and allow correction within reasonable time
- Accept at reduced price
- T4D

SERVICE CONTRACTS

- Different rules?
- If deficient performance, remedies vary:
 - Get contractor to re-perform/perform
 - Take steps to ensure future compliance
 - Deduct for deficiencies

ACCEPTANCE

- Who bears the risk:
 - Before acceptance – contractor
 - After acceptance - government
- Acceptance is Conclusive, except for the “Big 4”:
 - Latent defect
 - Fraud
 - Gross mistake amounting to fraud
 - Other contract provision - *e.g.*: warranty
- May be express or implied

Where Does Government Go Wrong?

- Overzealous inspectors
- Improper Inspections
- Waivers
 - Prior course of dealings
 - With same contractor
 - With different contractor
 - How long is the “prior course”?
- These inspection problems can give rise to constructive changes.



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