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# Virtual Fundamentals Class Slides

## **Session One**

LANDSCAPE, PLAYERS,  
and DEVELOPING THE  
PROCUREMENT

# Agenda

- Basic GovCon Legal Framework
- The Players
- Structure of the FAR
- Standard Contract Format
- Agency Requirements

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

# Let's Introduce Ourselves

Who are you currently employed by?

A) Government agency

B) Contractor - Large business

C) Contractor - Small business

D) Contractor - Socio-economic set-aside category  
(e.g., 8(a), Service-Disabled Veteran Owned)

E) Non-profit

F) Other (I'm looking!)

# Let's Introduce Ourselves

How many years of government experience do you have?

- A) Less than 5 years
- B) Between 5 and 10 years
- C) More than 10 years

# Let's Introduce Ourselves

What area do you principally work in?

A) Contracts

B) Finance and Accounting

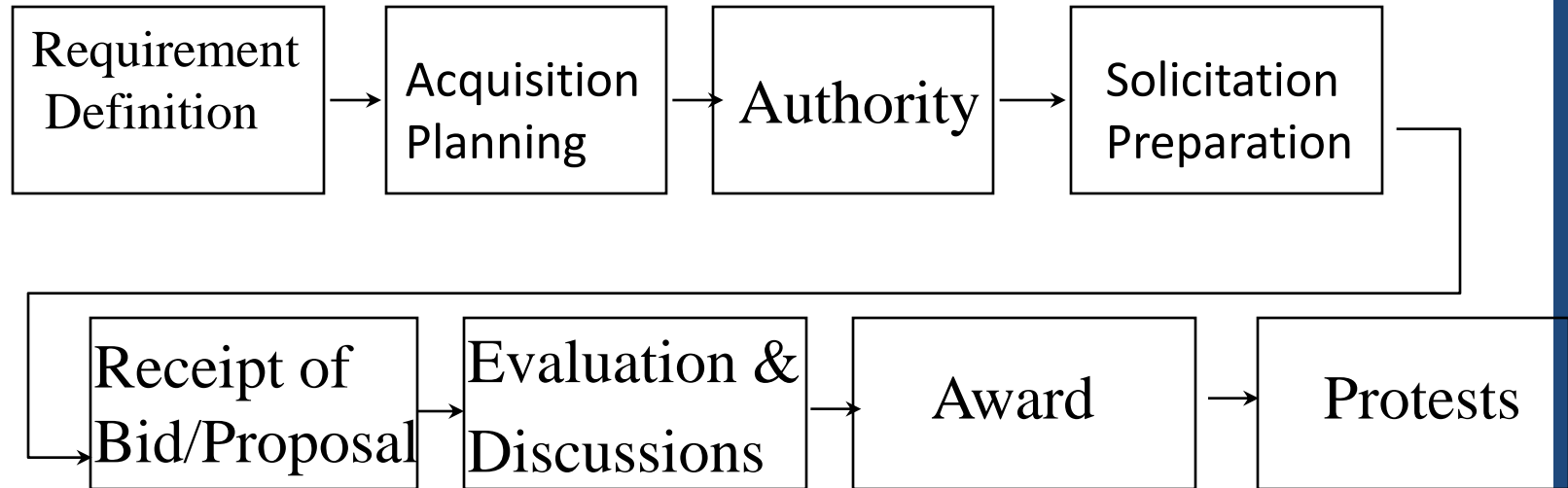
C) Program/Operations

D) Legal

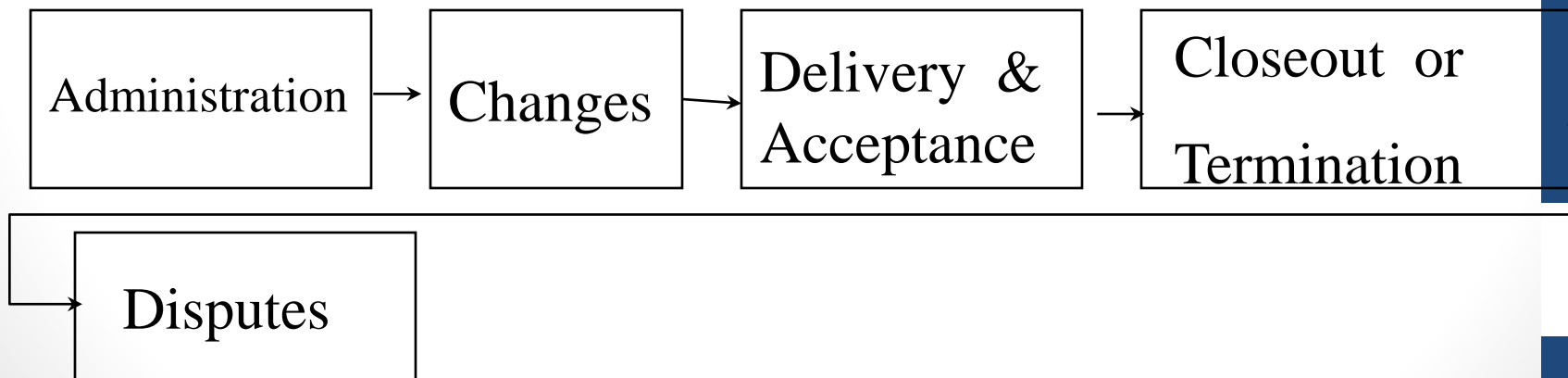
E) I'm a jack of all trades (and master of some)

# The Contracting Process

## *Contract Formation*



## *Contract Administration*





# The Contracting Process

- There are really three steps to government contracting
  - Creating a Requirement
  - Turning a Requirement into a Contract
  - Managing Performance of the Contract

And contractors have a hand in all three steps!

# Basic GovCon Legal Framework

- Hierarchy
  - Constitution
  - Statutes
  - Regulations
  - Executive Orders
  - Internal Agency Directives/Guidance
  - “Case Law”

# Basic GovCon Legal Framework

- Procurement Statutes
  - Post-World War II – the early years (1940's)
    - Armed Services Procurement Act of 1947
    - Federal Property & Admin Services Act of 1949
  - The Structure Evolves (1960-1990)
    - Truth in Negotiations Act (TINA) of 1962
    - Contract Disputes Act (CDA) of 1978
    - Competition in Contracting Act (CICA) of 1984

# Basic GovCon Legal Framework

- Procurement Statutes
  - Procurement Reform (1990's)
    - Federal Acquisition Streamlining Act of 1994
    - Federal Acquisition Reform Act of 1996 (aka “Clinger Cohen Act”)
  - Post-Reform (2000+)
    - Services Acquisition Reform Act of 2003

# Basic GovCon Legal Framework

- Related Statutes
  - Buy American Act
  - Trade Agreements Act
  - Davis-Bacon Act
  - Service Contract Act
  - Anti-Deficiency Act
  - Small Business Act

# Basic GovCon Legal Framework

- Procurement Regulations
  - Federal Acquisition Regulation
  - Agency FAR Supplements
    - Implement or supplement the FAR
- Relevant Agency Regulations – e.g.
  - Small Business (13 CFR § 120-130)
  - GAO Protests (4 CFR § 21)
  - Service Contracting (29 CFR § 4)

# GovCon Related EOs

- EO 11246, Sept. 24, 1965 (prohibiting discrimination by government contractors and subcontractors on the basis of race, color, religion, sex or national origin)
- EO 13495, Jan. 30, 2009 (contractor employees' right of first refusal for employment on successor service contract)
- EO 13658, Feb. 12, 2014 (establishing a minimum wage of \$10.10 per hour for contractor and subcontractor employees beginning January 1, 2015)
- EO 13672, July 21, 2014 (amending EO 11246 to prohibit discrimination based upon sexual orientation and gender identity)
- EO 13706, Sept. 7, 2015 (requiring contractors to offer their employees up to seven days of paid sick leave per year)

# Basic GovCon Legal Framework

- Internal Agency Guidance
  - “An agency head may issue or authorize the issuance of internal agency guidance at any organizational level” (FAR 1.301(a)(2))
    - Examples
      - Department of Defense (DOD) Policies, Procedures , Guidance, and Information (PGI)
      - DOD Directive 5000.01 (The Defense Acquisition System)
      - DOD Instruction 5000.02 (Operation of the Adaptive Acquisition Framework)



# Basic GovCon Legal Framework

- “Case Law”

Where does case law come from?

- Courts (Court of Federal Claims, U.S. Court of Appeals for the Federal Circuit)
- Government Accountability Office (GAO)
- Boards of Contract Appeals (ASBCA, CBCA)

What do cases do?

- Interpret/apply statutes, regulations
- Fill in gaps (“common law”)

# The Players

- Congress
- The President
- Office of Management and Budget
  - Office of Federal Procurement Policy
- Federal Agencies
  - Buyers/Program Offices
  - Heads of Contracting Activities
  - Contracting Officers
- Judges

# The Players

## Congress and the President

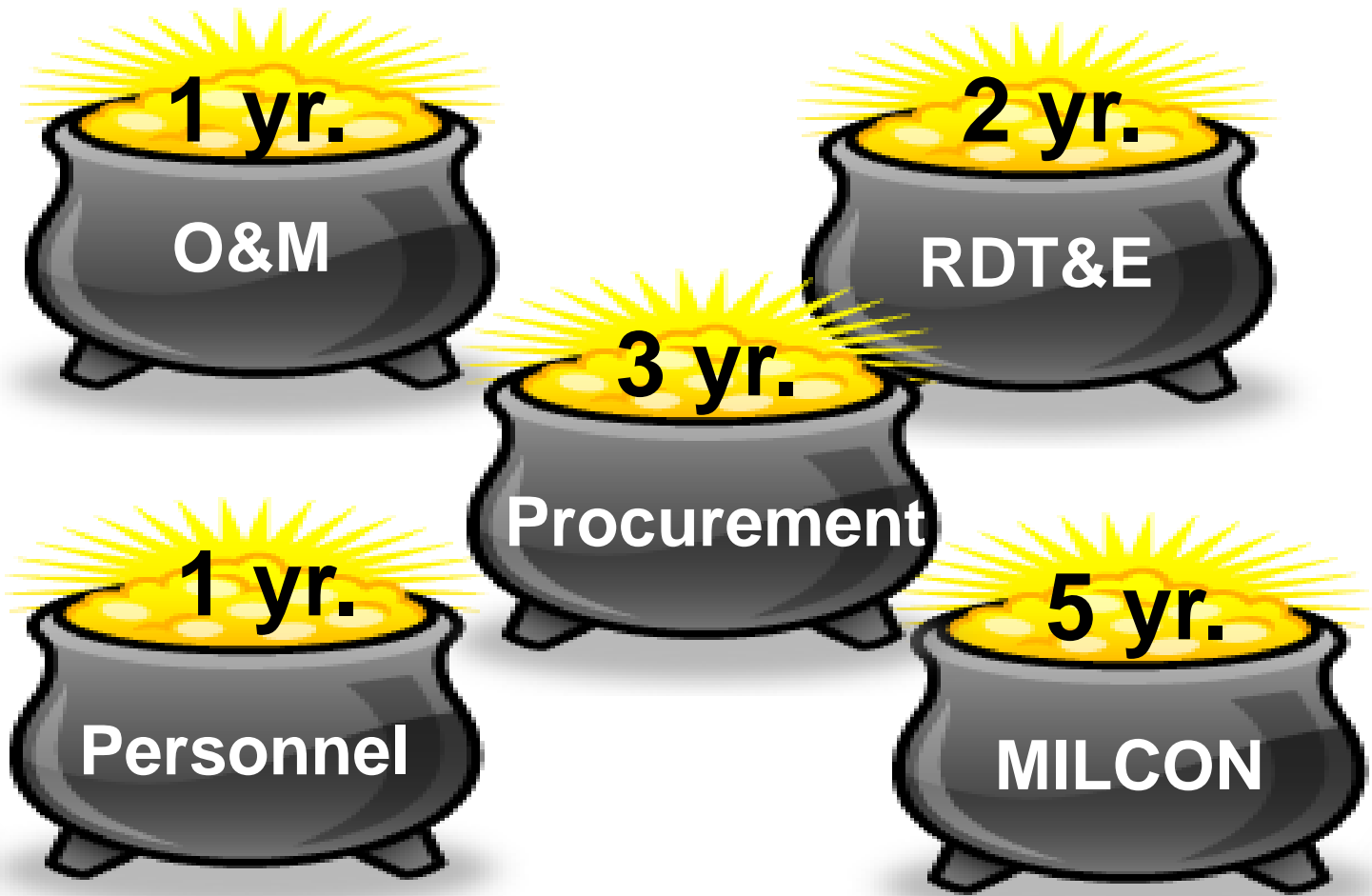
- **“No money shall be drawn from the Treasury, but in Consequence of an Appropriation made by Law.”**

**--Art. I, § 9, Cl. 7, U.S. Constitution**

# Appropriations Limits on Contracting

- Purpose Restrictions
- Time Restrictions
  - Presumption - Good for 1 Year
  - Bona Fide Needs Rule
- Amount Restrictions

# Appropriations Limits on Contracting (Purpose/Time)



# Appropriations Limits on Contracting (Amount)

- The Anti-Deficiency Act (ADA) subjects federal employees to administrative action, fines or even imprisonment for:
  - Obligating funds in excess of the amount available in appropriations
  - Obligating funds in advance of an appropriation
  - Accepting “voluntary” services

# The Players: Federal Agencies

- Program Heads/”Buyers”
  - Generate requirements for supplies, services
  - Develop specifications
- Contracting Activities
  - Structure and conduct procurements for supplies or services required by programs
  - Administer contracts once awarded
  - Administer contract terminations

# The Players: Federal Agencies

- **Who has authority** to bind the Government?
  - Contracting Officers have a “warrant”
- **Who does not have authority** to bind the Government? (but see next slide)
  - Contract Representatives (COR, COTR)
  - Program Managers!
  - Other Team Members
    - Specialists
    - Quality Control Representatives
    - Investigators, Inspector Generals



# Scenario 1 – The Helpful COR

- The Dotcom Company receives a contract from the Department of the Army for 12 months of IT software services. The first delivery, due in three months, is for a software system programmed in C++.
- During contract performance, Dotcom President Don Leggo deals exclusively with two people: Jim Scrivener, Contract Specialist (“the person to call with any question”) and Bill Jamison, the Contracting Officer’s Representative (COR).

# Scenario 1 – The Helpful COR

- The contract states:

“The Contract Specialist and the Contracting Officer's Representative are not authorized to change any of the terms and conditions of the contract. Changes, including changes in the scope of the work, place of performance, schedule, or terms of delivery, will be made only by the Contracting Officer by properly executed modifications to the contract.”
- The contract was signed by Marsha Bernstein, Contracting Officer, with whom Don Leggo (Dotcom President) has never worked.

# Scenario 1 – The Helpful COR

- After award, Bill Jamison (COR) tells Don Leggo (Dotcom President) that the Army's IT software system requirements are changing, and that the first delivery should instead be programmed in Cobol.
- Jim Scrivener (Contract Specialist) is present at the time of this conversation and says that this change in agency requirements will certainly, at some point, become a change in contract requirements.
- The Army, however, does not issue any modifications to the contract altering the original requirements.

# Scenario 1 – The Helpful COR

**45 days later Dotcom sends the completed software programs to the Army. The agency rejects them because they are not written in C++. **What should Dotcom have done?****

- A) Told Bill Jamison and Jim Scrivener to “Stuff it.”
- B) Followed their direction because Jim had probably consulted with the contracting officer about this.
- C) Followed their direction because it was important to support the war effort.
- D) Declined to follow their direction without actual written direction from a warranted contracting officer.

# Scenario 1 – The Helpful COR

**Q: Is there anything Dotcom can do now?**

- A) Seek ratification of the change from the contracting officer.
- B) Redouble its efforts to deliver compliant C++ software as soon as possible.
- C) File a Request for Equitable Adjustment.
- D) Complain to the Army Inspector General.

# What's The FAR?

## Federal Acquisition Regulation

- Became effective April 1, 1984
- GSA is responsible for managing the FAR
- FAR Council (FAR Secretariat) is authorized to issue and revise the FAR
- Changes to the FAR are accomplished by issuance of either a proposed rule (or interim rule) and then allowing for public comment.
- A FAC is an interim change to the FAR

# Structure of the FAR

The FAR is organized into 53 Parts

- Parts 1 - 51: Substantive Provisions (by topic)
  - (this is about half the book)
- Part 52: Clauses
  - (this by itself is about half the book)
- Part 53: Forms

# Structure of the FAR

FAR Parts are subdivided further into  
subparts,  
sections,  
subsections

E.g., FAR § 9.104-1

See FAR § 1.105-2 (FAR Arrangement)



# Creating the Requirement

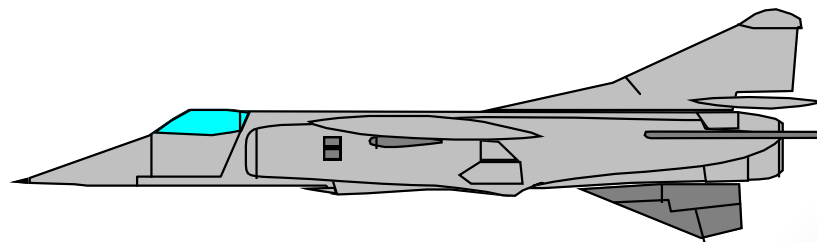
- Federal agencies should, and do, seek input from contractors when determining their needs. FAR Parts 7, 10, 11.
  - RFIs
  - Trade Shows/Industry Days
  - Trade Journals
  - Academic Publications
- There is nothing wrong with contractors influencing the development of requirements!

# Creating the Requirement

- Agencies have broad discretion when determining their needs and stating their requirements.
- Requirements cannot be: unduly restrictive, vague, ambiguous, insufficiently detailed

# How the Govt States its Needs/Requirements

- Design Specifications
- Performance Specifications
- Purchase Descriptions  
(i.e., “brand name or equal”)
- Mixed Specifications

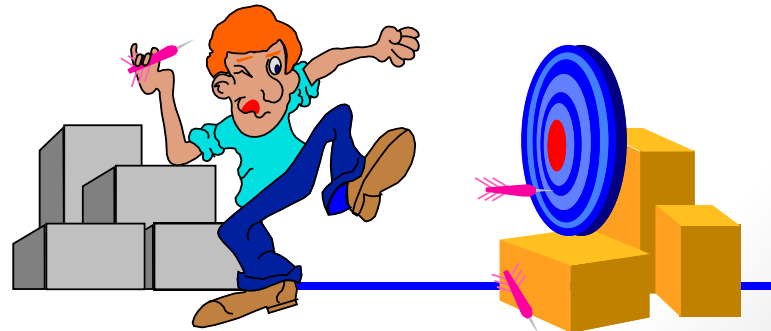


# Design-Type Specifications

- No design Involved (from contractor's perspective):  
“Build to print”
- Government tells contractor exactly how to perform
- Issues:
  - Restrictive of competition
  - Ambiguity – can lead to contract interpretation dispute, claim for constructive change
  - Implied Warranty

# Performance -Type Specifications

- Defines Outcome or Purpose, not Means/Methods/Manner of Performance
- Preferred method for acquiring services (FAR 37.102(a))
- Gov't doesn't tell the Contractor how to perform the work
- RFP should specify results desired, performance standards, method of assessment.



# Purchase Descriptions

- “Brand Name or Equal”
- Identify a product by brand name, model, or part number
- List the salient characteristics that define “equal”
- Don’t overstate requirements/be overly restrictive
- FAR 11.104

# Commercial Products and Services (FAR Part 12)



Buying commercial products & services has benefits

- **Proven Items (Quality Goods)**
- **Cheaper - No R&D (Reasonable Price)**
- **Faster (Acq. Lead time) (Delivered timely)**

Procedures more closely resemble those of the commercial marketplace

- It's really a hybrid between commercial (UCC) contracting and "regular" government contracting!

# Commercial Products and Services (FAR Part 12)



- The FAR contains broad definitions of the terms “commercial products” and “commercial services,” in order to support the “buy commercial” policy.
- There are incentives for both government agencies and contractors associated with the purchase of commercial products and commercial services.
- Generally a commerciality determination by one DoD contracting officer is upheld by other DoD contracting officers unless clearly erroneous.



# Polling Question

In our contracts we typically see:

- A) Design-Type Specifications
- B) Performance-Type Specifications
- C) Purchase Descriptions
- D) Commercial Products and Services
- E) Multiple types of specifications



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