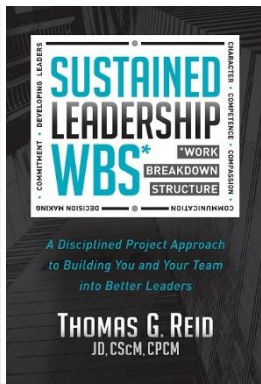




# Contracts Explained! How to Read a Government Contract

A Simplified Guide for  
Practitioners and Lawyers

*Session 3*



# Six-Week Series

- September 10 - 10 Basic Rules
- September 17 - Say What you Mean; Mean What you Say
- September 24 - What IS the Contract? Putting the right things in and leaving the wrong things out
- October 1 - Punctuate this!
- October 8 - Word usage – misused words; grammar; references
- October 15 – How do You Know When it is Done?

TUESDAYS FROM SEPTEMBER 10, 2024 TO OCTOBER 15, 2024

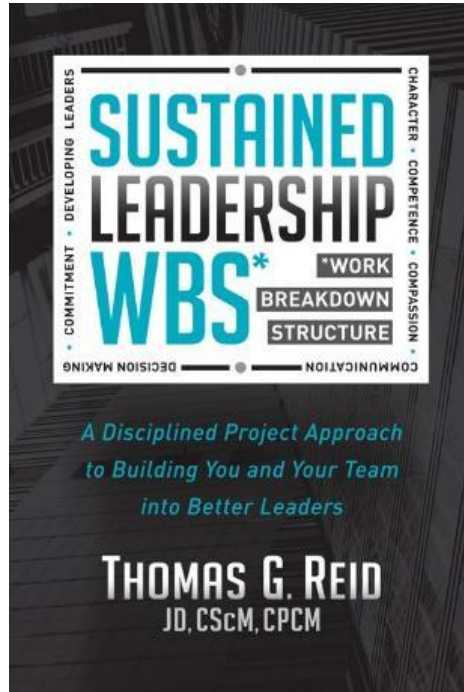
10:00 AM - 11:30 AM (EST)

# Who am I?

- Thomas Reid, JD, MPA, CPCM,
- Chief Problem Solver, CCS
- Over 40 years in government contracting
- Have served in government, large businesses, small businesses, 8(a), non-profit, and start-up
- Speaker, author, trainer, attorney, expert witness, and contract manager

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# Latest Publication



- Reveals 229 elements of leadership
- Provides a lexicon of leadership by defining each element
- Uses project management tools to help you build yourself into a sustained leader
- Covers the Professional Competencies defined by OPM

New learning platform at [www.TalkingHeadAcademy.Thinkific.com](http://www.TalkingHeadAcademy.Thinkific.com) provides CPEs for NCMA certification for all classes on the platform.

# Summary

- In a series of 6 weekly 90-minute sessions, you will gain deep insight on how contracts, both government and commercial, are interpreted by boards and courts. The rules are not always the same for them! We will also spend some time discussing good contract drafting that will avoid interpretation disputes. Filled with both legal theory for the legally inclined and practical application, you will develop a deeper appreciation for contract formatting, drafting quality contracts, and avoiding disputes, ambiguities, and misunderstandings.

All Sessions, 10:00 AM-11:30 AM (ET)

# Review of Session #1 – Ten Rules

1. A contract is read in its entirety
2. Order of Precedence
3. Patent ambiguities must be clarified
4. Trade and custom usage
5. Course of dealing and performance
6. Parol evidence
7. Plain meaning
8. Rule of sameness
9. Ejusdem generis
10. Contra preferentem

# Review of Session #2 – Say What you Mean

- A reasonable person is defined by the context of the situation; it is not an absolute and a person is required only to act “within the zone of reasonableness” under the circumstances
- Ordinary/Plain meaning, while falling into disfavor apart from context, it is still the majority view, especially in government contracting
- Parol evidence rule excludes extrinsic evidence in a complete integrated agreement; draft the contract to carry your intent
- Ejusdem generis tells us that lists contain only similar things

# Communication

- ***Many contract disputes arise because different people attach different meanings to the same words and conduct.***

**Restatement (Second) of Contracts, §2 (1981), comment b,  
Manifestation of Intention**



# Session 3 – September 24 - What IS the contract? Putting the right things in and leaving the wrong things out

- As troubling as it sounds, the parties to a contract are sometimes not even in agreement on what makes up the contract components. Issues such as attachments or clauses incorporated by reference, failing to identify specific versions of standard clauses, guidance versus requirement documents, incorporating changes, keeping cost, schedule and technical requirements aligned, and reading a contract as a whole are concepts that will be covered in this session. To properly interpret a contract you must first know what it is.

# The Starting Point

- The written government contract is the primary source of evidence; unless ambiguous, it is the ONLY source.
- The discussion on any government contract dispute starts with the contract
  - This is why it is IMPERATIVE that you get the contract document “right”
  - Document your file with whatever extrinsic evidence might be useful; just remember that a Board or Court might never see or consider it.

*Program & Construction Management Group v. GSA*, 246 F.3d 1363 (Fed. Cir. 2001)

<https://law.justia.com/cases/federal/appellate-courts/F3/246/1363/469052/>

# What is the Contract?

- Before attempting to interpret a contract, you must know what “the contract” actually is
- While a seemingly simple question – the answer is more complex and nuanced
- Different bodies of law create different outcomes

# Contract Defined

**A *Contract* is both a relationship and an agreement.**

**As a *relationship*, it is defined by the agreement between or among the parties. The relationship specifies the rights, duties, obligations and responsibilities of the parties.**

**As an *agreement* the parties have reached a “meeting of the minds” that describes the relationship.**

**In any jurisdiction, a contract is “*an agreement governed and restricted by law,*” and the applicable law shapes the nature of the contract.**

**“An agreement for which the law provides a remedy for its breach.”**

# Contract Defined - Restatement



## Restatement (Second) Contracts (1981)

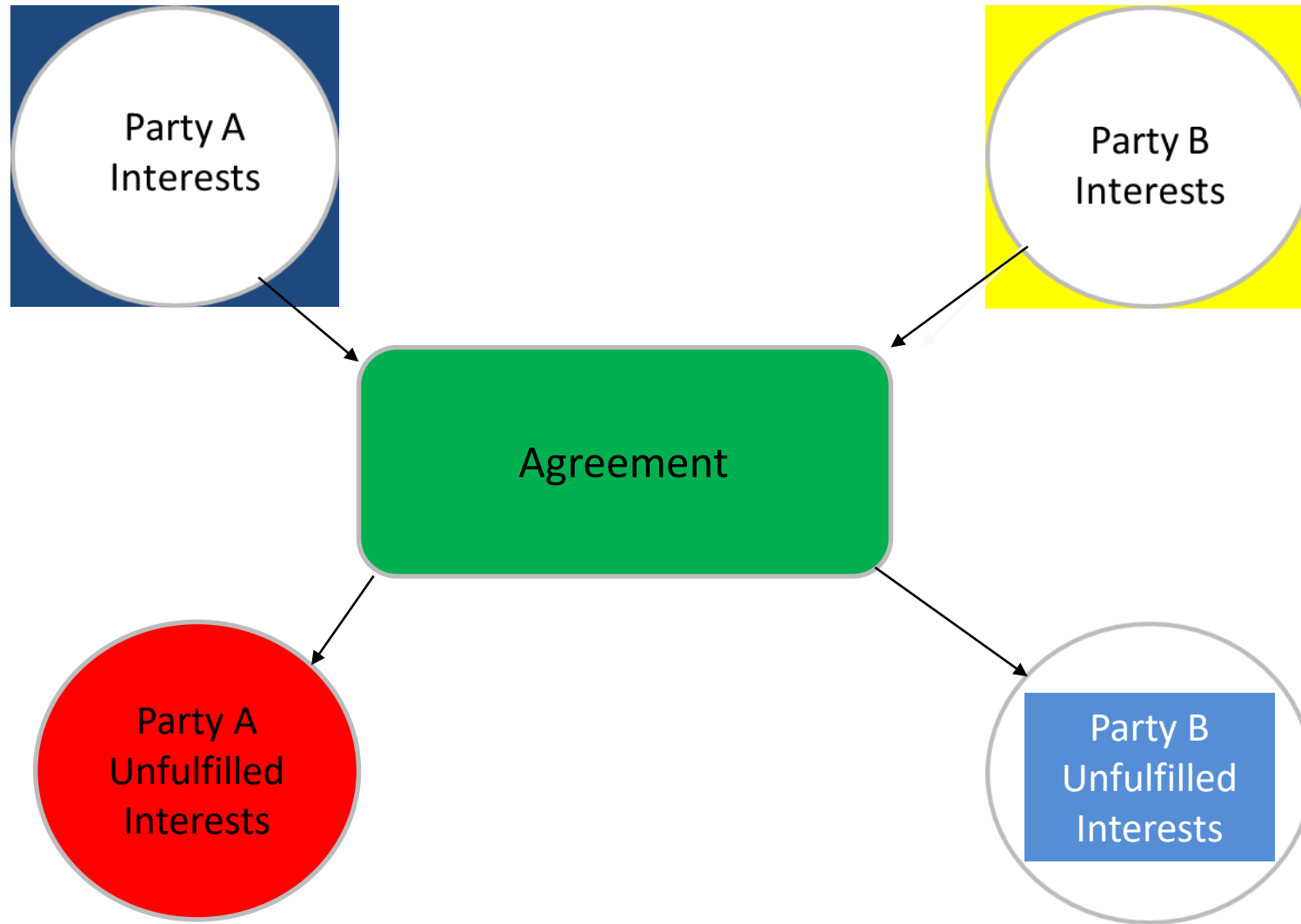
### §1 Contract Defined

**A contract is a promise, or a set of promises, for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.**

# Meeting of the Minds

- There are five essential elements under common law before a contract will be found to exist
  - Offer
  - Acceptance
  - Consideration
  - Lawful purpose
  - Capacity of the parties
- The first two represent the “meeting of the minds.”  
*Keddie v. Beneficial Ins. Inc.* 580 P.2d 955,957 (Nev. 1978).
- Oral contracts ARE valid (unless made illegal under civil law)  
*Samra v. Shaheen Bus. And Investment Group*, 355 F.Supp.2d 483, 497 (D.D.C. 2005).

# Negotiations



# Is There a Contract at All?

## Contract Formation

Restatement (Second) of Contracts, §20 (1981)  
Effect of Misunderstanding

*Comment c. Interpretation and agreement.*  
There is a problem of interpretation in determining whether a contract has been made, as well as in determining what obligations it imposes.





# What is the contract?

# Defining the Contract



**“When interpreting the plain meaning of a contract, a court must first determine what documents are actually a part of that contract.”**

*Travelers Casualty and Surety Company of America v. U.S., Ct. Federal Claims (2007)*

# Defining the Contract

## Contact Components:

- **The Written Contract, PLUS - ?**
- **Pre-contract Agreements Between “the Government” (Contracting Officer) and Contractors**
- **Common Law Principles Affecting Content – The Duty of Good Faith and Fair Dealing**
- **Extra Contractual Authorities Affecting the Subject of the Contract**

# How to Confuse the Other Party - Part I

- **Semantic ambiguity** - Money denomination; same words different meanings
- **Syntactic ambiguity** – use of unclear pronouns; obscure references; references to things that were moved or removed
- **Contextual ambiguity** – assigning same responsibilities to both parties; misunderstandings about subject matter

# Importance of Merger Clause

- The merger clause makes clear to both parties that while much has been discussed, THIS is the final and complete statement of the parties as to what has been agreed to.
- It makes clear to anyone who must later interpret it, that it is a complete and final contract within itself.
- A lack of the merger clause can imply that the document IS part of a larger whole.
- Merger clauses limit disputes
- Should NOT be complicated or verbose

**“This agreement sets forth the complete agreement of the parties. There are no promises of representation other than those in this agreement.**

# Presumption of Integration

*Restatement (Second) of Contracts, §209 (1981)*  
*Integrated Agreements*

**(3). Where the parties reduce an agreement to writing, which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final agreement.**

# Complete and Partial Integration

## *Restatement (Second) of Contracts, §210 (1981) Completely and Partially Integrated Agreements*

- (1) A completely integrated agreement is an integrated agreement adopted by the parties as a complete and exclusive statement of the terms of the agreement.**
- (2). A partially integrated agreement is an integrated agreement other than a completely integrated agreement.**

# Effect of Integration on Partially Integrated Agreements

**Consistent prior or contemporaneous agreements can supplement a partially integrated agreement.**

***Restatement (Second) of Contracts, §216 (1981)***  
***Consistent Additional Terms***

**(1). Evidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated.**



# Differing Perspectives: What SHOULD be Included

- The government operates within a strong public policy/  
public accountability environment
  - It controls the contracting process
  - It is entitled to strict performance
  - Sovereign immunity issues
- General commerce is to be encouraged
  - Freedom of contract among individuals/entities is entitled to  
much greater freedom

# Principles of the FAR

- Competition
- Fair and Reasonable Pricing
- Low Bid/ Best Value
- Sociological Preferences
- Detailed Specifications
- Equal Opportunity for All Participants
- Formal Structure to Control Expenditure of Public Funds

# Purposes & Construction of UCC

- The Code Is To Be Liberally Construed And Applied To Promote Its Underlying Purposes And Policies, Which Are:
  - To Simplify, Clarify And Modernize The Law Governing Commercial Transactions
  - To Permit The Continued Expansion Of Commercial Practices Through Custom, Usage, And Agreement Of The Parties
  - To Make Uniform The Law Among The Various Jurisdictions

# Construction of Contracts - UCC

§ 2-302 Unconscionability

§ 2-304 Price Payable in Money, Goods, Realty,  
or Otherwise

§ 2-305 Open Price Term

§ 2-309 Absence of Specific Time Provisions

# Christian Doctrine

- Based on a case from the US Court of Federal Claims (old name “Court of Claims), there are certain “deeply ingrained strand[s]” of federal procurement policy that if a particular clause is omitted from the contract, it will be “read in” to the contract.

**G. L. Christian and Associates v. the United States, 312 F.2d 418 (Ct. Cl. 1963)**

**See also:** *S.J. Amoroso Construction Company v. United States* and *General Engineering & Machine Works v. O’Keefe*, Fed. Cir.(1993)

# Christian Doctrine

- “We are not, and should not be, slow to find the standard termination article incorporated, as a matter of law, into plaintiff's contract if the Regulations can fairly be read as permitting that interpretation. The termination clause limits profit to work actually done, and prohibits the recovery of anticipated but unearned profits. That limitation is a deeply ingrained strand of public procurement policy.”
- “Although the housing contract does not contain such an express provision, there are at least four references in it (and the accompanying agreements) to a ‘termination of the Housing Contract for the convenience of the Government’ and to the Government's assumption of certain obligations in that event.”

# The Christian Doctrine – When it Applies

**“Appellant argues that the Standard Tax clause should be read into the contract under the Christian Doctrine. That doctrine, enunciated in G.L. Christian & Associates, requires missing mandatory clauses, which express a significant or deeply ingrained strand of public procurement policy, to be read into the contract. The Standard Tax clause, however, is not a mandatory clause for commercial item contracts.” Hillcrest Aircraft Company, Civilian BCA (2012)**

# What's In and What's Out

## IN:

- Disputes,
- Termination,
- Changes,
- Payment,
- Equal Opportunity,
- Affirmative Action,
- Buy America Act\*,
- Truth in Negotiations Act,
- Miller Act bonds, and
- Davis-Bacon Act.

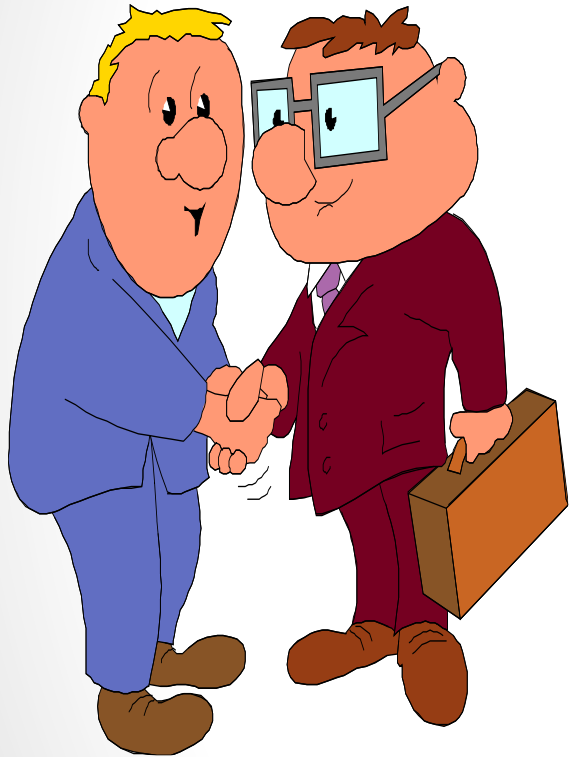
## OUT:

- Tax Clause
- Availability of Funds Clause
- Required cost pools (DAR)
- Small business subcontracting clause

\*Replaced incorrect clause (supply) with correct clause (construction).



# The Duty of Good Faith and Fair Dealing



**In every contract, there exists an implied covenant of good faith and fair dealing.**

**13 Williston on Contracts, §38:15**

# Duty of Good Faith and Fair Dealing Applied

**“In all contracts, American common law imposes on each party a duty of good faith and fair dealing in its performance and in its enforcement. This duty among other things, encompasses the ‘obligation’ that neither party will do anything that will hinder or delay the other party in the performance of the contract.”**

**Metric Construction Co., Inc. v. U.S., Ct. Federal Claims (2008)**

# The Duty of Good Faith and Fair Dealing

**It is a part of every contract – but is not written as a term of the contract.**

***“The implied obligation is as binding as if it were spelled out. ...the Government was impliedly obligated to do what was necessary to enable the contractor to perform.”***

**Blackstone Consulting, Inc. v. U.S., Court of Federal Claims (2005)**

# The Uniform Commercial Code

- The UCC has been adopted by all the states and has universal applications to the relationship between:
  - (1) A prime contractor and its subcontractors, and
  - (2) Between the subcontractors and lower tier subcontractors.
- The UCC permits informality in contracting and establishes special conditions for dealings between merchants.
- The “CONTRACT” is the total obligation which results from the parties’ agreement as affected by the UCC and any other applicable rule of law.

# UCC § 1-201. General Definitions.

- (3) "**Agreement**", as distinguished from "contract", means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in Section 1-303.
- (12) "**Contract**", as distinguished from "agreement", means the total legal obligation that results from the parties' agreement as determined by the Uniform Commercial Code as supplemented by any other applicable laws.

# The FAR

**The AGREEMENT is what appears within the “four corners” of the document – nothing more, nothing less, nothing else.**

**The applicable law is the Federal common law of contracts**

**Highly controlled by Federal statutes (with waiver of Sovereign Immunity)**

**Highly regulated by the FAR Council**

# The FAR

- **Contract says what it says**
- **Omitted clauses may be included through the Christian Doctrine**
- **Contracts in all amounts must be in writing; required to expend funds from the US Treasury**
- **The contract must contain all the material terms (PDQ<sup>2</sup>)**

# FAR 15.102 Oral Presentations

**§15.102(c). In deciding what information to obtain through an oral presentation, consider the following...(2) The need to incorporate any information into the resultant contract.**

**§15.102(f). When an oral presentation includes information that the parties intend to include in the contract as material terms and conditions, the information shall be put in writing. Incorporation by reference of oral statements is not permitted.**



# What is In and What is Out - Exhibits

- Schedule
- Exhibit
- Annex
- Supplement
- Appendix

Occasionally the words are given different meanings culturally. Especially problematic in treaties and certain other “standard” foreign contracts.

# How to confuse the other party Part II

What is in and what is out:

SCHEDULES, EXHIBITS, ATTACHMENTS

- Assign parts to multiple drafts writers
- Include lots of schedules of reference material as part of the contract
- Don't include things that should be directly included – like warranties, indemnifications, etc.

DO use schedules (etc.) when:

- Schedules are not released to the public (some SEC filings)
- The material is not readily available/might not exist at time contract is drafted

# What is In and What is Out - Exhibits

- Generally pick one term to avoid confusion
- Alternatively, be consistent in naming documents of similar impact
- Sometimes it makes sense to create a document for which one party has absolute right to change (Payment offices, ordering offices, customer service offices)
- Generally stay away from saying “Schedules” in government contracts since the UCF designates a part of the contract as a schedule already, and GSA uses it in the FSS (Federal Supply Schedule)
- Sometimes you need to provide definitions for each, especially if they have different orders of precedence.

# Caution when Incorporating Exhibits

- Applicable dates
- Requirement versus guidance
- Referring to “attached” (or mislabeled) that is not attached
- Making (sometimes vague) reference to, but never incorporating a document
- Incorporating via a bad (or dead) hyperlink
- Incorporating documents that incorporate other documents (DOD specs; DOE Orders)

# The Contractual Significance of Vendor Proposals

- **Part of Contract the Contractor's Obligation?**
- **An Offer to be Accepted?**
- **An Expression of the Contractor's Interpretation of the Solicitation/Specifications?**

# Statutes and Regulations

**“Helix's interpretation, that it had a guarantee to become a CATV provider, was in conflict with the detailed process embodied in the Cable Competition Act and mandatory Air Force instruction on the acquisition of CATV services. Applicable statutes and regulations are a part of the contemporaneous circumstances of the contract's execution, and are incorporated, without reference, into the agreement itself.”**

Helix Elec., Inc., v. United States, 68 Fed. Cl. 571 (2005).

# Incorporating EVERY Law

## 1.602-1 Authority.

...

(b) No contract shall be entered into unless the contracting officer ensures that all requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met.

# Incorporating EVERY Law (Part II)

## 1.602-2 Responsibilities.

Contracting officers are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships. In order to perform these responsibilities, contracting officers should be allowed wide latitude to exercise business judgment. Contracting officers shall-

(a) Ensure that the requirements of [1.602-1](#)(b) have been met, and that sufficient funds are available for obligation;

....



# Purchasing Systems

- The manner in which a contractor conducts its purchasing is of interest to the government
- The system must be:
  - Documented
  - Followed
  - Audited
  - Protect against fraud and misconduct

# Automation

- Common Contracting System/ Integrated Acquisition Environment

- Which system?
- Who owns the system?
- Who updates the system?
- Who repairs the system?

Some systems generate NO paper and do not even produce a unified copy. It is merely an index of things that apply from a massive database of every possible clause.

# Incorporation By Reference



- Commonly done for FAR clauses
- Incorporated terms have same standing as those set out in full text
- Can be subordinated by an Order of Precedence clause.

# Outdated/Mis-identified Clauses

- Use of Hyperlinks
  - Updated;
  - Dead
  - Double secret probation
- Clause matrix
  - A must-have from proposal to closeout
  - A must-have for multi-contract operations
  - A must-have for the new contractor learning government acquisition.

XYZ CORP.  
PROPOSED SUBCONTRACT with THE ABC COMPANY

CLAUSE SUMMARY MATRIX

Clause No.	Title	Requirement	Comments
------------	-------	-------------	----------

**Proprietary and Business Sensitive**

	31. Government Clauses	Government clauses are incorporated by some reference found elsewhere.	Curious clause, but it says what it says.
	32. Evidence of Citizenship or Immigration Status	All persons entering ABC premises on behalf of XYZ shall be properly documented as to their citizenship and immigration status	
	33. Access to Plants and Property	On ABC property, ABC rules apply and XYZ will follow those rules	
	34. Code of Conduct	Both ABC and XYZ are committed to conducting their business in a fair and ethical manner. Any failure on the part of any ABC employee should be reported to ABC's hotline.	
	35. Seller Financial Review	ABC reserves the right to conduct a financial review of XYZ for credit worthiness.	Typically the rights under this clause are limited to the information filed publically, or contained in an annual report.
	36. Performance and Fee	If XYZ is responsible ("direct and proximate cause") for the loss of fee by ABC on the prime contract, ABC will deduct that amount of lost fee from the fee owed XYZ.	This is an interesting risk, but probably acceptable. Sr. Contracts Person suggested an additional sentence at the end: "Such debit will not exceed the seller's current and accumulated contract Award Fee."
	37. Code of Basic Working Conditions and Human Rights	ABC has a code of basic human rights that applies to all of its operations world wide. It encourages XYZ to do likewise. Material breaches of this clause give rise to ABC's right to cancel for default.	
	38. Entire Agreement	This constitutes the entire agreement of the parties and no changes will be acknowledged unless signed by a ABC Authorized Procurement Representative	
C306W	Asbestos Free Dunnage	All packing material and filler must be asbestos free.	XYZ warrants that vermiculite and any other dunnage is asbestos-free.
E002	Rent Free Non Interference Use of Government Property	Pricing assumes rent free use of GFP. If status changes, XYZ is entitled to an equitable adjustment. Clause is a required flowdown where rent-free use of GFP is authorized by subcontractor.	

# Uniform Contract Format

**FAR has a Uniform Contract Format**

**If not awarded under FAR Part 15, various forms perform the same function (FAR Part 53)**

**FAR prescriptions and matrix of FAR clauses (FAR Part 52)**

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<b>Uniform Contract Format</b>	
<b>Part I – The Schedule</b>	
<b>Section</b>	<b>Title</b>
<b>A</b>	<b>Solicitation / Contract Form</b>
<b>B</b>	<b>Supplies / Services and Prices /Costs</b>
<b>C</b>	<b>Description / Specifications / SOW</b>
<b>D</b>	<b>Packaging and Marking</b>
<b>E</b>	<b>Inspection and Acceptance</b>
<b>F</b>	<b>Deliveries or performance</b>
<b>G</b>	<b>Contract Administration Data</b>
<b>H</b>	<b>Special Contract Requirements</b>
<b>Part II -- Contract Clauses</b>	
<b>I</b>	<b>Contract Clauses</b>
<b>Part III -- List of Documents, Exhibits, and Other Attachments</b>	
<b>J</b>	<b>List of Attachments</b>
<b>Part IV-- Representations and Instructions</b>	
<b>K</b>	<b>Representations, certifications, and other statements of offerors or respondents</b>
<b>L</b>	<b>Instructions, conditions, and notices to offerors or respondents</b>
<b>M</b>	<b>Evaluation Factors for award</b>

# Order Of Precedence

**Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order:**

- 1 - The Schedule (excluding the specifications);**
- 2 - Representations and other instructions;**
- 3 - Contract clauses;**
- 4 - Other documents, exhibits, and attachments; and**
- 5 - The Specifications**

**CLAUSE AT: 52.215-8 ORDER OF PRECEDENCE**



# The Uniform Commercial Code

## ORDER OF PRECEDENCE IN CONTRACT INTERPRETATION

- (1) The express terms of the agreement
- (2) Course of performance
- (3) Course of Dealing
- (4) Usage of Trade

# Exceptions To The Use Of The UCF

- **Basic agreements**
- **A & E**
- **Shipbuilding**
- **Subsistence**
- **Letter requests**
- **Small purchases**
- **Contracts requiring special forms or those exempted by agency head**

# Drafting Points

- If you are not using the UCF, draft an appropriate Order of Precedence clause
- Add the Order of Precedence to your negotiation checklist; make sure it is discussed
- Run an independent check on ALL references to exhibits, attachments, or other documents and make sure:
  - They exist and are accessible to the parties
  - The proper version is cited
  - They are assigned the right precedence

# Cut and Paste

- From the internet – DON'T
- From any source that you either:
  - Do not have reason to trust it
  - On any topic you do not understand (e.g. Arbitration or other Alternative Dispute Resolution)
- From a prior contract
  - ONLY to prevent extensive retyping of boilerplate
  - HOWEVER; read it carefully to avoid issues we've discussed in this class.

# Modifications

- Every contract should contain a modification clause – how, when permitted, unilateral, right to refuse, etc.
- SHOULD say “only in writing signed by both parties”
  - HOWEVER – generally courts will allow that to be modified by oral agreement and will judge the resolution of issue on the parties’ conduct.
  - Beware of language that requires “acceptance” by a specific person or office *after* the parties believe they have reached agreement.

# Modifications and Waivers - Clause

This contract cannot be modified, except in writing signed by both parties. The parties may not modify this provision orally or by their conduct. No waiver of this provision is valid unless in a writing signed by both parties.

# Modifications - UCC

- An agreement modifying the contract under the UCC needs no consideration to be binding. § 2-209(1)
- This negates the common law rule
  - Pre-existing duty
  - Course of performance

# Conflicting Provisions

- Often a function of cut and paste
- Sometimes a lack of understanding between legal concepts
  - Jurisdiction and venue
  - Arbitration rules versus forum
  - Indemnification versus hold harmless
  - Insurance versus assumption of risk
- More commonly a result of:

**Sloppy Drafting**



# Agreements to Agree

- Contracts that propose a future agreement are not a contract that will be enforced by the government
- Terms that propose a future agreement may or may not be enforced. Depends on:
  - Subject matter
  - Whether contract is government or commercial
- Teaming agreements are particularly problematic

# Sloppy Drafting

- Redundancies
  - Generally only adds confusion
  - Makes agreement longer
  - Does damage to “every part of the contract has meaning”
- Failure to define terms OR to use defined terms properly
- Using antiquated conventions (numbers and words)
- Complicates dispute resolution and prolongs litigation

# Benefits of Quality Negotiations

- Increases the likelihood that the required goods and services will be successfully acquired
- Thorough negotiations reduces the number and complexity of problems during contract performance
- Win/win negotiations include the 3 aspects of the deal, the process, and the relationship. Strong relationships yield more favorable outcomes

# What Is a High Quality Contract?

- Contract type represents reasonable apportionment of risk
- Requirements match the financial arrangement
- Contract clauses represent applicable laws and regulations
- Delivery/performance schedule is reasonable for desired goods or services
- Profit/fee is reasonable for work to be performed, the risk assumed, and reflects current economic conditions
- The document is devoid of ambiguities
- The document both includes and omits what it should
- Internal consistency is maintained amidst modifications

# Summary

- A contract should represent a “meeting of the minds” among the contracting parties
- To properly interpret a contract, you must first know what the contract is
- Good faith and fair dealing are part of every contract
- The legal context of a contract is automatically incorporated
- Careful drafting, great attention to detail, and improving your knowledge of contracting matters will enhance the quality of your contract.

# | PCI Instructor, Tom Reid

[www.CertifiedContractSolutions.com](http://www.CertifiedContractSolutions.com)

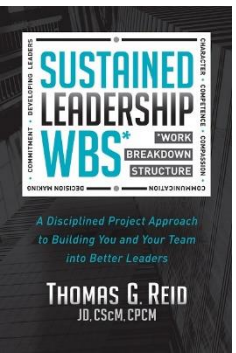
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“The first responsibility of a leader is to define reality. The last is to say thank you.”

**Max DePree**

*Author & Business Executive*

