



## Season 7: Episode 11 – Contract Administration

- **Part 233 – Protests, Disputes and Appeals**
- **Part 249 – Termination of Contracts**
- **Part 250 – Extraordinary Contractual Actions and The Safety Act**

# Co-Host – Lou Chiarella

- Senior Counsel, Crowell & Moring LLP
- Adjunct Professor at the George Washington University Law School, Government Procurement Law Program.
- Deputy Assistant General Counsel in the Procurement Law Division, Office of the General Counsel, U.S. Government Accountability Office (GAO) (2001-2022).
- Army Judge Advocate (1988-2018), culminating with his assignment as Chief Counsel for the Army Futures Command Task Force, which resulted in the Army's largest acquisition-related reorganization in 50 years.



# Co-Host – Dave Drabkin

Independent consultant with 41-plus years of federal government contracting experience in both the public and private sector.

Chairman of The Advisory Panel on Streamlining and Codifying Acquisition Regulations (Section 809 Panel), <https://discover.dtic.mil/section-809-panel/>



The President of the United States appointed Dave to the Service Acquisition Reform Act (SARA) and the Multiple Award Schedule (MAS) Panels.

DoD Program Manager for Federal Acquisition Streamlining Act (FASA) Implementation.

Dave has worked for the DoD, the General Services Administration (GSA) and the Homeland Security and Government Affairs Committee (HSGAC) of the U.S. Senate. He has also worked for Northrop Grumman Corporation and Dixon Hughes Goodman, LLP.

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# **Welcome Back, and Rules of Engagement**

- Class begins promptly at 2:00 pm ET.
- Class will end at 3:30 pm ET.
- Please use the Q&A panel to ask your questions
  - If we don't answer the questions today, we'll get back to you.

## **How to Receive Credits**

- To get credit for the class you must collect the passwords provided during the class.
- You must respond to the email from PCI with the passwords to get credit.

# **Today's Topics: Administering Contracts**

- Part 233 – Protests, Disputes and Appeals
- Part 249 – Termination of Contracts
- Part 250 – Extraordinary Contractual Actions and The Safety Act

# What's in the Documents Folder Today?

- DCMA Manual 2501-09 Contract Claims and Disputes, [Contract Claims and Disputes V.508C\\_05182021 \(dcma.mil\)](#)
- DCMA Manual 2501-06 – Terminations, [Terminations V.508C\\_05182021 \(dcma.mil\)](#)
- Rand Corporation – Assessing Bid Protests of the U.S. Department of Defense Procurements, [Assessing Bid Protests of U.S. Department of Defense Procurements: Identifying Issues, Trends, and Drivers | RAND](#)
- Contracting Officer Termination for Convenience (T4C) Quick Reference, [T4C procedures.doc \(live.com\)](#)
- GAO, Bid Protests at GAO: A Descriptive Guide, <https://www.gao.gov/assets/gao-18-510sp.pdf>
- GAO, Bid Protests: Guide for Document Redactions, [Bid Protests: Guide for Document Redactions \(gao.gov\)](#)
- GAO, Guide to GAO Protective Orders, <https://www.gao.gov/assets/gao-19-613sp.pdf>
- Public Law 85-804, <https://www.govinfo.gov/content/pkg/STATUTE-72/pdf/STATUTE-72-Pg972.pdf#page=1>

# Polling Question 1

What would be your primary source of information related to GAO bid protests (including the GAO bid protest process)?

- a. DFARS Part 233
- b. FAR Part 33
- c. GAO Bid Protest Regulations
- d. 2018 Rand Report Assessing Bid Protests of DoD Procurements



# Part 233 – Protests, Disputes, and Appeals

- GAO post-award protests require stay of contract performance (or termination) consistent with the deadlines set forth in CICA.
- Protests of MDAPs >\$1B must be briefed to DPC w/in 10 days
- Must report protests to the Procurement Integrated Enterprise Environment (PIEE) filed at both GAO and COFC
- Congress may not direct the payment of claims, REAs, or the provision of 85-804 relief w/o referencing 10 U.S.C. 3862(b)
- Contracting Officers, where useful, should review previous claims filed by a contractor
- Include the “Choice of Law” (Overseas) clause DFARS 252.233-7001, for overseas contracts



## Polling Question 2

Some government actions in DoD IT procurements, for both supplies and services, may not be protested.

- a. True
- b. False

# Part 233 – Protests, Disputes, and Appeals

- DFARS Subpart 239.73 concerns requirements for information relating to supply chain risk.
- Govt individuals may, in the course of procuring IT, (a) exclude a source that fails to meet qualification standards established in accordance with the requirements of 10 USC § 3243 for the purpose of reducing supply chain risk in the acquisition of covered systems, and (d) notwithstanding any other provision of law, limit the disclosure of information relating to the basis for carrying out the exclusion of a source as set forth above. DFARS 239.7305.
- “If the Government exercises the authority provided in 239.7305(d) to limit disclosure of information, no action undertaken by the Govt under such authority shall be subject to review in a GAO or federal court bid protest.” DFARS 233.102, 239.7305(d)(1)
- Extremely rare

# Polling Question 3

What “form” must the TCO use to “track” terminations?

- a. SF Form 30
- b. DD Form 1598
- c. Preying Mantis Form
- d. DD Form 448

# Part 249 – Termination of Contracts

- Termination Status reports
  - Prepare a DD Form 1598, Contract Termination Status Report
  - Report semi-annually
  - Submit final report w/in 30-days
- May use the DD Form 1598 to release excess funds
- Use SF 30 to settle T4Cs where:
  - The contractor fails to timely submit settlement proposal
  - The contractor doesn't appeal TCO decision
  - The effective date will be the same as the letter of determination
- T4Cs, partial or whole, or changes reducing scope, may not exceed amount on original contract
- TCOs must complete a Settlement Negotiation Memorandum, see PGI 249.110 for details
- Incrementally funded contracts may include the Special Termination Costs clause at DFARS 252.249-7000

# Part 249 – Termination of Contracts

- There are special rules for terminating contracts w/ the Canadian Commercial Corporation (CCC), see DFARS 249.7001
- There are notification of Congress rules for contracts employing over 100 employees or more.
  - Notification must occur before release of the termination notice
  - Doesn't apply to Iraq or Afghanistan
- Must notify w/in 60 days of termination or substantial reductions of MDAPs
  - Secretary of Labor
  - Each prime contractor
  - Prime contractors are responsible
    - Notifying subcontractors of a value >\$700K
    - Flowing down requirement to subcontractors for contracts >\$150K at all tiers
- Include DFARS Clause 252.249.7002, "Notification of Anticipated Contract Termination or Reduction in all contracts involving MDAPs

## Polling Question 4

DoD may indemnify a contractor for unusually hazardous contracts not covered by insurance for

- a. Death
- b. Bodily injury
- c. Damage to property
- d. All of the above

# Part 250 – Extraordinary Contractual Actions

- Public Law 85-804 authorizes indemnification of contractors under limited exceptional circumstances in furtherance of the “National Defense”
- Actions must be approved by the Assistant Secretary of Defense, Army, Navy or Air Force
  - Actions <\$75K may not be delegated below HCA
  - USD (A&S) delegated authority to approve indemnification for unusually hazardous or nuclear risks
- See PGI 250.1 for processes to be followed by contracting officers
- Requests for 85-804 relief should be filed w/ the PCO, ACO or the Office of General Counsel
- For research and development or unusually risky work, the contracting officer shall insert an appropriate clause using the authority of both 10 USC 2354 (contract indemnification provisions) and P.L. 85-804.



# Section 822 of the FY23 NDAA

- Section 822 of NDAA FY23, " Modification of Contracts to Provide Extraordinary Relief Due to Inflation Impacts," amends Public Law 85-804 to authorize DoD to grant fair adjustments to contractors for expenses resulting exclusively from economic inflation.
- The statute requires:
  - That funds be specifically appropriated to carry out this act
  - That DoD develop guidance to implement this act
- DoD has NOT issued guidance, because it is of the view that funds were not in fact specifically appropriated for this statute.
- This statute expires December 31, 2023

See you all again on December 6th . . .

Same Bat Time . . .

Same Bat Channel . . .

THANKS!!!!!!

