

Once they are awarded a contract, government contractors often repeat the same mistakes time and time again. Being mindful of these ten classic mistakes in government contract administration will help contractors avoid such blunders in the future.

BY RICHARD D. LIEBERMAN

# BIG

## About the Author

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This article does not constitute legal advice with respect to any particular transaction. The assistance of Jason D. Morgan, a J.D. candidate at George Washington University Law School, is gratefully acknowledged.

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# 10 Big Mistakes in Government Contract Administration

## 1 Have you ever actually read your entire contract?

The written contract is the key to your obligations and responsibilities. How many contractors actually read the entire contract before beginning performance? Most read the statement of work (SOW) and proceed from there, but there are other critical sections in the uniform contract format that may be equally important, such as Section E, Inspection and Acceptance; Section F, Deliveries or Performance; Section G, Contract Administration Data; and Section H, Special Contract Requirements.<sup>1</sup>

Indeed, many vital clauses are not even printed in your contract. Almost every government contract includes a clause that permits the government to “incorporate clauses by reference.”<sup>2</sup> Essentially, the government lists the *Federal Acquisition Regulation (FAR)* clauses, and states, “[t]his contract incorporates one or more clauses by reference, with the same force and effect as if they were given in full text.” You can easily obtain the full text on the Internet or you can ask your contracting officer for a copy. It doesn’t matter whether the clauses

are printed in your contract in full text or incorporated by reference—you are still responsible for all duties and obligations contained in them. Indeed, the typical government contract, which might be only 30 pages long, expands to two or three times that length once the clauses incorporated by reference are printed out. The smart contractor prints out a copy of all clauses incorporated by reference, and inserts it into the master contract file before the contract starts.

There is no substitute for a detailed, in-depth reading of your contract before performance begins. If you know the duties and obligations stated in any clause incorporated by reference, you can make a mental note and skip to the next. If you don’t know the duties and obligations, you must read the full text of that clause.

With certain minor exceptions that are not worth discussing here, the general rule is that the *FAR* clause in effect at the time of execution of the contract (and presumably included in your solicitation and contract) applies to that contract. It does not matter if the *FAR* clause is changed and updated one or more times during the performance of your contract—the clause in your contract at the time of award governs your rights and obligations. The government may not change these clauses without your agreement, or without

**IN MY 38 YEARS OF WORKING IN AND** around government contracting, including 18 years serving as government contracts counsel and advising clients, I find it surprising that government contractors repeat certain classic mistakes so frequently. This is particularly true of new government contractors. Information on these mistakes is readily available from training courses, literature, case law, and from others in the field. Presented herein are my views of 10 common mistakes made by contractors in the administration of government contracts.

permitting you to make an equitable adjustment resulting from the change.

## 2 Is your performance world-class and do you care about your customer?

In today's government contracting environment, "satisfactory" performance will not ensure both current and future success. To grow as a business, the performance of a government contractor must be "world-class" and must demonstrate that the contractor shares the concerns of his agency client. Only then will you achieve the kind of respect and admiration that will make the agency want to award more contracts to you. Here are some suggestions that may help make you a world-class contractor, but remember, all of them must be done within the framework of your contract's statement of work and specifications.

- Provide effective and efficient solutions to your customer's problems;
- Be innovative when problems arise;
- Recommend improvements and

efficiencies for contract processes and procedures; for example, recommend appropriate value engineering change proposals, i.e., suggestions made by the contractor for performing the contract more economically;<sup>3</sup>

- Provide superior service to your government customer; and
- Provide a skilled, well-trained, capable, and professional contract workforce.

## 3 Do you take direction from unauthorized officials?

Government contract cases at the Court of Federal Claims and the Boards of Contract Appeals are filled with examples of contractors who took direction from officials who had no authority to direct them. The *FAR* states

Contracting officers have authority to enter into, administer, or terminate contracts, and make related determinations and findings. [They] may bind the government only to the extent of the authority delegated to them [and they] shall receive from the

appointing authority (citation omitted) clear instructions in writing regarding the limits of their authority. Information on the limits of the contracting officers' authority shall be readily available to the public and agency personnel.<sup>4</sup>

Although not clearly stated in the *FAR*, government personnel and contractors often speak of these officials as "warranted contracting officers."<sup>5</sup> Contract specialists (who work for contracting officers) do not possess this authority, nor does a contracting officer's representative, a contracting officer's technical representative (COTR), or any other inspector, auditor, or similar person working for the contracting officer. Only the contracting officer (CO) can give you direction, interpret the specifications, demand changes, or revise the written contract in any way.

The changes clause of most contracts states, "the contracting officer may at any time, by written order...make changes within the general scope of this contract..."<sup>6</sup> When speaking of the contracting officer, the *FAR* defines this person as someone



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With the authority to enter into, administer, and/or terminate contracts, and make related determinations and findings. The term includes certain authorized representatives of the contracting officer acting within the limits of their authority as delegated by the contracting officer. 'Administrative contracting officer (ACO)' refers to a contracting officer who is administering contracts.<sup>7</sup>

Contractors forever confuse the contracting officer, who has these authorities, with the ACO, who normally does not possess them. Indeed, the most common CO/ACO split occurs in the Department of Defense (DOD), where buying activities employ the COs (who possess this authority), but the contracts are administered by the Defense Contract Management Agency (DCMA), a group of ACOs who lack the authority. Many times the CO and ACO are located at separate geographic locations. Although a CO may delegate his or her authority to an ACO, it is rare.

It is easy to find out if a person (such as an ACO, COR, COTR, or inspector) who attempts to direct you or make a change in your contract has authority to do so—just ask this person for his or her written delegation of authority. If it isn't in writing from a contracting officer (or his designee), it isn't valid direction under the *FAR*. If an ACO, COR, or COTR is reluctant to give you a copy of his or her delegation, you should conclude that he or she possesses no such authority and contact your CO. The case law is filled with contractors who took direction from someone without authority and the result is always the same—the court or board finds against the contractor or denies the claim because the contractor did not comply with the written contract.

## 4 Do you always comply with quality control or quality assurance requirements and specifications in your contract?

Quality is a crucial aspect of any contract. Contract quality requirements are the "technical requirements in the contract relating to the quality of the product or service and the clauses prescribing

inspection and other quality controls incumbent on the contractor to assure that the end product or service conforms to the contract requirements."<sup>8</sup> Basically, there are four different quality requirements.

- Commercial items that rely on the contractor's existing quality assurance systems as a substitute for government inspection;
- Government reliance on inspection by the contractor for contracts less than \$100,000;
- Standard inspection requirements that require the contractor to maintain an acceptable inspection system (including records), and also give the government the right to test and make inspections while work is in progress; and
- Higher-level contract quality standards for complex or critical items (high-performance aircraft, submarines, etc.).<sup>9</sup>

The government is entitled to insist upon strict compliance with the contract specifications and to require correction of nonconforming work.<sup>10</sup> It is imperative that a contractor develop a quality assurance or quality control inspection system that rejects nonconforming items and tenders only those goods or services that meet the contract. The government deems such quality systems essential for all contractors, and even if you must engage a consultant to develop your system, the cost will be well worth it. Failure to do so could result in rejection of your goods as nonconforming.

## 5 Do you always follow what is in your written contract, or do you listen to verbal promises and direction?

Only the written word is binding. Contractors should learn to ignore diplomatically any verbal advice from any government official—no matter how convincing. The written contract always defines your duties and responsibilities. Reliance upon verbal advice from unauthorized government employees is at the contractor's risk and the government is not bound by such advice.<sup>11</sup> This is

particularly true when a government official attempts to make a "side deal" (e.g., "Instead of fixing the faucets in Building 520, as required by the contract, just fix the toilet in the commander's house. We will call it a wash.") These verbal requests are usually made by government officials who do not have legal authority to change the contract, (i.e., are not warranted contracting officers,) and may have their own agenda. In these circumstances, you must respond diplomatically, but otherwise ignore such requests.

## 6 Do you fail to deliver on time as required by the delivery schedule and think the government will deem this to be acceptable?

Failure to meet the delivery schedule is a very common reason for the government to terminate your contract for default immediately. Do not think you can be late and get away with it. Default can be prevented only by a good reason or cause that was beyond the contractor's control and without its fault or negligence.<sup>12</sup> The fixed-price default clause states that the government may terminate a contract in whole or in part if the contractor fails to deliver the supplies or to perform the services within the time specified in the contract.<sup>13</sup> No "cure notice"—a letter of noncompliance requesting that the contractor make corrections—is required. The government may also terminate the contract after sending a cure notice if the contractor fails to make progress, so as to endanger performance, or fails to perform any other provision of the contract and the condition is not cured within 10 days.

It is very important to perform all of the required aspects of your contract, including on-time delivery. The consequences of a default termination are severe, and the courts call it a "drastic sanction."<sup>14</sup> Not only does a default cause you to lose your current contract, but it has two other severe consequences.

- The government may acquire supplies or services similar to those terminated, and the contractor will be liable to the government for any excess costs for those supplies or services (i.e., costs in

excess of the price in the terminated contract)—this could be substantial and could easily bankrupt a small business; and

- The default may come back to haunt you by causing the loss of future contracts. All government contracts over \$100,000 are required to include a certification by the contractor stating whether they have or have not “within a three-year period preceding [the contract] had one or more contracts terminated for default by any federal agency.”<sup>15</sup>

There is no way to hide your default and you can rest assured that the next contracting officer is likely to think twice about awarding you a new contract if you have a recent default.

## 7 Do you invoice properly, in accordance with the requirements of your contract?

Cash flow is the lifeblood of any business, including government contracting. Every contractor needs cash to operate, purchase supplies, pay rent, hire employees, and take care of many other business activities. Surprisingly, many government contractors are somewhat cavalier about cash flow. Having received a contract, they fail to follow up on the receipt of payments from

the government, which is a notoriously slow payer despite the Prompt Payment Act, which requires payment within 30 days of a proper invoice.<sup>16</sup> Improper invoicing can hurt a government contractor in two ways: (1) if the contractor doesn't invoice properly, the invoice may not get paid; and (2) an overzealous or cheating contractor may falsify its invoices, which is likely to result in civil and criminal fraud prosecution, something that no government contractor wants.

What are the solutions for these two problems? For the first one, the key is to develop a system that does the following:

- Ensure that every invoice is “proper,” that it fully complies with all contractual requirements, and is sent to the correct address stated in the contract.
- If you do not receive payment within 45 days, write to the contracting officer and insist that the invoice be paid within seven days (or if it was not a proper invoice, correct and resubmit it).
- If you do not get paid within seven days, obtain counsel and submit a claim for nonpayment of an invoice that is in dispute.

There is one simple solution to the

potential falsification of invoices—have an effective compliance program in place that trains employees and emphasizes the importance of accurate statements in all aspects of government contracting.<sup>17</sup>

## 8 On multiple award schedule (MAS) contracts, do you give most favored customer pricing to the government throughout the entire life of the contract?


The General Services Administration (GSA) multiple award schedules, also known as the federal supply schedules, provide a simplified process for obtaining commercial supplies and services at prices associated with volume buying.<sup>18</sup> The volume of purchases from the schedules is now more than \$30 billion annually, even though GSA's volume declined as a result of the Abu Ghraib prison scandal, where the U.S. Army obtained interrogators and screeners through an MAS contract for information technology.<sup>19</sup> Many contractors think they have reached a state of nirvana when they receive an MAS contract. They think they now have a “license to sell” to the federal government and a continuous stream of revenue. What they overlook are the terms and conditions in the MAS contract, especially the Price Reductions Clause.<sup>20</sup> This clause requires the contractor to reduce prices under its MAS contract if the contractor grants more favorable terms or conditions to another. Many contractors overlook this requirement and the results are not found by GSA until years later during an audit—when GSA demands huge refunds.

The solution to this problem is central control of MAS pricing by the contractor, so that any time a price reduction triggers the clause, the contractor can ensure that all future sales are made at the new, lower price.

## 9 Do you volunteer to perform extra work?

Volunteers embark upon duties of their own free will and without any expectation that they will be paid for the work. Government contractors frequently fall

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into this category in a desire to please their clients. If a contractor freely elects to perform work not required by a contract and without a formal change order, the contractor is a volunteer that will not be paid for the services.<sup>21</sup> Contractors should be wary of any situation where the government asks for services or performance not included in the contract. To be compensated for such a constructive change, the contractor must identify the work, notify the contracting officer, and request an appropriate change order and equitable adjustment. If the contracting officer refuses, the contractor should not perform the work unless it intends to be a volunteer and perform uncompensated work.

## 10 Do you fail to flow down your FAR clauses to your subcontractors and suppliers?

Many government contracts are complex and require prime contractors to obtain assistance from other contractors to fully perform. A common method is the use of subcontracts between the prime contractor and a subcontractor. A subcontractor is generally any firm that supplies materials or performs services for a prime contractor, pursuant to the requirements of a government contract. Subcontract management is critical.

Certain clauses in the government's prime contract must flow down, i.e., be incorporated into the subcontracts awarded by the prime. These clauses are designed to protect the government's rights and interest and to promote government policies. Some clauses explicitly mandate flow down to the subcontracts (e.g., the audit clause,<sup>22</sup> the cost accounting standards clause,<sup>23</sup> the equal opportunity clauses<sup>24</sup>), while other clauses implicitly require the flow down (e.g., the Davis-Bacon Act<sup>25</sup> and the Service Contract Act of 1965 clauses<sup>26</sup>). Strangely enough, the government does not require, either implicitly or explicitly, the flow down of the changes clause<sup>27</sup> or the termination for convenience of the government clause.<sup>28</sup> However, it is essential that these two clauses flow down in every subcontract;

otherwise the prime contractor will be unable to terminate the subcontractor in the event of a government convenience termination. Similarly, the prime contractor will be unable (absent what could be a monumental price increase) to change the specifications, delivery date, or quantity in response to a government-ordered change order. The subcontract is a commercial contract between two commercial entities, and is subject to the *Uniform Commercial Code* and state laws. The concepts of "change" or "termination for convenience" are not part of commercial contracts, which require mutual agreement by the parties in order to change any term of an existing contract.<sup>29</sup>

Prime contractors should examine their contracts carefully, and whenever there is a doubt in their mind, flow down the prime contract clause to the subcontractor, making appropriate changes in the text. This is normally accomplished by incorporating the text of the clause by reference in the subcontract to its *FAR* clause number and title, and by stating in the subcontract that "the clauses are incorporated herein by reference with the same force and effect as if set forth in full text."

Furthermore, the subcontract should also include a statement that explains that whenever the phrase "government or contracting officer" appears in the clause, it shall be replaced by "prime contractor," and whenever the term "contractor or prime contractor" appears in the clause, it shall be replaced by "subcontractor." Subcontracts often include several pages of clauses incorporated by reference. Whenever there is any doubt, the prime contractor should flow down the substance of the clause in the prime contract to the subcontract, thereby ensuring that the subcontractor will be required to comply with the same terms with which the prime contractor must comply.

### Conclusion

While sometimes the product of a government contract is indeed a rocket, the administration of government contracts is not really "rocket science." Effective government contract administration is similar to good business practices in the commercial world. A company examines its problems and procedures, breaks them



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down, and devises working solutions. The larger government contractors use numerous written procedures for administering their government contracts. The smaller (and newer) government contractors need to establish simple, but effective procedures, train their personnel, and heed the lessons learned by their predecessors. Finally, all government contractors should have the ability to call upon government contracts counsel when things go sour, or when the government acts unreasonably and forces the contractor to demand and enforce its rights. **CM**

**Endnotes**

1. See FAR 14.201-1.
2. FAR 52.252-2.
3. See FAR Part 48 and FAR 52.248-1.
4. FAR 1.602-1.
5. See, e.g., Department of Agriculture Acquisition Regulation 416.405-2; Department of State Acquisition Regulation 652.242-70.
6. FAR 52.243-1.
7. FAR 2.101.
8. FAR 46.101.
9. FAR 46.202
10. *Cascade Pac. Int'l v. United States*, 773 F.2d 287, 291 (Fed. Cir. 1985).
11. *Spring St. Found., Inc.*, AGBCA No. 92-232-1, 94-2 BCA ¶ 26,737.
12. FAR 52.249-8(c).
13. FAR 52.249-8.
14. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 765 (Fed. Cir. 1987).
15. FAR 52.209-5.
16. 31 U.S.C. § 3901 et seq.; see also FAR Part 32.9 and FAR 52.232-25.
17. The attributes of an effective government contract compliance program were explained in my July 1999 article "Compliance Programs: They're Worth It!", *Contract Management* (Vol. 39, No. 7).
18. See FAR Part 8.4.
19. GAO-05-201, "Interagency Contracting: Problems with DOD's and Interior's Orders to Support Military Operations," April 29, 2005.
20. GSAM 552.238-75.
21. *N. Star Ala. Hous. Corp. v. United States*, 30 Fed. Cl. 259, 272 (1993) [citing *Calfon Constr. v. United States*, 17 Cl. Ct. 171, 177 (1989)].
22. FAR 52.215-2.
23. FAR 52.230-2.
24. FAR 52.222-26.
25. FAR 52.222-6.
26. FAR 52.222-41.
27. FAR 52.243-1.
28. FAR 52.249-2.
29. U.C.C. § 2-209.

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