

Government Contracts Fundamentals: Session 5 Contract Administration



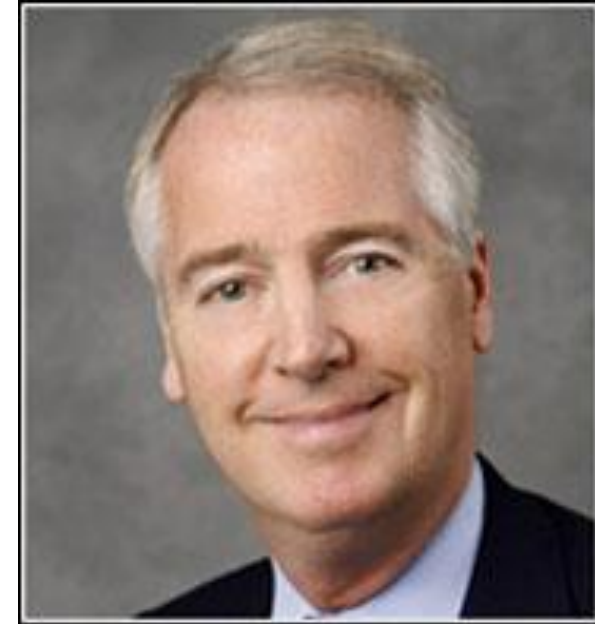
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- **Tim Sullivan** has spent 45 years in the Government contracting world. He is a co-founder of the Public Contracting Institute and has lectured and written on Government contracting topics, both nationally and internationally, since 1983. He has dealt with the full range of Government contracting issues and has successfully litigated both bid protests at the GAO and the U.S. Court of Federal Claims and contract claims before the boards of contract appeals and the U.S. Court of Federal Claims.
- Tim spent his last 19 years of practice as a partner at Thompson Coburn LLP, where he chaired the Government Contracts Group. Tim has represented numerous prominent companies, such as Google and Rolls-Royce, and he is widely acclaimed for his lectures on contract negotiations.
- Tim earned a bachelor of arts degree from the University of Michigan and his Juris Doctor degree from Georgetown University Law Center, where he was a member of the Georgetown Law Journal. Tim also served as a counterintelligence agent for the U.S. Army and as a contract negotiator for the Central Intelligence Agency.

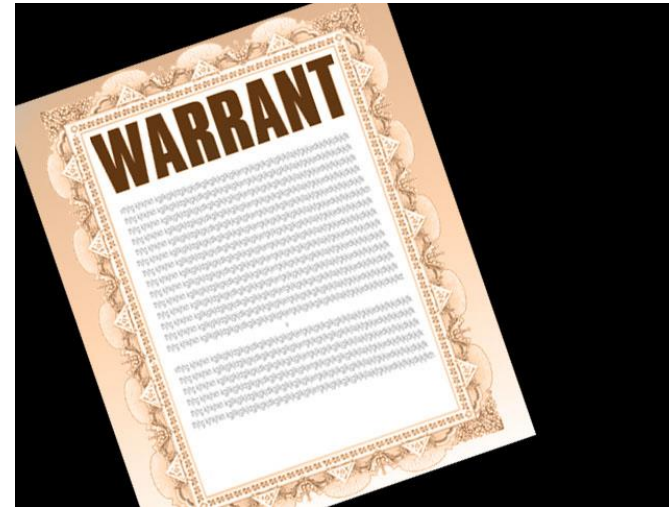


Session 5 - Contents

- Limitations on authorizations (to make agreements or execute documents)
- Compliance with audit requirements
- Records retention
- Nepotism
- Internal personal conflicts of interest

Limit on Authorizations - General Authority Rules

- Government: Only persons with Actual Authority bind the government
- Contractors: Both persons with Actual Authority and Apparent Authority bind the contractor



Only Contracting Officers Have Authority for the Government

- Contracting Officers will be given an official appointment, a “warrant,” that grants them the authority to commit the government to a contract.
- Warrants define the dollar value of the contracts a contracting officer can commit.
- Only a Contracting Officer may modify or change a Government contract.
- Contracting authority cannot be assigned or delegated
- CORs and contracting specialists do not have the authority to bind the government.

FAR 1.102-3,-4, FAR 1.6.

Only Contracting Officers Can:

- Commit the government to a contract
- Define the price of a contract
- Define the quality of the deliverables
- Define the quantity
- Define the delivery schedule
- Modify or change a Government contract
- SIGN the contract and any changes or modifications
- Ratify payment for work that was not properly authorized – but don't rely on this!

Request Outside of Authority

- Requests to perform a contract or modify or change a contract that are not signed by the C.O will not commit the government.
- If asked to perform, modify or change a contract by someone other than the contracting officer, ask for a written, signed contract, modification, or change order from the C.O.

Government employees may not obligate money that has not been appropriated – that would violate the Anti-Deficiency Act (a criminal statute).

Why Limit Contractor Authorizations?

Manage communications and commitments with government

- Establish “man-to-man” defense, not zone defense
- Prevent mixed signals

Manage company commitments generally

- Trust issues?
- Scope of understanding of company business



Why Limit Contractor Authorizations?

Provide appropriate oversight

- Two eyes are better than one
- May be difficult for small businesses

Negotiating tactic

- Have you ever bought a new car without having to wait for the sales manager to approve the deal?
- Can be carried to extreme

What Agreements Need Limits?

No prescribed rule, but consider:

Contracts

- Government agencies
- Prime contractors/subcontractors
- Commercial customers

Teaming Agreements

Non-Disclosure Agreements

Polling Question

John, a new salesperson for the Standard American National Toy Aficionados, Inc. (SANTA), a small business, executes a non-disclosure agreement with Rudolph, Inc., hoping to team on a competition for a government purchase of athletic shoes. After discussions between the companies break down, SANTA teams instead with Blitzen, Inc., a competitor of Rudolph. Concerned that SANTA will use its confidential trade secrets in the competition, Rudolph seeks a court injunction prohibiting SANTA from competing for the athletic shoe contract.

- A. SANTA should ignore the SANTA-Rudolph NDA because John was a new salesman and did not have the authority to execute the NDA.
- B. SANTA should promise that it won't use any proprietary Rudolph information in preparing its proposal.
- C. SANTA should agree that the employees who worked engaged in discussions with Rudolph will not participate in the proposal effort.
- D. SANTA should hire expert litigation counsel.
- E. SANTA should require John to go through "Salesperson Boot Camp" to learn what he should and shouldn't do.
- F. SANTA should fire John.



Audits

Who Are the Auditors?

- Defense Contract Audit Agency (DCAA)
- Agency Representatives (Quality Assurance, Department of Labor, Defense Contract Management Agency)
- Inspectors General
- FBI, Agency Investigators (CID, NIS, PIS)
- Congress? (GAO)



Government Audit Process

- Government agencies are directed to avoid duplicate audits, inspections, and examinations of contractors and subcontractors
- Agencies are directed to agree on the “cognizant agency” that will lead the audits of the contractor/subcontractor
- Once identified as the “cognizant agency” they remain so for five years.
- The cognizant agency is charged with sharing the information gathered as needed with other agencies.

FAR Part 42.1

What Might Be Audited?

(Recap – week 7)

Pre-Award

- Contractor Purchasing System Review (CPSR)
- Contractor Business Systems (Accounting and Estimating Systems, Material Management and Accounting Systems, Earned Value Management System)
- Forward pricing and billing rates

Post-Award

- Incurred Costs/ Indirect Costs
- Defective Pricing
- Compliance with laws and regulations

Incurred/ Indirect Costs

Certification of Final Indirect Costs (FAR 52.242-4):

- All costs in proposal are allowable.
- Proposal does not include costs that are expressly unallowable.
 - Cost may be unallowable per FAR – *e.g.*, costs of alcoholic beverages are expressly unallowable. (FAR 31.205-51)
 - Cost may be unallowable per contract.
 - Cost may be unreasonable or improperly allocated.
 - If direct cost is unallowable, so is associated indirect cost.
 - Category of costs considered “expressly allowable” is expanding.
 - December 18, 2014 DCAA Memorandum for Regional Directors



Government Audit Rights

- What can be examined? ([FAR 52.215-2](#))
 - “... books, documents, accounting procedures and practices and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form.”
 - “... all records and other evidence sufficient to reflect properly all costs claimed to have been incurred ... directly or indirectly ... [to] include inspection of the Contractor’s plants ...”



Contractor Audit Rights

Do Contractors have the right to audit subcontractors?

- Not authorized by regulation
- Subcontractors will resist. (They may be competitors on other deals.)
- Depends on leverage. Who needs whom more?
- If subcontractor information/documentation is required by government, it can be provided in a “sealed envelope.” [Contractor acts as postman, who delivers mail but isn’t permitted to read it.]

The Audit Process

1. **Audit Planning - by auditor**
2. **Audit Request – identifies audit dates and requests data**
Entrance Conference - Reviews audit objectives. *This is an important opportunity to communicate.*
4. **Field Work - Review of data, follow-up requests, and interviews**
5. **Preliminary Findings/conditions – Conditions may be “significant” or “insignificant,” “satisfactory” or “unsatisfactory.”**
6. **Interim Conference(s) between auditor and contractor**
This is Contractor’s first opportunity to influence audit results!

The Audit Process

7. **Exit Conference - Discussion of Findings and Conditions.** There should be no surprises.
8. **Contractor's Response/Rebuttal – Contractor can agree or disagree with each Finding/Condition.**
9. **Auditor's Response to Contractor's response/rebuttal.**
10. **Audit Report Issued.**
11. **Contracting Officer Action (if required) – The CO or ACO can overrule DCAA, but rarely do.**
12. **Dispute Resolution at Board of Contract Appeals or Court of Federal Claims (if required)**

The best time to challenge audit findings and conditions is before they are put into writing!

Dealing with Government Auditors

- **What to do during an audit ...**
 - **Establish rapport with the auditor. Try to understand the auditor's point of view.**
 - **Keep relationship non-adversarial, respectful, and professional. Remember, they are doing the job that "we" hired them to do.**
 - **Establish a single point of contact.**
 - **Manage access in organized and systemic manner – ask that data requests and questions be provided in writing.**
 - **Ensure that all facts are understood.**
 - **Document all meetings and telephone conversations, and save all notes. Get copies of all audit reports.**
 - **Remember that you may have a long-term relationship with the auditor. Establish credibility for the future.**

Dealing with Government Auditors

- **What *NOT* to do during an audit ...**
 - **Refuse to provide access to requested records that are relevant to scope of audit.**
 - **Create unreasonable delays in providing access to needed data or personnel.**
 - **Burden auditors (*e.g.*, poor working conditions, restriction on ability to make copies).**
 - **Miss promised dates for furnishing data.**
 - **Fail to cooperate, in general.**
 - **Attack the auditor (as opposed to the audit findings).**
 - **Pursuing a dispute that is groundless or is not worth fighting.**

Example of Type A Auditor DCAA Checklist for Accounting Systems

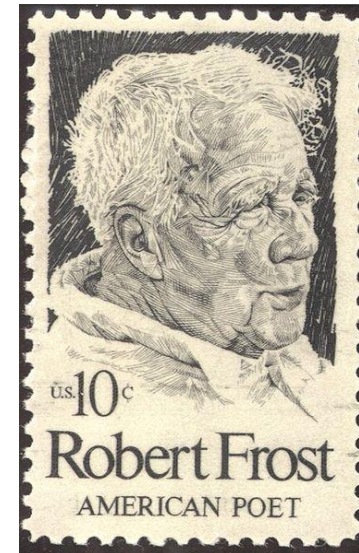
(http://www.dcaa.mil/preaward_accounting_system_adequacy_checklist.html)

- Segregation of direct/indirect costs
- Consistent allocation of indirect costs
 - *e.g.*, Same rates for estimating, bidding, recording, and charging (CAS 401)
- Timekeeping system
- Exclusion of unallowable costs
- Capability to provide required financial information (*e.g.*, progress payments, limitation of costs requirements)

Example of Type B Auditor

*Never ask of money spent
Where the spender thinks it went.
Nobody was ever meant
To remember or invent
What he did with every cent.*

“The Hardships of Accounting” by Robert Frost



Polling Question

You and your team have spent months preparing purchasing files for a CPSR audit. You and the ACO have agreed that only purchases made during the past six months in support of cost-reimbursement contracts will be reviewed. Three weeks before the scheduled audit, however, the Auditor sends you a notice asking to review purchases made during the past nine months in support of all contracts (including fixed price).

What should you do?

- A) Plan to work nights and weekends to prepare the additional files.
- B) Appeal to the ACO to limit the scope of the audit per the prior agreement.
- C) Refuse to produce purchasing files relating to fixed-price contracts, since they do not have notice and consent requirements.
- D) Ask for an equitable adjustment for your increased costs in producing the additional information.

Records Retention

- The FAR requires that contractors retain certain records – FAR requirements may be more stringent than for company's commercial business.
- The records must be easily accessible in the event the government requests access or copies of the records
- Best practice is for contractors to maintain all business records in an orderly, easily accessible way
- Contractors should develop retention schedules – based on the type of document, applicable regulations, and long-term needs.

FAR 4.7, FAR 52.215-2



Records Retention

- Best Practice: It's not enough to do what is required. You must be able to prove you did what is required.
- Audits are enabled by keeping good records. If a contractor's records are incomplete, they can fail an audit.
- Therefore, you will need to keep records of:
 - Prime Contracts and Subcontracts
 - Communications between and among contractor staff, the CO, and the contracting team.
 - During Negotiation, Performance, and closeout
 - Accounting records.
 - Records of where costs come from.

Government Audit Rights

FAR record retention requirements apply if contract contains GAO audit clause.

- What can be examined? ([FAR 52.215-2](#))
 - “... books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form.”
 - “... all records and other evidence sufficient to reflect properly all costs claimed to have been incurred ... directly or indirectly ... [to] include inspection of the Contractor’s plants ...”
- Yes, it includes email!



Two-Year Retention

Generally the following records must be kept for two years, from the end-of-fiscal year when the records were generated:

- Labor Cost Distribution Cards
- Petty Cash Records
- Clock Cards
- Paid checks & receipts for wages paid
- Store requisitions for materials, supplies, equipment and services

FAR 4.705.

Three-Year Retention

- Documents related to contract negotiation
- Documents related to contract administration
- Any records needed to comply with government audit requirements
- May be longer period
 - If prescribed in contract
 - If delayed indirect cost submission occurs

FAR 4.703

Four-Year Retention

Generally, the following records must be kept for four years from the end-of-fiscal-year when the records were generated:

- Financial and cost-accounting records (but not labor cost distribution cards and petty cash records)
- Payroll sheets
- Maintenance work orders
- Equipment records
- Expendable property records
- Receiving and inspection reports
- Purchase orders for supplies and services
- Supporting documents for acquisition and supply records
- Quality control records
- Property Records

FAR 4.705.

Storing Records

- Records may be stored digitally.
- Digital records must be stored in a manner that allows for:
 - Machine readable documents
 - Reliability of the documents
 - Securing the documents
- Contractors should keep a record of how digital records were gathered and stored
- Original hard copies must be kept for one year after digitization.

FAR 4.703(d)

Nepotism

- Nepotism is providing a job to a family member
- What are the risks?
 - Favoritism
 - Perception of favoritism
 - Inability to make hard decisions
 - Potential internal stress
- What are the benefits?
 - Access to Talent
 - Loyalty
 - Geographical flexibility



And one more thing; don't call me "Uncle" while we are in the office!

Personal Conflict of Interests – Internal (Government PCI rule – discussed in week 10)

- Employee business/family interests could create conflict with company's (not just government's) interests.
 - May not reflect improper or unethical behavior.
 - Appearance of conflict may be just as damaging.

Contractor employees should avoid (and disclose) conflicts between personal interests and job responsibilities.

- *e.g.*, financial interest in supplier, customer, or competitor
- Contractor employees shouldn't act (or refrain from acting) due to personal or family relationships and interests.
- The good news: These conflicts can usually be avoided by full disclosure and reassignment of responsibilities.

Scenario

- Standard American National Toy Aficionados (SANTA) buys several tons of coal every year in November, to provide to clients who are on the “naughty” list.
- Mr. Elf is a SANTA employee whose job is to keep the client list up to date.
- Mr. Elf’s wife owns a competing coal supply company.
- Mr. Elf has no involvement in her company.

Does Mr. Elf have in a conflict of interest and if so, what should his company policies require?

Discussion

Does Mr. Elf have a conflict of interest? YES!

- Mr. Elf should disclose that his wife owns a competing coal company, because he and his wife may financially benefit from competing against SANTA.
- Mr. Elf should be prohibited from disclosing the client list to anyone, including his wife's company.
- Mr. Elf should be prohibited from disclosing the price of coal to anyone.
- Mr. Elf should not be involved in the pricing or sale of coal. He should stick to toys.

The Best Best Practice

- Regardless of your position, you must stay on top of what is happening in the world of Government contracts
- How do you do that? You subscribe to, *and actually read on a regular basis*, a few periodicals that cover our business, such as:
 - Bloomberg's Federal Contracts Report (daily)
 - The Nash & Cibinic Report (Thomson Reuters--monthly)
 - Briefing Papers (Thomson Reuters--monthly)

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