



# MAY THE ~~CLAUSE~~ BE WITH YOU<sup>SM</sup>

**FAR 52.212-4, Commercial Terms and  
Conditions—Commercial Products and  
Commercial Services**

Tim Sullivan  
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## 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.

# What is it?

- In order to attract commercial companies to sell their products and services to the Government, Congress required the Government to minimize the terms and conditions it would use and to model those provisions on commercial practices
- The Government's response was to use this single set of terms and conditions when an acquisition is conducted under FAR Part 12, *i.e.*, the U.S. Government is buying either commercial products or commercial services
- It purports to include terms and conditions which are, to the maximum extent practicable, consistent with customary commercial practices
- It is incorporated into the solicitation and contract by reference—which means you have to look it up

# Does it Apply to All Contracts for Commercial Items or Services?

- No—if the Government is purchasing on a time and materials basis, or on a labor-hour basis, it will use Alternate I



## FAR 52.212-4

- With its alternates, it covers nearly ten pages of the printed FAR

# What Topics are Covered by the Clause?

- Inspection and Acceptance
- Assignment
- Changes
- Disputes
- Definitions
- Excusable Delays
- Invoice
- Patent Indemnity

# What Topics are Covered by the Clause?

- Payment
- Risk of Loss
- Taxes
- Termination for the Government's Convenience
- Termination for Cause
- Title
- Warranty
- Limitation of Liability

# What Topics are Covered by the Clause?

- Other Compliances
- Compliance With laws Unique to Government Contracts
- Order of Precedence
- Unauthorized Obligations
- Incorporation by Reference





# Tailoring

- The C.O. is permitted to “tailor” a particular provision, if, after appropriate market research, it is deemed necessary to do so in order to adapt to the market conditions for a particular acquisition
- Certain provisions may not be tailored because they implement statutory requirements. They include:
  - Assignments
  - Disputes
  - Payment
  - Invoice
  - Other Compliances
  - Compliance with laws unique to Government contracts
  - Unauthorized obligations

# Limitations on Tailoring—FAR 12.302

- A. C.O. may not tailor any clause or otherwise include any additional terms or conditions in a solicitation or contract for commercial products or commercial services in a manner that is inconsistent with customary commercial practice for the item being acquired unless a waiver is approved in accordance with agency procedures
- There are several court and GAO decisions finding improper tailoring:
  - *Red River Waste Solutions, LP*, B-411760.2, 2016 CPD 45 (fixed price per ton not commercial practice for refuse collection services)
  - *CW Govt. Travel, Inc. v. United States*, 99 Fed. Cl. 666 (2011) (15-year fixed price schedule for travel services contracts not commercial practice)

# Waivers

- A waiver request shall describe the customary commercial practice found in the marketplace, support the need to include a term or condition that is inconsistent with that practice, and include a determination that use of the customary practice is inconsistent with the needs of the Government
- A waiver may be requested for an individual or class of contracts for that specific item
- These waivers can be challenged in the U.S. Court of Federal Claims

# Where does the tailored language appear?

- In an addendum to the solicitation or contract



# Interpreting FAR 52.212-4

- This standard clause contains a short paragraph on each of the major topics covered by the general provisions of noncommercial product contracts
- There has been a lot of litigation on the meaning of these short provisions

# Changes

- (c) *Changes.* *Changes in the terms and conditions of this contract may be made only by written agreement of the parties*
- This is the only Changes clause in the FAR that does not give the Government the unilateral power to direct a change
- It is also unique in that it does not direct the contractor to obey the Government in the event that the contractor disagrees with the change or the terms of the change

# Disputes

- *(d) Disputes. This contract is subject to 41 U.S.C. chapter 71, Contract Disputes. Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal or action arising under or relating to this contract shall be a dispute to be resolved in accordance with the clause at Federal Acquisition Regulation (FAR) 52.233-1, Disputes, which is incorporated herein by reference. The contractor shall proceed diligently with performance of this contract, pending final resolution of any dispute arising under the contract.*
- Unlike the Changes clause, the last sentence of this clause reminds everyone that one of the parties is Uncle Sam

# Termination

- There are two kinds of termination clauses in FAR 52.212-4
- The first is “Termination for the Government’s Convenience”
- The second is Termination for Cause”
- Both have been the subject of frequent litigation



# Termination for the Government's Convenience

- *(l) The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms and conditions of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.*

# Termination for the Government's Convenience

- This provision has been a source of frequent litigation due to the vague statement that a contractor is entitled to recover “reasonable charges” resulting from the termination
- One contractor was unable to recover because it did not have a standard record keeping system
- Others failed to recover because they could not prove they had actually incurred the costs they were claiming
- Others failed because their costs were deemed to be unreasonable

# Termination for Cause

- *(m) The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated the contract for default, such termination shall be deemed a termination for convenience.*

# Termination for Cause

- Although the rules for non-commercial Government contracts don't apply to commercial contracts, the decisions that have been issued seem to indicate that they have a significant influence
- In one case, the Federal Circuit held that a subcontractor's failure to perform was a valid grounds for default because a prime contractor bears the risk of a sub's non-performance
- In another case, the Civilian Board of Contract Appeals held that the default for failure to meet the contract's requirements was invalid because the Government hadn't issued a cure notice as required by FAR 12.403(c)(1)—despite the fact that the requirement is not in FAR 52.212-4

## Other Compliances

- *(q) The Contractor shall comply with all applicable Federal, State and local laws, executive orders, rules and regulations applicable to its performance under this Contract.*
- This is broad and open-ended language, and it puts the burden on each contractor to make sure it is in compliance with these requirements—whatever they are

# Compliance With Laws Unique to Government Contracts

- *(r) The Contractor agrees to comply with 31 U.S.C. 1352 relating to limitations on the use of appropriated funds to influence certain Federal contracts; 18 U.S.C. 431 relating to officials not to benefit; 40 U.S.C. chapter 37, Contract Work Hours and Safety Standards; 41 U.S.C. chapter 87, Kickbacks; 41 U.S.C. 4712 and 10 U.S.C. 2409 relating to whistleblower protections; 49 U.S.C. 40118, Fly American; and 41 U.S.C. chapter 21 relating to Procurement integrity*
- These requirements are a far cry from what companies deal with under most commercial contracts, and the failure to understand them, and the failure to educate your team on them, could be disastrous

# Incorporation By Reference

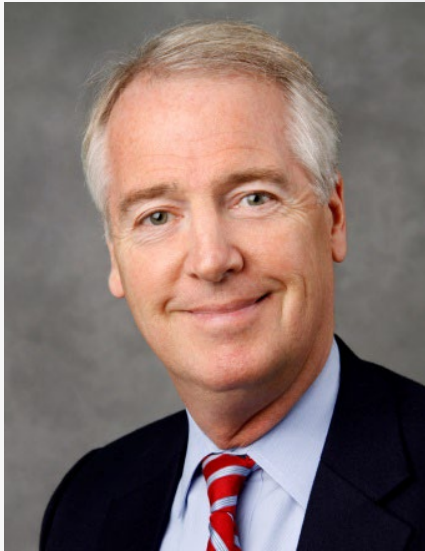
- *(v) The Contractor's representations and certifications, including those completed electronically via the System for Award Management (SAM), are incorporated by reference into this contract.*



Questions?



# Thank you



**Tim Sullivan**  
sullivant472@gmail.com