



GovCon “Risks & Hazards” Seminar “Financial, Legal, Compliance, Operational”

Part I - Understanding the Importance of Risk Management from the Government’s Perspective (and therefore a company’s perspective...)

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Risk Identification & Management/Mitigation...

When we say those words, everyone seems to have their own version of: “What does that mean? How should we address risk? How should I protect my organization from a “risk outcome” when a risk becomes realized?” Though these questions cover a significant scope and depth, as well as specific situational aspects that must be bridged across financial, legal, compliance, and operational functional areas, we must start somewhere (right?).

Over these three Seminar sessions we will provide you...

- A beginning of your “risk journey” by providing you with a starting point – the customer perspective (Government).
- We will then cover some basics of methodologies used for identification of, and management/mitigation of risks.
- Lastly, we discuss a few “special risks” that are broadly applicable but require some special consideration.“

Risk Identification & Management/Mitigation...

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Seminar Part I: Understanding the importance of risk management from the Government's perspective (and therefore a company's perspective) (Jan 24th, 2024)

This class (part of the “GovCon Risks & Hazards Series”) provides a survey level of depth of a Government perspective on risk, and how it should influence Industry's response in approaching identification and management of those risks. This session will focus (at a practical level) on:

- What is the Government worried about?
- Why is the Government worried?
- How is the Government managing this?

Importance of risk management

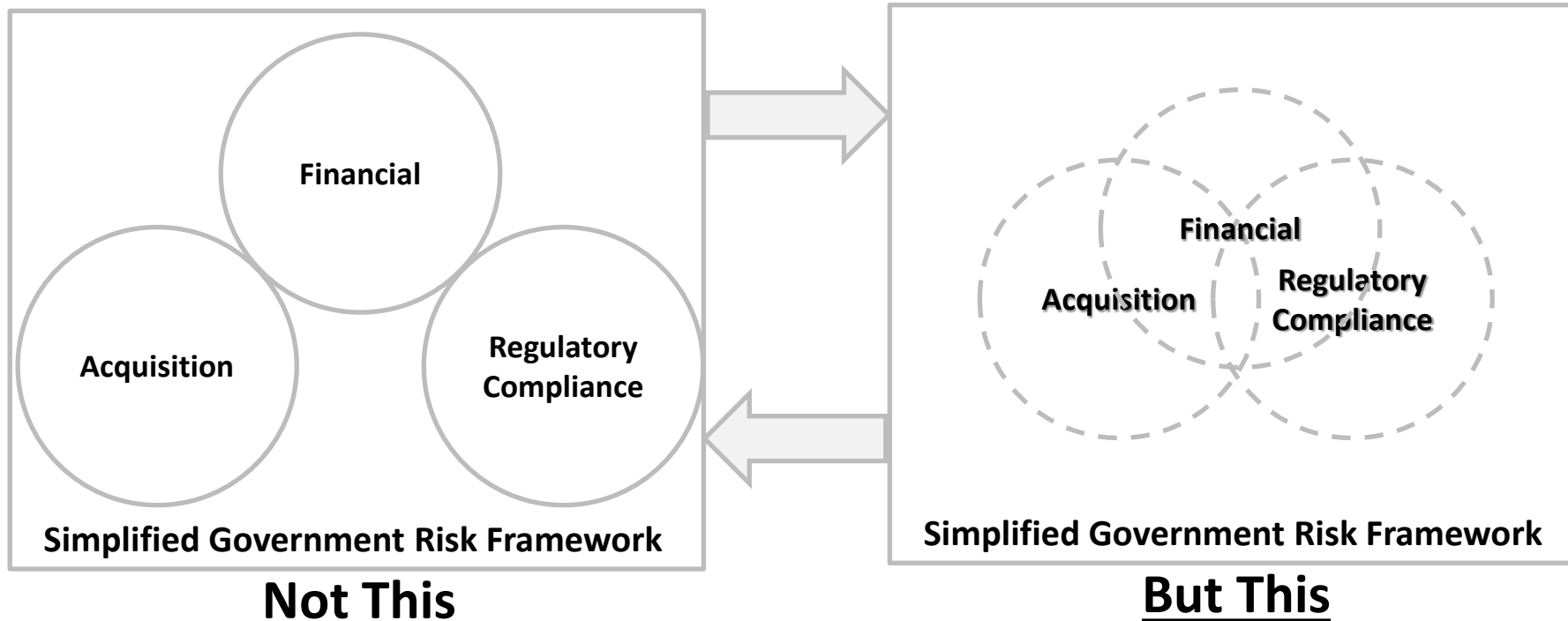
Where does all this come from anyway?

...and how complicated is it?

Understanding the importance of risk management from the Government's perspective...

- **A Very Simplified Government View – “3 buckets of risk”**
 - Financial Transparency & Accountability Risk
 - Generally, program integrity, reduction of fraud, waste, and abuse
 - Acquisition Risk (Capability & ROI)
 - Generally, Cost-Schedule-Performance
 - Regulatory Compliance Risk
 - Generally, National Security and Rule of Law

Understanding the importance of risk management from the Government's perspective...



...But we are going to attempt to break these 3 up for discussions

- (But...when we do that, they will come back to overlapping...)

Understanding the importance of risk management from the Government's perspective...

◦ ***A Very Simplified Government View – “3 buckets of risk”***

- Financial Transparency & Accountability Risk
 - Generally: Program integrity, reduction of fraud, waste, and abuse
 - No surprise this area was the “first” to get significant stand-alone legislative action
 - It also gives us insight into “it is really hard to keep up with risk legislation”
 - Let's investigate Financial Transparency & Accountability Risk a bit further
- Acquisition Risk (Capability & ROI)
 - Generally, Cost-Schedule-Performance
- Regulatory Compliance Risk
 - Generally, National Security and Rule of Law

Understanding the importance of risk management from the Government's perspective...

“Driver”: Transparency in Government in spending to leads to accountability (one can argue this...)

- **Why?** Significant public resources invested in improving the procurement function
 - Public sector procurement accounts for ~ 1/3 of Government spend globally (OECD-ilibrary.org) – must be accountable
- **Observation:** Legislation seldom pre-empts, more often, it reacts...
 - **Problem – Legislation:** In **2006**, the United States passed the Federal Financial Accountability & Transparency Act (FFATA), leading to the creation of the usaspending.gov, providing details on federal spending for contracts, grants, loans, and other financial assistance awards over \$25,000
 - The primary goal is to **reduce wasteful spending in the government by full disclosure of all entities and organizations receiving federal funds**, including grants, contracts, loans, and other assistance and payments to primes, then to subs
 - FFATA Subaward Reporting System, Government reports primes funds, then Primes must enter for 1st tier subcontractors into FSRS
 - Using transparency to get to accountability, **will it work...???**
 - **Well, no..., so again Problem - Legislation:** Improper Payments Elimination and Recovery Act of **2010** (IPERA) defined a stringent strategy for agencies to reduce improper payments
 - To emphasize the mounting challenge, when IPERA was enacted in 2009, improper payments tally was \$110 billion – by 2016, the number had increased 33%+ to \$136.7 billion
 - Compliance Legislation was added to added to Transparency to “get er’ done (this problem was growing), **Will adding more compliance regulations fix it?**
 - **Well, no..., so again Problem - Legislation:** On March 2, 2020, the Payment Integrity Information Act of **2019** (PIIA) (Public Law 116-117) repealed IPERA (and other laws) but set forth similar improper payment reporting requirements, including an annual compliance report by Inspectors General
 - **Well, maybe it will work if assign a specific “independent” reporting party...**
 - **Problem - Legislation: Next??? (And so on?)**

Understanding the importance of risk management from the Government's perspective...

Reactive Legislation often ends up driving the Government's responsibility in contractor risk management

- Task to Agencies: Provide an immediate impact on program integrity and the reduction of fraud, waste, and abuse

Typical Risk framework for “preemptive action” by the Government

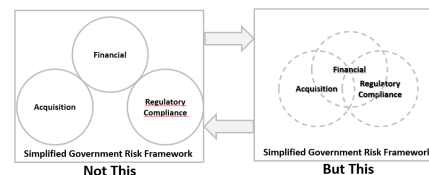
- A very good (and recent) case study of these GAO's August, “2023 DHS Acquisitions (Opportunities Exist to Enhance Risk Management)”
 - [DHS Acquisitions: Opportunities Exist to Enhance Risk Management | U.S. GAO](#)
 - Includes a specific and very representative set of expectations of “how the Government is supposed to handle contractor risk management” – provides a “near one-to-one” representation of the following general framework
- So, for a typical, and simplified Government framework
 - Establish a standard decision framework for mitigating contractor risk
 - Validate potential contractors with rigorous due diligence during the pre-award phase
 - Monitor contractor risk during the post-award phase
 - Adopt a portfolio view that assesses and manages the collective risk of contractors across the entire organization

Of course, **this isn't new, agencies are continuously working to strengthen the rigor of their “contractor responsibility determinations”**

- The acquisition agencies have developed and applied a specific set of procedures have defined to accomplish this responsibility

An example discussion of those agency procedures (next page) is the implementation of a contracting requirement used in the implementation of the framework above...

- Remember my earlier “Opinion/Commentary”: “We are going to attempt to break these 3 up for discussions (But...when we do they come back to overlapping...)” – for now, we are going to stick with our framework of the **“Oversimplified Government Risk View: Financial-Acquisition-Compliance”**



Discussion: Responsibility Determination

A tool in the Government's Competition for Contracts...

- Part of every Source Selection – but separate from Technical & Price Evaluation
- Generally, “after” determination of the apparent winner (but not always)
 - Some CO's will “lean forward in the saddle” meaning more than one assessment conducted in parallel

Authorities For Responsibility Determinations

10 USC Section 2305 - DoD

41 USC Section 253(b) - Public Contracts

OFPP Policy Letter, Jan. 21, 2011, Improving Contractor Performance Assessments

- White House – Office of Federal Procurement Policy

FAR Subpart 9.1 - Responsible Prospective Contractors

- (a) Purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only
- (b) No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility...

Responsibility Determination

An offeror is ineligible for contract award or purchase order unless the contracting officer makes an affirmative determination of responsibility

- FAR Part 9.103(b)
- Note: There is no requirement for additional responsibility determinations before task/delivery orders are issued once a Responsibility Determination is made on the Master Contract (e.g., GWAC, MAC, etc.)

In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer makes a determination of nonresponsibility

- FAR Part 9.103(b)

Responsibility refers to an offeror's apparent ability and capacity to successfully perform the contract...

To be responsible, a prospective contractor must meet the standards for responsibility (FAR Part 9.104) – note “or the ability to obtain...”

- (a) ...adequate financial resources to perform the contract, or the ability to obtain them (see 9.104-3(a))
- (b) ...able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments
- (c) ...satisfactory performance record (see 9.104-3 (b) and subpart 42.1501)
 - Conforming to requirements and to standards of good workmanship; Forecasting and controlling costs; Adherence to schedules, including the administrative aspects of performance; Reasonable and cooperative behavior and commitment to customer satisfaction; Reporting into databases (see subpart 4.14, and reporting requirements in the solicitation provisions and clauses referenced in 9.104-7); Integrity and business ethics; and Business-like concern for the interest of the customer
 - Satisfactory performance record. A prospective contractor that is or recently has been seriously deficient in contract performance shall be presumed to be nonresponsible, unless the contracting officer determines that the circumstances were properly beyond the contractor's control, or that the contractor has taken appropriate corrective action...The contracting officer shall consider the number of contracts involved and the extent of deficient performance in each contract when making this determination
 - A prospective contractor shall not be determined responsible or nonresponsible solely on the basis of a lack of relevant performance history, except as provided in 9.104-2 (see next slide Special Standards)
- (d) ...satisfactory record of integrity and business ethics (see subpart 42.1501)
- (e) ...necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them
 - ...including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors). (See 9.104-3(a))
- (f) ...necessary production, construction, and technical equipment and facilities, or the ability to obtain them (see 9.104-3(a))
- (g) ...otherwise qualified and eligible to receive an award under applicable laws and regulations (also inverted domestic corporation prohibition at 9.108)

Responsibility refers to an offeror's apparent ability and capacity to successfully perform the contract...

Special Standards (FAR Part 9-104-2)

- When it is necessary for a particular acquisition or class of acquisitions, the contracting officer shall develop, with the assistance of appropriate specialists, special standards of responsibility.
 - Special standards may be particularly desirable when experience has demonstrated that unusual expertise or specialized facilities are needed for adequate contract performance.
 - The special standards must be included in the solicitation (and so identified) and apply to all offerors
- Examples:
 - Years of experience
 - Experience performing the same or similar work (e.g., a specific number of previous projects)
 - Security clearances (personal, facility)
 - Adequate cost accounting system (cost reimbursement contracts)
 - Etc.

More on Financial Responsibility

Bankruptcy should not be the sole basis for a nonresponsibility determination

- This would violate the bankruptcy anti-discrimination provisions

A really low price may render a bidder or offeror nonresponsible for financial reasons (this is totally separate from the price evaluation)

- Don't confuse the two analyses!!

Sources of Responsibility Information (FAR Part 9.105 b & c)

Pre-award surveys (promptly after proposal submission)

Excluded Parties List System (EPLS) + Other FAPIIS Systems

- Included in Federal Awardee Performance and Integrity Information System (includes CPARS, CCR, EPLS), now available in SAM.gov

Contracting and audit agency records and data pertaining to the contractor's prior contracts

Contracting records from other agencies, other contracting officers in the same agency

- COs are required when they find relevant information casting doubt, must exchange this information

Contractor-furnished information (proposal, discussions)

- The contracting officer may elect to open a dialogue with a prospective offeror to address responsibility concerns
 - This does not constitute discussions
 - This dialogue is not required where an agency has an otherwise reasonable basis for assessing responsibility

Other sources such as commercial publications; suppliers, subcontractors, and customers of the prospective contractor; financial institutions; Government agencies; and business and trade associations

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Subcontractor Responsibility (FAR Part 9.104-4 a & b)

The contracting officer may also review subcontractor responsibility

Subcontractor responsibility is determined in the same fashion as the responsibility of the prime contractor

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Further Statutory/Regulatory Compliance

Licenses and permits (general versus specific)

Equal opportunity compliance (FAR Subpart 22.8)

- Contracting officers must obtain pre-award clearances from the DoL for equal opportunity compliance before awarding contracts (other than construction) over \$10 million (from OFCCP regional office)
 - Office Federal Contractor Compliance Programs (OFCCP) mandates that contractors who do business with the Federal government fulfill two goals: they not discriminate against job applicants or their employees; they treat both employees and applicants fairly with regard to race, color, religion, sex or national origin
 - Exceptions FAR 22.805 (a)(4)&(a)(8)
 - Contractor maintains a current OFCCP National Preaward Registry (and CO documents the review in the file), OR
 - 30-day notice to OFCCP of preaward compliance evaluation is processed (can take up to 35 days total) and is unable to be completed by OFCCP prior to the expiration date of offers or required date...(can require a post award evaluation and enforcement)

Organizational Conflicts of Interest (OCI, FAR Subpart 9.5) Separate from responsibility

- Note: OCI is hard! (op-ed)

Discussion: (NOT specifically related to Responsibility Determination) – OCI dealing with bidding contractor OCI, can (must) be submitted by the bidding and “cleared” by the Government CO prior to the submission of a proposal....

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GAO & COFC Reviews – Responsibility Determinations

GAO still does not generally review an affirmative determination of responsibility absent a showing of bad faith or fraud

- The determination of responsibility rests within the broad discretion of the contracting officer who, in making that decision, must necessarily rely on his or her business judgment
 - As of Jan 1, 2003, there are two exceptions!
 - Definitive responsibility criteria in the solicitation are not met
 - Evidence identified raising serious concerns that, in reaching a particular responsibility determination, the CO unreasonably failed to consider available, relevant information or otherwise violated statute or regulation
 - Bonus Topic Discussion: *Impresa Costruzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324 (Fed. Cir. 2001) COFC then CAFC (Drama! See notes section for details)
 - On a separate Italian case, the winning contractor above, intimidation of one competitor to withdraw a competing bid, and likely probable connection to death of the owner of another firm)

GAO will not question a negative determination of responsibility unless the determination lacks a reasonable basis

For both an affirmative or a non-responsibility determination, COFC will review whether the contracting officer conducted an independent and informed responsibility determination, and whether the agency's determination lacked a rational basis

- In practice, contracting officers are generally given broad discretion in responsibility determinations

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Was Responsibility Determination On Your “Risk Radar” Pre-Award?

Is this a step in your proposal cycle where someone (Contracts possibly?) “owns” a “risk” evaluation before submission?

- AND in time to do something about it? Best practices:
 - Review at baseline solution development Executive Review pre-RFP (some clients refer to this as a “Blue Team” review of the Baseline)
 - Review as part of the “Proposal Management Team” DRFP/RFP release, and provide input to the Executive team for Bid-No Bid decisions
 - Review as part of each “color team” (“Red” and “Gold” Team Reviews)

Understanding the importance of risk management from the Government's perspective...

◦ ***A Very Simplified Government View – “3 buckets of risk”***

- Financial Transparency & Accountability Risk
 - Program integrity, reduction of fraud, waste, and abuse
- Acquisition (Capability & ROI)
 - Risk Generally, Cost-Schedule-Performance
 - This was already happening at the Program Level well before the above legislation, but “it was hard, and very technically complex” (i.e., Packard Commission 1986)
 - Bonus Topic Discussion: Government science, management, and engineering disciplines and approaches “generally” have been led by best practices originating in DoD which were required for development of large and/or complex projects
 - Acquisition Risk Management evolution has taken place in the 20th Century (though it goes back to blacksmithing, and shipbuilding)
 - Think of the Manhattan project (discovery of Nuclear fission, in 1938 to a 1939-1946 project growing to over \$2B (\$24B in today) and 130,000 people across 30 sites in 3 countries (US, UK, CAN))
 - Let's Investigate Acquisition Risk a bit further
- Regulatory Compliance Risk
 - Generally, National Security and Rule of Law

Understanding the importance of risk management from the Government's perspective...

A Thought on Agency Risk Management Complexity

HHS Risk Management Plan/Guide

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DoD Risk, Issue, Opportunity Guide

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At first blush, HHS appears to be “generally” a less complex activity than DoD; however, this can be significantly misleading (and just flat false!)

- Think of HHS/ASPR mission for preparedness/response/recovery to disasters and public health emergencies, e.g., CBRN

“Complexity” does not drive any particular risk having a higher chance of happening, nor does it ever mean a consequence is less impactful...

- Normally we will characterize risks as Phase, Likelihood, Consequence, etc. – lets investigate these terms

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Understanding the importance of risk management from the Government's perspective...

Risk Management a working definition...

- ...begins with requirements formulation and assessment
 - ...includes the planning and conducting of a technical risk reduction phase if needed, and strongly influences the structure of the development and test activities
- ...Active risk management requires investment based on identification of where to best deploy scarce resources for the greatest impact on the program's risk profile
 - ...PMs and staff should shape and control risk, not just observe progress and react to risks that are realized
 - Anticipating possible adverse events, evaluating probabilities of occurrence, understanding cost and schedule impacts, and deciding to take cost effective steps ahead of time to limit their impact if they occur is the essence of effective risk management

Risk management should occur throughout the lifecycle of the program and strategies should be adjusted as the risk profile changes

Understanding the importance of risk management from the Government's perspective...

“Acquisition Risks” are those risks that can affect an Acquisition Project/Programs: Cost, Schedule and Performance (any or all)

Cost

- Any risk which affects Cost (or “Price”)
 - Cost – direct impact on Gov’t (C+, C+IF, C+AF), indirect impact on contractor (though may affect cashflow)
 - Price – Contractor absorbs price variation however:
 - “Underpricing” can also affect source selection:
 - Responsibility as previously discussed (source selection)
 - Technical score (low price indicates lack of understanding...)
 - Past Performance (Gov’t will find out usually based on observation)
 - See “cross affects” below
 - Consider FPEPA where applicable (Justify and Negotiate it, being careful it does not “select you out”)
- Examples:
 - You estimated x+y manhours for this labor category, and the actual work took x+z hours (and extremes)
 - You estimated airfare to be x, but you did not include (and explain) expected inflation
 - Supply chain “mis-estimates” because you did not address supply chain risks
- Beware of “cross affects” on Schedule and Performance – they will be seen

Schedule

- Any risk which affects Schedule (incremental or final)
 - Schedule changes will very likely be observed
 - Direct impact on Gov’t & likely on the contractor
 - Incorrectly planning a schedule
 - Significant effort (and expertise) is applied during source selection:
 - Technical score likely main impact
 - Will likely affect Cost / Price (Gov’t is expert at finding this)
 - Will affect Past Performance (Management, Technical, Cost, Performance, etc.)
 - See “cross affects” below
 - Asking for “forgiveness” during delivery – DO NOT HIDE IT (on discovery, bring forward a reasonable re-baseline request with rationale for “mercy of the court” – but better than other possibilities later)
- Examples:
 - You estimated it takes x time for the planned resources to accomplish y, and it doesn’t happen – whatever the reason
 - You underestimated labor level /expertise and significantly affect schedule – same as above in Source Selection
 - Supply chain “mis-estimate” on availability because you did not address supply chain risks
- Beware of “cross affects” on Cost (Price) and Performance – they will be seen

Performance

- Any risk which affects Performance of contracted Service or Product
- Performance – direct impact on Gov’t, and likely contractor (performance can tie to payments)
- Research and Development versus Supplies & Services per FAR Part 35, Research and Development
 - Unlike contracts for supplies and services, most R&D contracts are directed toward objectives for which the work or methods cannot be precisely described in advance
 - It is difficult to judge the probabilities of success or required effort for technical approaches, some of which offer little or no early assurance of full success
 - E.g., Research should drive toward achieving specified objectives and knowledge, and development toward achieving pre-determined end results with performance characteristics
 - See next pages for guidance provided to Contracting Officers by FAR Part 35
- Examples:
 - Most likely case – not doing adequate due diligence in an R&D contract by reviewing the RFP (SOW) for the proper type of performance
 - You performed an “engineering estimate” to define a level of effort expected to achieve a research objective in a phenomena investigation – and you got it wrong...similar as with the schedule, when you find it fix it, and share with customer
 - A slightly different case – you “claimed to have an analogous based estimate when really the “analogous data” was not actually analogous (statistical basis or methods)
- A best practice – include a properly documented BOE (e.g., with full assumptions) BOE requested by the RFP or not
 - Some feel this is exposing “cost data” – “pick your poison” - Which risk would you rather be exposed to? (losing is a risk too, right?)
- Beware of “cross affects” on Schedule and Cost – they will be seen

How Does This Represent Key Acquisition Risks In Your POV?

Anything “new” here to you?

Other key points you wish to discuss on cost-schedule-performance?

Discussion: FAR Part 35 R&D Guidance to Contracting Officers – A Key to Risk Management

A tool in the Government's Competition for Contracts...

- A Key to Risk Management is not pushing undue risk onto industry

FAR 35.005 Developing a work statement

...clear and complete work statement concerning the area of exploration (for basic research) or the end objectives (for development and applied research...allow contractors freedom to exercise innovation and creativity...individually tailored ... to attain the desired degree of flexibility for contractor creativity and the objectives of the R&D

- In basic research the emphasis is on achieving specified objectives and knowledge rather than on achieving predetermined end results prescribed in a statement of specific performance characteristics. This emphasis applies particularly during the early or conceptual phases of the R&D effort

...contracting officers ensure language suitable for a level-of-effort approach, which requires the furnishing of technical effort and a report on the results, is not intermingled with language suitable for a task-completion approach, which requires the development of a tangible end item designed to achieve specific performance characteristics.

- **...wording of the work statement consistent with the type and form of contract to be negotiated** (e.g., cost-reimbursement contract promising the contractor's best efforts for a fixed term would be phrased differently than a work statement for a cost-reimbursement completion contract promising the contractor's best efforts for a defined task. Differences between work statements for fixed-price contracts and cost-reimbursement contracts should be clearer

...provide in the solicitation

- (1) A statement of the area of exploration, tasks to be performed, and objectives of the R&D effort;
 - (2) With background information helpful to a clear understanding of the objective or requirement (e.g., any known phenomena, techniques, methodology, or results of related work);
- (3) Information on factors such as personnel, environment, and interfaces that may constrain the results of the effort;
- (4) Reporting requirements and information on any additional items that the contractor is required to furnish (at specified intervals) as the work progresses;
- (5) The type and form of contract contemplated by the Government, and for level-of-effort work statements, an estimate of applicable professional and technical effort involved; and
- (6) Any other considerations peculiar to the work to be performed; for example, any design-to-cost requirements

**A Government
Means, method,
or tool**

FAR 35.006 Contract Methods and Contract Type

In R&D...precise specifications necessary for sealed bidding are generally not available, thus making negotiation necessary. However, the use of negotiation in R&D contracting does not change the obligation to comply with competition requirements (in Part 6)

Selecting the appropriate contract type is the responsibility of the contracting officer

- ...because of the importance of technical considerations in R&D, the choice of contract type should be made after obtaining the recommendations of technical personnel
- Although the Government ordinarily prefers fixed-price arrangements in contracting, this preference applies in R&D contracting only to the extent that goals, objectives, specifications, and cost estimates permit such a preference
 - The precision with which the goals, performance objectives, and specifications for the work can be defined will largely determine the type of contract employed. The contract type must be selected to fit the work required.

Because the absence of precise specifications and difficulties in estimating costs with accuracy (and lack of confidence in cost estimates) normally precludes using fixed-price contracting for R&D, the use of cost-reimbursement contracts is usually appropriate

- The nature of development work often requires a cost-reimbursement completion arrangement. When the use of cost and performance incentives is desirable and practicable, fixed-price incentive and cost-plus-incentive-fee contracts should be considered in that order of preference.
- When levels of effort can be specified in advance, a short-duration fixed-price contract may be useful for developing system design concepts, resolving potential problems, and reducing Government risks
 - Fixed-price contracting may also be used in minor projects when the objectives of the research are well defined and there is sufficient confidence in the cost estimate for price negotiations.

Projects having production requirements as a follow-on to R&D efforts normally should progress from cost-reimbursement contracts to fixed-price contracts as designs become more firmly established, risks are reduced, and production tooling, equipment, and processes are developed and proven.

- When possible, a final commitment to undertake specific product development and testing should be avoided until
 - (1) Preliminary exploration and studies have indicated a high degree of probability that development is feasible and
 - (2) The Government has determined both its minimum requirements and desired objectives for product performance and schedule completion.

A Government
Means, method,
or tool

Is This Part Of Your DRFP/RFP Risk Assessment Process?

Does your “Proposal Management Team” conduct this a part of their DRFP/RFP release review, providing inputs to the Executive team for Bid-No Bid decisions? (Is your Contracts organization part of that Proposal Management Team review?)

Understanding the importance of risk management from the Government's perspective...

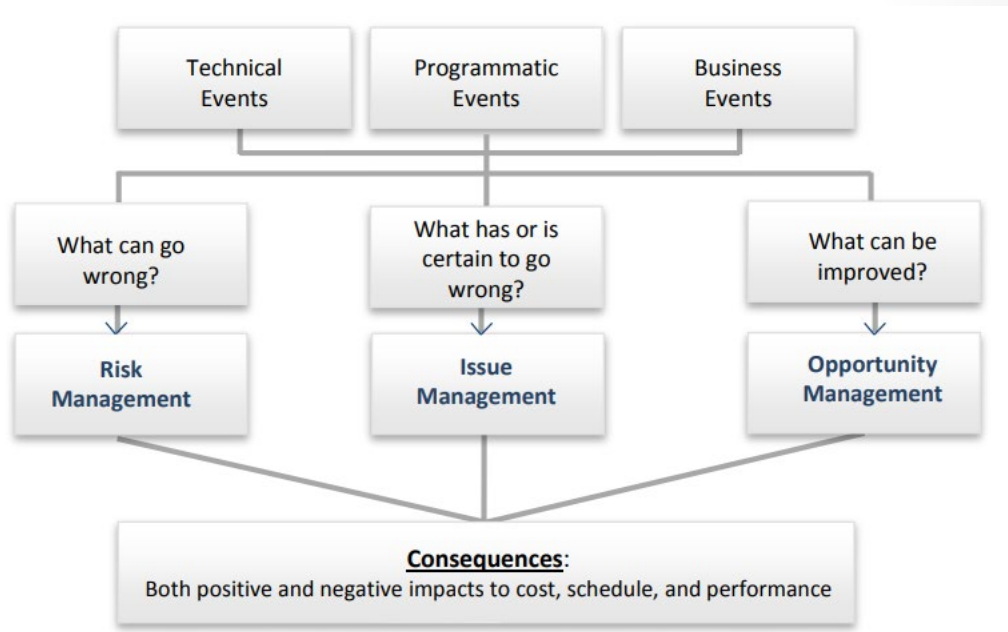
Some Common Risk Terms / Approach

Risks: potential future events or conditions that may have a negative effect on achieving program objectives for cost, schedule, and performance

- Risks defined by
 - (1) the probability (>0 , <1) of an undesired event/condition and
 - (2) consequences, impact, or severity of the undesired event, were it to occur

Issues: events/conditions with negative effect that have occurred (such as realized risks) or are certain to occur (probability of 1) that should be addressed

Opportunities: have potential future benefits to the program's cost, schedule, and/or performance baseline



Sources of Acquisition Risk

A Government Means, method, or tool

Government tools: A great Government reference (yes, it is DoD, but in my view, it provides one of the most clear, complete, and practical Why, What, and How guides) – Link: [DoD Risk, Issue, Oppy Mgt Guide](#)

Understanding the importance of risk management from the Government's perspective...

Some Common Risk Terms / Process

Risk Identification

- *What can go wrong? / What is particularly difficult in this program executions?*
- Identify risk event, cause, and effect
- Sources: Interviews (SMEs, stakeholders) lessons learned, similar programs, WBS, RFPs, etc.

Risk Analysis

- *What are the likelihood and consequence of the risk? and How high is the risk?*
- Estimate
 - Likelihood the risk event will occur
 - Possible consequences in terms of cost, schedule, and performance
- Determine the resulting risk level and prioritize for mitigation

Risk Mitigation

- *What is the plan to address the risk?*
 - Should the risk be accepted (may occur, and prepared to accept consequences), avoided (use an alternate path), transferred (to another entity), or controlled (actively reduce to acceptable level)?
- Options & implementation approach to one of the 4 above, with specifics of:
 - *What should be done*
 - *When should it be accomplished*
 - *Who is responsible?*
 - *The resulting cost, schedule, and performance impact*
 - *Resources required to implement the individual risk mitigation plan*

Risk Monitoring

- *How has the risk changed? / How are the risk mitigation plans working? ? Based on results, should additional actions be taken to mitigate or control the risk?*
- A continuous process to track and evaluate the performance of risk mitigation plans throughout the acquisition process



The Only "Process Diagram" We Will Reference (You may cheer here!)

- There are literally thousands (**Do you already have one?**)
- **Best Practice:** Adjust yours to represent the Agency you are proposing to – BUT do not change your process in your proposals (that would add risk)

Understanding the importance of risk management from the Government's perspective...

Some Added Context

Issue Management

- An issue is when a previously identified risk is realized
- Issues may emerge without prior recognition of a precursor risk
- Assess consequence, and resolve as needed (also previous diagram)

Opportunity Management

- Future benefits to the program's cost, schedule, and/or performance baseline
 - Usually achieved through proactive steps which may include allocation of resources

Cross-Program and Portfolio Risk Management

- Cross-program is working with programs that interface to your program of interest via internal or external interfaces – a must in risk management
- Portfolio Risk Management can provide “lessons learned” (not just “observed”) from one program to another
- A very good (and recent) case study of these GAO's August, “2023 DHS Acquisitions (Opportunities Exist to Enhance Risk Management)”

Assumptions

- Framing assumptions for a program need to be identified and validated (Government AND Industry)
 - Discussion: How much time do you spend validating the Government Assumptions that will influence your solution (Cost, Schedule, Performance)?

Government / Contractor Risk Management Process & Data Integration

- The Government Program Office, prime contractor(s), and associated subcontractors must employ a compatible risk management process to align data for both analysis and communication (risk registers and other Risk Management activity and results)

Cost Type Contracts

- Best suited where inherent technical risks are greater (typically during development) – [see previous FAR Part 35 discussion earlier](#)
 - Programs will need to allocate sufficient resources to manage emerging risks
 - Government retains control in a cost type environment and should make (with the prime contractor) final decisions on risk mitigation plans
 - The contractor may have responsibility for managing a risk, the government still has ownership and responsibility for the efforts and outcomes

Fixed-Price Contracts

- Appropriate when the requirements are stable and expected to remain unchanged
- Where technical and technology risks are understood and minimal, and the contractor has demonstrated a capability to perform work of the type required
- PMs and their contracting officers should reach an agreement with industry contractors during contract negotiations on risks:
 - How key risks must be mitigated
 - When progress will be measure
 - Appropriate contract incentives and options
- Note: A contractor may have financial responsibility for mitigating a risk on a fixed-price contract, the government needs the product and bears the risk if the contractor fails to deliver it in a timely manner (so risk is never fully transferred to industry just on the basis of an FFP contract)

Discussion: Supplier Performance Risk System (SPRS)– A Key to Government Risk Management

A tool in the Government's Risk Management Approach....

- We are only showing this from an awareness level based on this critical function (it is “owned” by DLA and managed through the Procurement Integrated Enterprise Environment (PIEE))
 - Industry has basic access to PIEE (some RFPs are being managed through this interface SAM.gov will provide notice, but to gain access you have to go to PIEE)

A Government
Means, method,
or tool

Supplier Performance Risk System

In (especially Major) contracts – a key source of Risk is within the Prime Contractor (and Subs) supplier base:

- What is the risk to the program if a supplier fails? The Government must assess this!
- One of the key ways: The Supplier Risk Management System, it includes:
 - NIST SP 800-181 (see upcoming Special Risks section, this presentation)
 - Vendor help for posting Basic IT Security Assessments for Government Review
 - NIST 800-181 General Information
 - Vendor Threat Mitigation
 - Enhanced Vendor Profiles
 - SPRS Reports (8 areas of reports)
- Limited access to SPRS by industry, focus here is being aware the Government has invested in significant tools to access industry performance data (additional below, as discussed in the previous Responsibility Determination discussion)
 - Pre-award surveys (promptly after proposal submission)
 - Excluded parties list (FAPIS)
 - Contracting and audit agency records and data pertaining to the contractor's prior contracts
 - Contracting records from other agencies, other contracting officers in the same agency
 - COs are required when they find relevant information casting doubt, must exchange this information
 - Contractor-furnished information (proposal, discussions)
 - Other sources such as commercial publications; suppliers, subcontractors, and customers of the prospective contractor; financial institutions; Government agencies; and business and trade associations

A Government
Means, method,
or tool

Understanding the importance of risk management from the Government's perspective...

◦ ***A Very Simplified Government View – “3 buckets of risk”***

- Financial Transparency & Accountability Risk
 - Program integrity, reduction of fraud, waste, and abuse
- Acquisition (Capability & ROI)
 - Risk Generally, Cost-Schedule-Performance
- Regulatory Compliance Risk
 - Generally, National Security and Rule of Law
 - This, for the most part has “always” been happening, but it is a significant series of separate and smaller legislative actions...
 - It also has the “potential” to change the fastest (well, within the “legislative timeline world”), and requires constant surveillance to “keep up”let’s try to scope this

Discussion:

Provision and Clause Matrix - A Key to Government Regulatory Compliance Risk Management

A tool in the Government's Risk Management Approach....

A Government
Means, method,
or tool

How Big Is Regulatory Compliance?

Provision and Clause Matrix serves as a point of reference

Relevance: This is a Title 48 CFR Federal Acquisition Regulations System

- Chapters 1 (FAR)-34, 51-54, 57, 61, and 99) covers all agencies
- This is NOT just for DoD
 - Includes FAR, DFAR (including class deviations), VAAR (Veterans Affairs), DEAR (DoE) – do others have a similar tool? (Could not find one if so)

The tool has 1,623 provision and clauses (as of 4 Jan 2024)

- It may have used to be a “cut and paste, and then check your work” approach – now there is a way to use the menus and pull downs to get it right
- Provision/Clause #
- Title
- Instructions for insertion (“Prescription”)
- General Instructions for each (e.g., is it Incorporate by Reference?)
- For each clause, the below (R for when required, A when applicable, is required, O for optional)
 - Contract Type (FP, CR, T&M LH)
 - Contract Purpose (including both commercial and non-commercial 12 types)
 - Flow downs

Show the Provision and Clause Matrix visual

- Use the link to assure you have the most current version: [DAU Provision and Clause Matrix | www.dau.edu](http://www.dau.edu)

Note: Some specifics will be discussed in more detail in Part 3

A Government
Means, method,
or tool

Have You Seen Other Tools Similar To This Provision & Clause Tool?

Realize the limitation to basic FAR and limited FAR supplements (Defense, Veterans, Energy)...have you seen such a tool for other agencies you deal with more often?

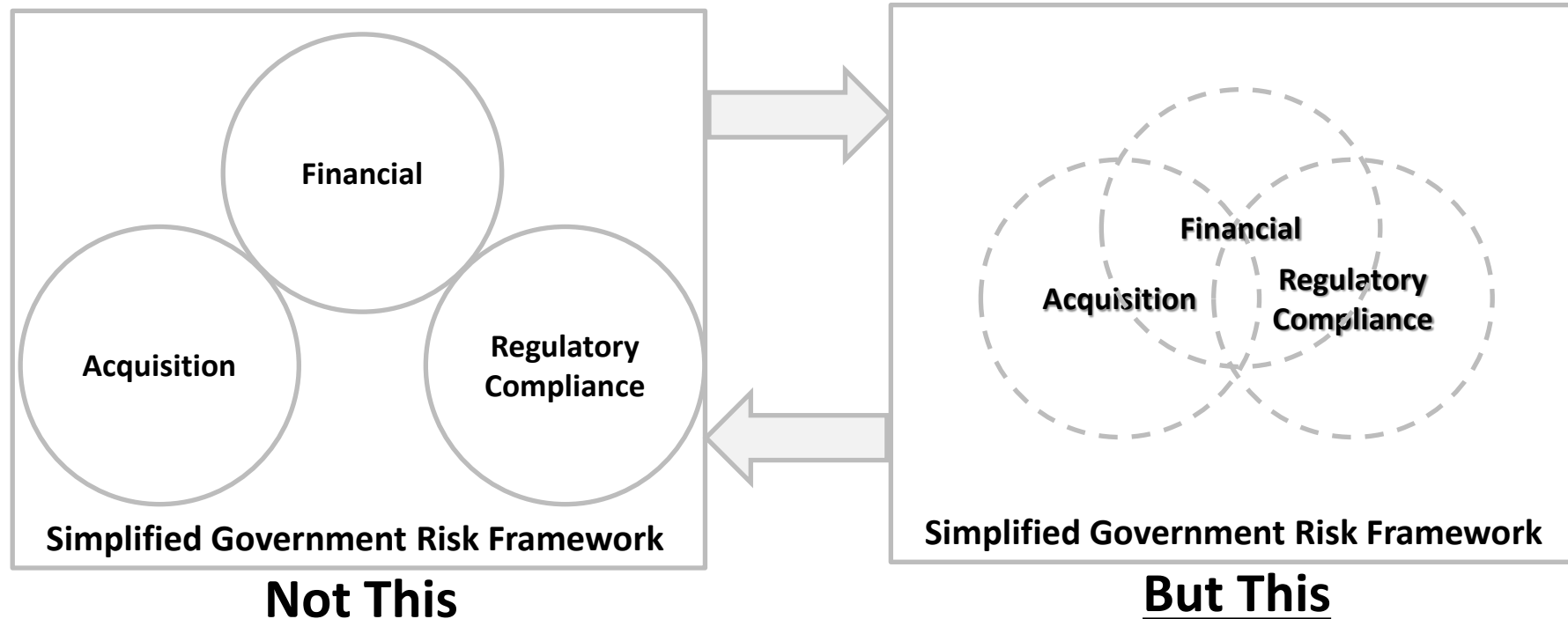
- Something of a discussion item maybe if you ever have a casual conversation with a Government Contracting Officer you have built a relationship with...

Understanding the importance of risk management from the Government's perspective...

◦ **A Very Simplified Government View** – *“3 buckets of risk”* - **An Interim Summary**

- Financial Transparency & Accountability Risk
 - Generally, program integrity, reduction of fraud, waste, and abuse
- Acquisition Risk (Capability & ROI)
 - Generally, Cost-Schedule-Performance
- Regulatory Compliance Risk
 - Generally, National Security and Rule of Law

Understanding the importance of risk management from the Government's perspective...



...But attempted to break these 3 up for discussions

- (But...when we do that, they overlap...)

Seminar Part I: Understanding the importance of risk management from the Government's perspective (and therefore a company's perspective) (Jan 24th, 2024)

This class (part of the “GovCon Risks & Hazards Series”) provides a survey level of depth of a Government perspective on risk, and how it should influence Industry's response in approaching identification and management of those risks. This session will focus (at a practical level) on:

- What is the Government worried about?
- Why is the Government worried?
- How is the Government managing this?

End of Part I – Thank You!

Your Facilitator's Contact Data:

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General Discussion and Q&A

Next Seminar Part II: Expectations Around Managing Risks (Jan 31st, 2024)

This class (part of the “GovCon Risks & Hazards Series”) provides a survey level of depth of identification and management of risk. This session will focus (at a practical level) on:

- Risks by contract/program phase
- The mechanics of risk management (basic+) – determining levels and deciding mitigation priorities
- Contract Type (Cost versus Fixed-Price) – Who is at risk?



GovCon “Risks & Hazards” Seminar “Financial, Legal, Compliance, Operational”

Part I - Understanding the Importance of Risk Management from the Government’s Perspective (and therefore a company’s perspective...)

Seminar Presenter:
Rick “A to Z” Agopsowicz
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Richard “Rick A to Z” Agopsowicz

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“Rick A to Z” leads CorVantage Program Execution of client strategies and programs to achieve their Business Objectives through Market Analysis, Pipeline and Business Development, Capture, Negotiations, and Public Sector Program Start-up and Execution.

Professional Experience:

“A to Z” has over 45 years of Government and Industry experience in operations and government acquisition across R&D and operational programs, complex program management, systems development engineering, Information Assurance, Information Operations/Cyber Development & Special Technical Operations, and business capture.

During his preceding 30-year career with the U.S. Air Force, he held positions from B-52 operational squadron level up to that of Director at the Air Force Information Warfare Center. He has spent 20+ years as an industry senior executive working with over 50 clients winning and executing programs. This includes leading over 170 campaigns across 42 Federal Agencies and 17 State & Local Governments as well as commercial business-to-business. He has worked in defense, homeland security, intelligence, Special Operations, energy, health and human services, biotechnology & life sciences, IT/telecommunications, and transportation.

“A to Z” is actively involved in the Professional Services Council, Washington Homeland Security Roundtable, Coast Guard Industry Academy Alumni Association, University advisory boards, and Technology Incubators & Accelerators. He is a guest lecturer at Defense Acquisition University DAWIA Senior Program Management and Contracting Officer courses. He also is a professional educator in Accessing Government non-dilutive R&D Funding, Source Selection Evaluation, Innovative Contracting, DoD Adaptive Acquisition Framework, and Best Practices in Business & Capture Leadership with George Mason University, Public Contracting Institute, and Federal Publications Seminars as well as directly with CorVantage Clients.

Richard “A to Z” Agopsowicz

Selected Previous Experience

Executive Vice President, Business Capture & Program Sector Execution, CORTAC Group, Inc.

- Business unit acquired by CorVantage, Dec 2022

Managing Director, Strategy & Business Development, Robbins-Gioia, LLC.

Senior Vice President, Capture Practice, Steven Myers & Associates (SM&A)

Director, U.S. Air Force Information Warfare Center (AFIWC/RM), and Technical Director, Advanced Programs “Skunk Works”

Planner and operational lead conducting Special Technical Operations in support of SOCOM, EUCOM, CENTCOM, LANTCOM, Intelligence Community, and UK MOD

Conceptualized, organized, and led the development & employment of National level capabilities during Desert Storm Joint Force Component/Task Force Activities

Chief, Special Programs and Activities Intelligence Division (AFIWC/INJ); Chief, USAF Computer Threat Division (AFIWC/INC), National Threat and Vulnerability Analysis Sub-Committee (DCI)

Program Manager, Air Force Information Systems Security Research & Development

B-52 Squadron and Wing Combat Crew Flight Instructor (Defensive Air tactics, techniques, and procedures) and Combat Crew Training School Flight Instructor

Strategic Air Command, 1st Combat Evaluation Group, COMBAT SKYSPOT instructor, as well as assigned to multiple 1st CEVG Sites

Break Point Part I to Part II



GovCon “Risks & Hazards” Seminar “Financial, Legal, Compliance, Operational”

Part II - Expectations Around Managing Risks

Seminar Presenter:

Rick “A to Z” Agopsowicz

Executive Vice President, Program Execution

CorVangent, LLC.

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1-202-775-7240

Risk Identification & Management/Mitigation...

When we say those words, everyone seems to have their own version of: “What does that mean? How should we address risk? How should I protect my organization from a “risk outcome” when a risk becomes realized?” Though these questions cover a significant scope and depth, as well as specific situational aspects that must be bridged across financial, legal, compliance, and operational functional areas, we must start somewhere (right?).

Over these three Seminar sessions we will provide you...

- A beginning of your “risk journey” by providing you with a starting point – the customer perspective (Government).
- We will then cover some basics of methodologies used for identification of, and management/mitigation of risks.
- Lastly, we discuss a few “special risks” that are broadly applicable but require some special consideration.“

Risk Identification & Management/Mitigation...

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Seminar Part II: Expectations Around Managing Risks (Jan 31st, 2024)

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- Risks by contract/program phase
- The mechanics of risk management (basic+) – determining levels and deciding mitigation priorities
- Contract Type (Cost versus Fixed-Price) – Who is at risk?

Understand types of risk to consider in each stage of the contract lifecycle

We need to also consider this from a “program” lifecycle as well as the “contract” lifecycle

- The Government typically views contracting through a “program lifecycle” view for the program. Thinking about Risks across the program (not just a contract, which can be very limited a modular “phase”), can enable your due diligence with focus which is arguably more comprehensive, and likely will lead to a more refined and effective assessment of risk
 - Thinking past contracts within the program lifecycle – e.g., Lesson Learned from previous work with this Program and/or Contracting Office
 - What is the focus now? - We can then determine the context of reviewing Government documents provided (e.g., Sources Sought, RFIs, RFPs, Model Contracts, etc.)
 - For instance, is this research (life cycle component) with objectives and knowledge as the planned outcome? Versus a more mature “development” where there are more specifics defining a predetermined result? (See previous FAR 35 (R&D) discussions on cautions to the Contracting Officer)
 - Within this particular Program lifecycle phase, are there specific risks we should pay attention to?
 - e.g., Lessons Learned but on a much larger scale where we look across other programs which are directly interrelated (input and outputs to the program which we are working on), or those programs that are part of an Agency portfolio view (or even extending to similar programs in the Government, but outside the supported Agency portfolio)
 - There is a good discussion of this in GAO’s August, “2023 GAO’s August 2023 DHS Acquisitions (Opportunities Exist to Enhance Risk Management)”

But for now, let’s “answer the mail” with a discussion to meet the intent of the scope for this seminar...

- We are taking the broader context here as a set-up for discussion – otherwise the answer here is 1,000s of risks

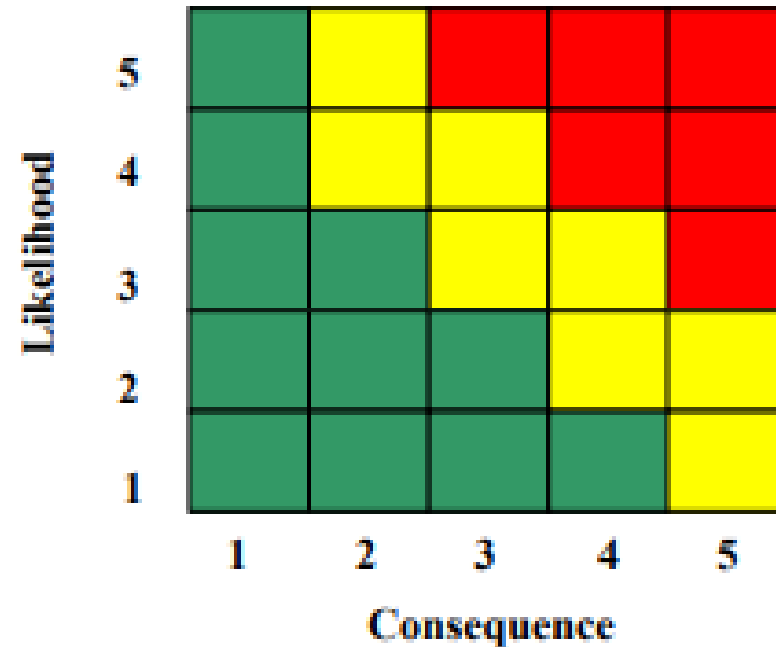
Understand types of risk to consider in each stage of the contract lifecycle...*A starting framework for discussion*

“Contract Ph.”	Timing	Types of Risks to Consider (Not All Inclusive)	General Comments
Capture (Post BD “validation”)	“Post Opportunity “discovery/ validation” and corporate decision for pursuit (pre-RFI/DRFP/RFP) – includes Protest Plans (to Protest, to “defend”)	<ul style="list-style-type: none"> •Initial assessment of “can we/should we do this” •The key opportunity to change the contract (type, and model contract) – SS, RFI’s Industry Days, One-on-Ones •Make sure capture team includes contracts and legal from the beginning (as well as HR and other elements that may affect regulatory environment) 	<ul style="list-style-type: none"> •Develop Strategy-to-Win & full baseline solution: Tech, Mgt, Pricing, Past Perf, Staffing, Corporate Risk, Contracts (inc. Clause “watch list”, IP, etc.), Orals, etc. •Develop plan to Protest, & to “counter protest” for inclusion in proposal)
DRFP & RFP	Can vary significantly with size, for less than \$100M class, ~2-6 months pre-proposal submission	<ul style="list-style-type: none"> •Must fully scrub each document (and official statements, and Industry Days) for additional (+ or -) risk discovery, and action plan the actions to address •Use Q&A, industry days, etc. to understand / manage risks •Gain CO approval of COI plan if req’d (counter protest) pre-submission 	<ul style="list-style-type: none"> •Continuously update Strategy-to-Win, and full Baselines (see above) •Update protest plans
Proposal Submission / Orals / ENs	<ul style="list-style-type: none"> •Government assigned submission date •Timing changes (Inc. day of submission) - RFP changes review & plan changes 	<ul style="list-style-type: none"> •Pre-submission protest? •Orals team actually part of Proposal Management – Hands on? •Plan for ENs (Again, Contract & Legal involvement) •Ready for any responsibility discussion (dirty laundry?) 	<ul style="list-style-type: none"> •Continuously update Strategy-to-Win, and full Baselines (see above) •Update protest plan •Finalize negotiation team (within known limits and contingencies0
Prepare to Negotiate	Best Practice: Start strategy & plan as part Capture , and RFP response (Early strategy, and pre-DRFP Baselines, update with RFP & Proposal)	<ul style="list-style-type: none"> •If plans have been developed as above, prepare to implement, and act on any contingences (advance planning) •This is NOT a contracts and legal only activity (it isn’t for the Government) •Prepare all the “what if’s” Ts & Cs / Clauses / Price / Tech & Mgt /Key Pers. / Responsibility / Full pricing “what if” / Counter new protest leanings in answers 	<ul style="list-style-type: none"> •Continuously update Strategy-to-Win, and full Baselines (see above) – make sure negotiation team has 100% knowledge (and maintain a 100% library accessible by team and support •Update protest plans
Negotiation & Execution	On notice by Government Contracting officer	<ul style="list-style-type: none"> •As above, are Key Personnel Available (no surprises) 	<ul style="list-style-type: none"> •Negotiation can be very short (< 1-day) or lengthy (months)
Contract Execution (Perf Mgt & Reports)	Period of performance	<ul style="list-style-type: none"> •Execute what you propose, constant vigilance on changing landscape that can add new terms/clauses/scope •Be aware of timeline for Incurrent Cost Submission audits (12 months) 	<ul style="list-style-type: none"> •N/A
Closeout / Extension / Renewal	Self explanatory	<ul style="list-style-type: none"> •Audit results (anytime during PoP up to closeout) •Closeout (4.804-5) – 15 items (4.804 includes 3 types of “who”) – max wait? •Extension – may be more than just extending dates - Ts & Cs? – new risks 	<ul style="list-style-type: none"> •Be aware of time lag which can occur for contract closeout – records and \$ (+ and =)

Levels of Risk Categories

To Get There – A Methodology:

- Estimate the likelihood the risk event will occur
- Estimate the possible consequence in terms of cost, schedule, and performance
 - This is focused on Acquisition Risk, but can (and should) equally apply for the Financial and Regulatory Compliance areas...
 - Remember “they will overlap no matter how hard we try to separate them...”
- Determine the resulting risk level and prioritize for mitigation using >>>



Yes, everyone uses this!

(But few explain it or use it correctly!)

Levels of Risk Categories

To Get There – A Methodology:

- Estimate the likelihood the risk event will occur
- Estimate the possible consequence in terms of cost, schedule, and performance
- Determine the resulting risk level and prioritize for mitigation

Level	Likelihood	Probability of Occurrence
5	Near Certainty	> 80% to ≤ 99%
4	Highly Likely	> 60% to ≤ 80%
3	Likely	> 40% to ≤ 60%
2	Low Likelihood	> 20% to ≤ 40%
1	Not Likely	> 1% to ≤ 20%

Typical Likelihood Criteria

What is your Approach?

Levels of Risk Categories

To Get There – A Methodology:

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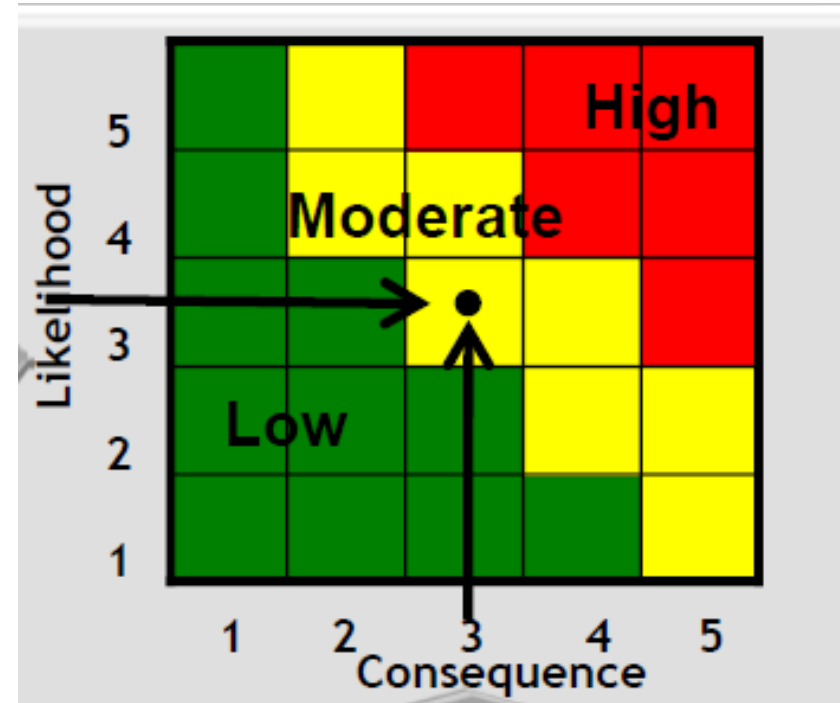
Level	Cost	Schedule	Performance
5 Critical Impact	10% or greater increase over BOE supported data Cost increase causes program to exceed affordability cap	Schedule slip will require a major schedule Re-baselining Precludes program from meeting contract required deliverable date	Degradation precludes deliverable from meeting key contract requirement; will jeopardize program success Unable to meet contract performance requirement
4 Significant Impact	5% - <10% increase over threshold BOE cost Costs exceed life cycle ownership cost contract requirement	Schedule deviations will slip program to within 2 months of approved delivery date Schedule slip may put funding at risk Delivery delayed by more than 6 months	Degradation impairs ability to meet a Key Contract requirement Significant performance impact affecting CONOPs for product use Work-arounds required to meet Government mission objectives
3 Moderate Impact	1% - <5% increase over objective BOE supported costs Manageable with Government assistance	Can meet contract deliverable date, but zero margin for schedule slip Further schedule slip may impact Government synchronization with interdependent programs by greater than 2 months	Unable to meet lower tier performance requirements Supportability margins reduced Minor performance impact Government synchronization with interdependent programs
2 Minor Impact	Costs that drive <1% over budget Cost increase, but can be managed internally	Some schedule slip, but can meet Contract objective dates with no additional Government support	Reduced technical performance can be tolerated with little impact on Government program objectives Solution design margins reduced, but within trade space
1 Minimal Impact	Minimal impact. Costs expected to meet approved funding levels	Minimal schedule impact	Minimal consequences to meeting technical performance Design margins will be met; margin to planned tripwires

Example Consequence Criteria

Levels of Risk Categories

To Get There – A Methodology:

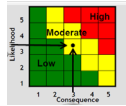
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- **Determine the resulting risk level and prioritize for mitigation**



Plot The Scores

Levels of Risk Categories

A Very Short Discussion on “finishing” the Level of Risks Analysis



- Plot all risks
- Create a table of Risks by Likelihood %
- Add consequence costs (and to whom)
- Then Risk weight the costs
- Calculate cost to mitigate
- Figure out the ROI to invest (based on who is investing)

Risk	Likelihood	Consequence Cost	Risk Weighted Cost	Cost to Mitigate	Expected ROI
Risk 1:	20%	\$200k	\$40k	\$20k	\$20k (1:1)
Risk 2:	50%	\$50k	\$25k	\$10k	\$15k (1.5:1)
Risk 3:	30%	\$300k	\$90k	\$10k	\$80k (8:1)
Risk 4:	50%	\$100k	\$50k	\$10k	\$40k (4:1)
Risk 5:	10%	\$400k	\$40k	\$5k	\$35k (7:1)

How Do You Currently Determine Risk Likelihood, Consequence, Level, and Investment Profile?

Discussion

Which party has the least and most risk (in contracts)

Cost Type Contracts

- Best suited where inherent technical risks are greater (typically during development) – see previous FAR Part 35 discussion earlier
 - Programs will need to allocate sufficient resources to manage emerging risks
 - Government retains control in a cost type environment and should make (with the prime contractor) final decisions on risk mitigation plans
 - The contractor may have responsibility for managing a risk, the government still has ownership and responsibility for the efforts and outcomes

Fixed-Price Contracts

- Appropriate when the requirements are stable and expected to remain unchanged
- Where technical and technology risks are understood and minimal, and the contractor has demonstrated a capability to perform work of the type required
- PMs and their contracting officers should reach an agreement with industry contractors during contract negotiations on risks:
 - How key risks must be mitigated
 - When progress will be measure
 - Appropriate contract incentives and options
- Note: A contractor may have financial responsibility for mitigating a risk on a fixed-price contract, the government needs the product and bears the risk if the contractor fails

Discussion: Questions to answer for each “which party has...”:

- What area, then who? Then what is the consequence, and on whom? E.g.,
 - Cost overrun?
 - Knowledge product is not as predicted?
- Other topics to discuss, e.g.:
 - IP FAR based versus IP OTA based
 - Inflation, Supplier Failure, etc.

Seminar Part II: Expectations Around Managing Risks (Jan 31st, 2024)

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- Risks by contract/program phase
- The mechanics of risk management (basic+) – determining levels and deciding mitigation priorities
- Contract Type (Cost versus Fixed-Price) – Who is at risk?

End of Part II – Thank You!

Your Facilitator's Contact Data:

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General Discussion and Q&A

Next Seminar Part III: Special Categories of Risk, a Discussion

This class (part of the “GovCon Risks & Hazards Series”) provides a survey level of depth of discussion on “special categories” of risk that are often broadly applicable but require some level of special consideration. This session will focus (at a practical level) on:

- Most Negotiated Terms & Conditions
- Partnering/Subcontracting
- International Contracting & Subcontracting with non-US Organizations
- Ethics & Compliance
- Human Subjects
- Intellectual Property
- Inflation
- IT & Telecommunications Security (e.g., NIST SP 800-171, McCain Amendment, etc.)
- Protest as a risk



GovCon “Risks & Hazards” Seminar “Financial, Legal, Compliance, Operational”

Part II - Expectations Around Managing Risks

Seminar Presenter:

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Break Point Part II to Part III



GovCon “Risks & Hazards” Seminar “Financial, Legal, Compliance, Operational”

Part III - Special Categories of Risk, a Discussion

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Risk Identification & Management/Mitigation...

When we say those words, everyone seems to have their own version of: “What does that mean? How should we address risk? How should I protect my organization from a “risk outcome” when a risk becomes realized?” Though these questions cover a significant scope and depth, as well as specific situational aspects that must be bridged across financial, legal, compliance, and operational functional areas, we must start somewhere (right?).

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- A beginning of your “risk journey” by providing you with a starting point – the customer perspective (Government).
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Seminar Part III: Special Categories of Risk, a Discussion

This class (part of the “GovCon Risks & Hazards Series”) provides a survey level of depth of discussion on “special categories” of risk that are often broadly applicable but require some level of special consideration. This session will focus (at a practical level) on:

- Most Negotiated Terms & Conditions
- Partnering/Subcontracting
- International Contracting & Subcontracting with non-US Organizations
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The most negotiated terms and conditions

Again, this discussion significantly depends on the specific contract, e.g.,

- Area of contract (products, services, etc.)
- Type of contract (Fixed Price, or Cost)
- Contracting strategy (GWAC/MAC, Part 12, Part 15, OTA, Procurement for Experiments, BAA, etc., there are 24 of these by the way)
- Competition Type: Full an open, Limited, and the governing FAR (or Non-FAR) guidance
- **Remember previous discussion in Part I – Provision and Clause Matrix (1,623 of them) - A Key to Government Regulatory Compliance Risk Management**

- But let's not just give up on this, lets put down some **obvious ones** applicable to you? - and have a brief discussion about each – **Discussions:**
- **Obvious:**
 - Price
 - Cost
 - Intellectual Property
 - Inflation (EPA)
- **Applicable?**
 - Type of contract?
 - Key Personal?
 - Unique to subcontracting?

Partnering / Subcontracting

....significantly depends on the specifics

Some obvious ones applicable to you? - a brief discussion about each - *Discussions: Risk & Mitigation*

- **Obvious Partnering & Subcontracting (ground truth, compliance, ethics)**
 - Past Performance
 - Responsibility criteria (back in Part I)
 - Other contracts
 - Resources (people, facilities, etc. hire status, availability)
 - Security – same as we discussed last topic
 - Privacy Act, HIPAA, Personally Identifiable Information
 - NIST SP 800-181 (defer to later)
 - Foreign relationships known?
 - For International Subcontracts – see Special Risks
 - Access to proprietary competitive data (“Competimates”)
- Partnering with Non-Profits/Not for Profit, Institutions of Higher Education, FFRDCs, etc.
 - Also, NIH trend over time awards to IHEs

Consideration of Special Risks

International Contracting & Subcontracting with Non-US Organizations – Discussion

- Legal risk - Laws of originating country
- Legal risk - Laws of country of Prime Origin if subcontracting to them; or Sub origin
 - E.g., US Army OMFV “Take 1” story
- Legal risk - Laws of US (dealing with the US Government)
 - A CorVantage “War Story”
- Foreign exchange risk – Currency value fluctuation (US versus foreign entity)
- Political risk
 - e.g., Trade barriers, embargoes, quotas, trade wars, crime/violence?, Government financial viability

Ethics and compliance risks

Again, this discussion significantly depends on the specifics

Some obvious ones applicable to you? - a brief discussion about each - **Discussions:**

- **Obvious “Ethics & Compliance” (can be one, but with slight change can become another)**
 - Key Personnel
 - Past Performance
 - Human Subjects
 - Security
 - Privacy Act
 - HIPAA
 - Personally Identifiable Information
 - NIST SP 800-181 (defer to later)
 - **Other?**
 - Institutional Review Board
 - Ethics & Code of Conduct
 - Financial Conflict of Interest
 - Other?

Human Subjects

“Human Subjects Protection & Code of Ethics

- Institutional Review Board
 - Under HHS FWA procedures as granted by HHS-Ofc of Human Research Protections
 - Cuts across 20 US Govt agencies

Additional discussion – your experience

Intellectual Property (Typically Data Rights & Tech Data) Is this an issue for you?

- **Agency need:** Government does not want to pay for something more than once (pay over and over for the same thing that is NOT commercial)
- Work with the **best practices** on Contract risks (Pages 47-49)
- **Significant evaluation points (current trend for ~4-5yrs.)**
- **Typical Asks**
 - Complete Architecture of system – ID every component and SW Item
 - Which items are required to work together? (They do not want interfacing items to have differing levels of Data Rights / Tech Data)
- **Levels of Rights (To Be Negotiated, remember scoring):**
 - **Unlimited (TD & SW)** – includes right to re distribute during a future acquisition
 - **Limited Rights (TD only)** – within the Government Only (can not create a competitor in industry or Government) – must be ready to defend
 - **Restricted Rights (SW & SW Docs)** – use on only 1 computer at a time – other contractors may service – (create no competitors) - must be ready to defend
 - **Government Purpose Rights (TD & SW)** – (all mixed funding development) – within the Govt. no restrictions (use withing Govt. and Competition) – note, GPR is for 5 years, then automatically unlimited (unless negotiated otherwise)
 - **Specifically Negotiate License Rights (SW & TD)** – CO's can not accept less than Limited (TD) or Restricted (SW) (typically compromise between)\ them)
 - **Commercial Tech Data and SW Rights** – another discussion (must prove/defend)
- **Discussion – How much IP challenge do you deal with?**

Inflation

Inflation - Discussion

- Inflation can impact contract performance, costs, and ability to perform work (cost of service or product)
- **Cost-reimbursable contracts** - inflation is an assumed part of the risk borne by the Government
- **Fixed Price Contracts** – The Government is aware (e.g., 5 May 2022 DoD Memorandum – Guidance on Inflation and Economic Price Adjustments) – Yes, it is DoD, but don't forget “ripple down”
 - However, it refers to EPA as the “out” but discourages the CO's to use the “change clause” in case of inflation but does at least leave the door open for EPA (REA)
 - e.g., supply chain – change : ...too difficult for a contractor to bear...)
 - Ask the Government to add an EPA clause “during capture” if significant risk
- **“You get what you negotiate”**

IT Security (Select Discussions)

Please also refer to discussions:

- Ethics and Compliance
- Partnering/Subcontracting

We will not repeat HIPAA, Privacy Act, PII here (covered as above)

NIST SP 800-171

- Who does it apply to?
 - Support of CUI data for DoD, General Services Administration (GSA), NASA or other federal or state Agency supply chains (see below)
 - So, we do not process CUI, we do not have to comply right? – Correct but!!!
 - CUI policy provides a uniform marking system across the Federal Government that replaces a variety of agency-specific markings, such as FOUO (For Official Use Only), LES (Law Enforcement Sensitive), SBU (Sensitive But Unclassified), etc.
- Our observation of RFPs & Government CUI Training (about RFPs)
 - Note can not reference the training here (by link) – needs to be provided by your Security FSO (direct from DoD)

“McCain Amendment” or “889” (FY2019 NDAA Section 889, effective 13 Aug 2019) - Parts A & B

Part A (FAR 4.21, 12.301 (Commercial), and 13.201 (Micro Purchase) - The Government Cannot Obtain

- Prohibited Telecom (August 13, 2019) - Part A **prohibits the government from obtaining (through a contract or other instrument) certain telecommunications equipment** (including video surveillance equipment) or services produced by the following covered entities and their subsidiaries and affiliates:
 - Huawei Technologies Company
 - ZTE Corporation
 - Hytera Communications Corporation
 - Hangzhou Hikvision Digital Technology Company
 - Dahua Technology Company
- The Department of Defense has the authority to add additional companies to this list

Part B **Government Contractors Cannot Use** Prohibited Telecom (Part B is effective August 13, 2020)

- Part B (FAR 4.21) **prohibits the government from contracting with any entity that uses certain telecommunications equipment or services produced by the entities listed in the statute.**
 - The Government cannot contract with an entity that uses covered telecommunications equipment or services as a substantial or essential component of any system or as critical technology as part of any system.
 - **Prohibition applies regardless of whether or not that usage is in performance of work under a Federal contract.**
- The prohibition **applies to every sector and every dollar amount.** Your ability to enter into contracts with the Government will be impacted by Part B.
- After **conducting a reasonable inquiry, entities will represent whether they do or do not use prohibited telecommunications equipment or services**

Consider recent client (non-DoD) story (sanitized)

Protest

Current Protest Statistics (Increasing or decreasing) – “Myth versus Reality”

Protest Level Escalation

- Agency to GAO to COFC to CAFC to Supreme Court
- [See Kingdomware story](#)

Pre-Award Protests



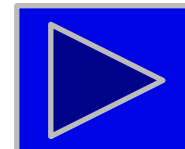
- RFP issues?
 - Resolve them or protest before you submit
 - Remember the previous discussion about OCI Plans pre-award approval (for countering a protest)

Post Award Protest

- Again - Agency to GAO to COFC to CAFC to Supreme Court

“Interested Party”

- [Future Long Range Assault Aircraft](#) (Yes, “product” may not be directly relevant to your market, but this demonstrates a risk that does apply to all protest knowledge needs.)
- A deficient contractor can not an “Interested Party” when they challenge award to another contractor when they themselves have been judged deficient in a Factor (and there is remaining only one awardable contractor)
- [GAO Sikorsky Aircraft Corporation B-421359; B-421359.2](#)



Kingdomware Tells The “Rule of Two” Story

Congress passes the Veterans Benefits, Health Care, and Information Technology Act of 2006

- 38 U.S.C. Sections 8127-8128

The VA fails to set aside for SD/VOSBs a procurement for computer software and training

Kingdomware protests to the GAO, which sustains the protest

The VA states that they are not going to follow the GAO decision (remember GAO can only make a recommendation)

Kingdomware protests to the US Court of Federal Claims (COFC)

COFC sides with the VA and denies the protest

Kingdomware appeals COFC decision to the US Court of Appeals for the Federal Circuit (CAFC)

CAFC upholds the COFC decision (2-1)

Kingdomware appeals to the US Supreme Court, which agrees to hear the appeal!

The US Supreme Court side with Kingdomware, 8-0

The “Rule of Two” doesn’t just apply when the VA was meeting its SD/VOSB goal, but in all circumstances where the CO reasonably expects at least two SD/VOSBs will submit offers



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End of Part III – Thank You!

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General Discussion and Q&A

Summary - Risk Identification & Management/ Mitigation...

When we say those words, everyone seems to have their own version of: “What does that mean? How should we address risk? How should I protect my organization from a “risk outcome” when a risk becomes realized?” Though these questions cover a significant scope and depth, as well as specific situational aspects that must be bridged across financial, legal, compliance, and operational functional areas, we must start somewhere (right?).

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Summary - Methods for operating with risk in contracting/ acquisition

This is the entire topic wrapped into one (up to this point)

- Understand **importance of risk management** from both the Government's and company's perspective
 - Extensive coverage
- Understand **types of risk to consider in each stage** of the contract lifecycle
 - Discussed from both a Program Centric, then Contract Lifecycle Centric approach
- Define **levels of risk categories** (e.g., low, medium, high, extremely high) and related escalation paths.
 - E defined a methodology to analyze and define risk, and how to decide on an investment strategy
- This was **a lot of the "well, it depends" discussions** (but it did stop some of the "death by PowerPoint")
 - Discuss **which party has the least and most risk** (financial and operational) in different types of contracts
 - Understand the **most negotiated terms and conditions** in government contracting/subcontracting and identify risk management strategies.
 - Understand **ethics and compliance risks** and how to mitigate.
 - Review **partnering/subcontracting risks** and mitigation.
 - Identify **common technology risks** and mitigation.
- **Consideration of special risks** (e.g., international contracting, subcontracting with US and non-US organizations, human subjects, Intellectual Property, Inflation, Security (e.g., IT-NIST 800-171, McCain Amendment), Protest, etc.)
 - Some specific discussions for each of these
- Discuss **methods for operating with risk in contracting/acquisition – back to the top if the list**

Bringing us to Final Seminar Q&A and Discussion

- A great place to start that *Understanding the importance of risk management from your perspective...*

Summary - Understanding the importance of risk management from your perspective...

A potential internal risk discussion – may start like this?

- A successful corporate risk management program (*identification, mitigation, response*) saves staff time, resources, and money by significantly reducing the number of problems related to our non-performance or perception of fraud on a Government contract (or Grant)
 - Successful risk management enables smooth performance on government programs and functions that otherwise might be disrupted by critical failures on the applicable government contracts (enables good Past Performance/ Reputation)

Again - Thank You!

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Select References

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[DHS Acquisitions: Opportunities Exist to Enhance Risk Management | U.S. GAO](#)

[889-Flyer-Approved.pdf \(acquisition.gov\)](#)



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End of Part III & Seminar