



BOSTON | HARTFORD | STAMFORD | NEW YORK | NEWARK | EAST BRUNSWICK | PHILADELPHIA | WILMINGTON | WASHINGTON, DC

Essentials of Government Contracting: Post-Award



Bonnie A. Vanzler, Esq.
NCMA Boston Chapter
54th Annual March Workshop
March 11, 2015

Overview / Agenda

- ◆ Not so fast! Dealing with post-award bid protests.
- ◆ Reading your contract. Yes, all of it, including the never-ending list of FAR clauses.
- ◆ Understanding subcontract flow-down requirements.
- ◆ Understanding changes, stop-work orders, contract terminations, and contract close-out.
- ◆ Handling claims and disputes.
- ◆ Why effective contract administration matters not just for the current contract, but also for your next one!

Post-Award Bid Protests

Post-Award Bid Protests

- ◆ A written objection by an “interested party” to the award of a contract
 - Who is an interested party?
 - An actual bidder that did not win the contract
 - Need to be able to demonstrate prejudice
- ◆ Strict timeliness rules apply!
 - When did you know (or when should you have known) the basis of protest?
 - Special rules apply if a required debriefing occurs

Post-Award Protests: Where to File?

<u>Forum</u>	<u>Pros</u>	<u>Cons</u>
Procuring Agency	<ul style="list-style-type: none">- Less formal- Less expensive- Decision usually within 35 days	<ul style="list-style-type: none">- Access to less information- Review by the same agency (not a neutral party)
U.S. Government Accountability Office	<ul style="list-style-type: none">- Availability of a stay- Early release of agency memorandum & report- Expertise of GAO- Decision within 100 days	<ul style="list-style-type: none">- Limited opportunity for a hearing- More adversarial
U.S. Court of Federal Claims	<ul style="list-style-type: none">- Opportunity to seek a temporary restraining order- Opportunity for discovery	<ul style="list-style-type: none">- No automatic stay- No decision timetable- More expensive

Potential Post-Award Protest Grounds

- ◆ Non-responsiveness of successful bidder's bid
- ◆ Flawed evaluation or failure to follow solicitation's established evaluation criteria
- ◆ Organizational conflicts of interest
 - Types: (1) unequal access to information;
 - (2) biased ground rules; (3) impaired objectivity
 - Failure to consider and evaluate potential OCIs
 - Inadequate OCI mitigation plan
- ◆ Inadequate, unequal, or misleading discussions

Post-Award Protests: Available Relief

- ◆ Stay of contract award/performance
 - Something to think about as the incumbent!
- ◆ Termination of contract award to competitor
- ◆ Reevaluation of bids/proposals
- ◆ Reopening discussions
- ◆ Conducting a new round of best and final offers
- ◆ Issuance of a new or revised solicitation
- ◆ Attorney's fees
- ◆ Other agency corrective action

Reading Your Contract and Basics of Contract Administration

Executing Your Contract

- ◆ How many contractors actually read the entire contract before beginning performance?
 - Not just the Statement of Work
 - . . . including the full text of FAR clauses incorporated by reference?
- ◆ Do not start work and incur costs before the contract is actually signed!
 - A notice of award ≠ an executed contract

Reading Your Contract

- ◆ Mandatory vs. permissive language
 - “*Shall*” or “*Must*” = mandatory, imperative requirement
 - When “shall” is used in the FAR, it means that the regulation must be followed unless the contracting officer has obtained a waiver or deviation
 - “*Should*” or “*May*” = non-mandatory, permissive
 - FAR 2.101 defines “should” as “an expected course of action or policy that is to be followed unless inappropriate for a particular circumstance”
 - Except as used in the FAR, “no person may ...” means that no person is required, authorized, or permitted to do the act described

Contract Format

- ◆ Solicitation *provisions* vs. contract *clauses*
- ◆ Uniform contract format:

16. TABLE OF CONTENTS							
(X)	SEC.	DESCRIPTION	PAGE(S)	(X)	SEC.	DESCRIPTION	PAGE(S)
PART I - THE SCHEDULE				PART II - CONTRACT CLAUSES			
	A	SOLICITATION/CONTRACT FORM			I	CONTRACT CLAUSES	
	B	SUPPLIES OR SERVICES AND PRICES/COSTS		PART III - LIST OF DOCUMENTS, EXHIBITS AND OTHER ATTACH.			
	C	DESCRIPTION/SPECS./WORK STATEMENT			J	LIST OF ATTACHMENTS	
	D	PACKAGING AND MARKING		PART IV - REPRESENTATIONS AND INSTRUCTIONS			
	E	INSPECTION AND ACCEPTANCE			K	REPRESENTATIONS, CERTIFICATIONS AND OTHER STATEMENTS OF OFFERORS	
	F	DELIVERIES OR PERFORMANCE			L	INSTRS., CONDS., AND NOTICES TO OFFERORS	
	G	CONTRACT ADMINISTRATION DATA			M	EVALUATION FACTORS FOR AWARD	
	H	SPECIAL CONTRACT REQUIREMENTS					

- ◆ Don't forget to pay careful attention to:
 - Clauses incorporated by reference
 - Clauses that may be read into contract by operation of law (e.g., Termination for Convenience clause)

Order of Precedence

- ◆ FAR 52.215-8, Order of Precedence—Uniform Contract Format
 - Any inconsistencies shall be resolved by giving precedence in the following order:
 - The schedule
 - Representations and other instructions
 - Contract clauses
 - Other documents, exhibits, and attachments
 - The specifications

The FAR as a Guide to Contract Interpretation

- ◆ The government's overriding objective in contract interpretation is to avoid uncertainty
- ◆ Achieved by creating standardized language that governs nearly every conceivable eventuality that may arise in the course of performance
 - FAR Part 52—Text of Provisions and Clauses
 - Enhances predictability in contract administration by developing a coherent and uniform body of precedent
 - When disputes arise, resort to interpretation of standardized statutes, regulations, and clauses

Developing a Strong Working Relationship

- ◆ Necessity of cooperation and good faith, on both sides!
- ◆ Government's interest in obtaining performance within the contract price vs. contractor's interest in maximizing profit
 - Contractors must keep in mind that the government is entitled to receive the promised performance
 - Government must keep in mind that the contractor may be entitled to price adjustments under certain standard clauses
- ◆ **Key themes:** Documentation of contract events and timely identification and communication of differences in contract interpretation or other problems

Contracting Officer Authority

- ◆ As a contractor, you should only take directions from officials who have the actual authority to issue directives under and administer the contract!
 - The government cannot be bound by unauthorized acts of its officers or agents
 - FAR 1.602-1(a): “Contracting officers have authority to enter into, administer, or terminate contracts and make related determinations and findings. Contracting officers may bind the Government only to the extent of the authority delegated to them.”
- ◆ **Trap for the unwary:** Reliance on oral promises, advice, and directions vs. following the contract as written and formally modified

Subcontractor Flow-Downs

Subcontractor Flow-Down Requirements

- ◆ Clauses prescribed by the government that “flow down” rights and responsibilities of the prime contractor to the subcontractor
 - Intended to promote federal contracting policies
 - Also serve to protect the prime contractor’s interests
- ◆ How to flow down a FAR clause?
 - List by reference to FAR number, title, and date
 - Prefatory language:
 - *“These clauses are incorporated by reference with the same force and effect as if set forth in full text.”*
 - *“Whenever the term ‘government’ or ‘contracting officer’ appears in a clause, it shall be replaced by ‘prime contractor’ and whenever the term ‘contractor’ or ‘prime contractor’ appears in a clause, it shall be replaced by ‘subcontractor.’”*

Subcontractor Flow-Down Requirements

- ◆ Language to look for: “The Contractor shall include the substance of this clause, including this paragraph (x), in subcontracts [insert threshold / standard].”
- ◆ Examples of clauses expressly required to be incorporated in certain subcontracts:
 - FAR 52.203-7, Anti-Kickback Procedures
 - FAR 52.203-13, Contractor Code of Business Ethics and Conduct
 - FAR 52.222-21, Prohibition of Segregated Facilities
 - FAR 52.222-26, Equal Opportunity
 - FAR 52.222-54, Employment Eligibility Verification
 - Consult FAR 52.212-5(e) for commercial item subcontracts

Subcontractor Flow-Down Requirements

- ◆ Clauses that should always be incorporated:
 - **Changes clause**
 - *E.g., “The prime reserves the right to make changes within the general scope of this agreement to the extent the prime contract is changed by the government.”*
 - **Termination for Convenience clause**
 - *E.g., “In the event that the prime contract is terminated in whole or in part for convenience of the government, the prime may terminate performance under this agreement to the same extent as the prime contract was terminated.”*
- ◆ Contrary to customary commercial practice, but necessary to protect the prime!

Changes and Stop Work Orders

Changes

- ◆ A “change” is broadly defined as any alteration to a contract permitted by the Changes clause
- ◆ The purpose of having a changes clause:
 - To provide operating flexibility by giving a means for effectuating changes in government requirements
 - To allow the government to authorize additional work within the general scope of the contract without undertaking a new procurement
 - To provide the contractor a means of proposing changes in its performance

Two General Types of Changes

- ◆ **Unilateral**: Change order signed only by government
 - Typically used to make administrative changes
 - Does not require the contractor's consent to the change
- ◆ **Bilateral**: Modification or supplemental agreement signed by both the government and the contractor
 - Typically used to execute negotiated equitable adjustments resulting from the issuance of a change order or to reflect other agreements modifying the terms of the contract

Government's Authority to Direct Changes Under the Contract

- ◆ FAR 43.102(a): “Only contracting officers acting within the scope of their authority are empowered to execute contract modifications on behalf of the Government.”
 - “Other Government personnel shall not—
 - (1) Execute contract modifications;
 - (2) Act in such a manner as to cause the contractor to believe that they have authority to bind the Government; or
 - (3) Direct or encourage the contractor to perform work that should be the subject of a contract modification.”
- ◆ FAR 43.202: “Change orders shall be issued by the contracting officer except when authority is delegated to an administrative contracting officer.”

The Changes Clause

- ◆ Government contracts will typically contain a Changes clause that permits the government to make unilateral changes “within the general scope” of the contract
 - Standard clauses at FAR 52.243-1 through 52.243-5
- ◆ FAR 43.201(b): “The contractor must continue performance of the contract as changed,”
 - “except that in cost-reimbursement contracts ... the contractor is not obligated to continue performance or incur costs beyond the limits established in the Limitation of Cost clause.”

Standard Form 30

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT				1. CONTRACT ID CODE	PAGE	OF	PAGES
2. AMENDMENT/MODIFICATION NO.		3. EFFECTIVE DATE	4. REQUISITION/PURCHASE REQ. NO.	5. PROJECT NO. (If applicable)			
6. ISSUED BY		CODE	7. ADMINISTERED BY (If other than Item 6)		CODE		
8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code)				(X) 9A. AMENDMENT OF SOLICITATION NO.			
				<input type="checkbox"/> 9B. DATED (SEE ITEM 11)			
				<input type="checkbox"/> 10A. MODIFICATION OF CONTRACT/ORDER NO.			
				<input type="checkbox"/> 10B. DATED (SEE ITEM 13)			
CODE		FACILITY CODE					

“Except as provided herein, all terms and conditions of the Document referenced in Items 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.”

13. THIS ITEM ONLY APPLIES TO MODIFICATION OF CONTRACTS/ORDERS. IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.

CHECK ONE	A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.
<input type="checkbox"/>	
<input type="checkbox"/>	B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).
<input type="checkbox"/>	C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:
<input type="checkbox"/>	D. OTHER (Specify type of modification and authority)

E. IMPORTANT: Contractor is not, is required to sign this document and return copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

“Within the General Scope of the Contract”

- ◆ Examples of permissible changes:
 - Drawings, designs, or specifications
 - Description of services to be performed
 - Method of shipping or packing
 - Method or manner of performance
 - Time of performance
 - Place of delivery or performance
- ◆ To identify a change, you have to know what the contract baseline is!
 - Proposal expectations \neq contract requirements

Out of Scope Changes

- ◆ Two circumstances where the scope of a contract modification is frequently challenged:
 - **Contractor** claims that the modification is a “cardinal change” amounting to a breach of contract
 - **Competitor** claims that the modification violates the Competition in Contracting Act
 - Legal theory: The scope of work embodied in the modification should instead be the subject of a new competitively awarded contract

What is a Cardinal Change?

- ◆ No bright-line standard (instead, case-by-case inquiry)
- ◆ Look to the original scope of work
 - The broader the language, the greater the ability to make significant changes
 - The more specific and narrow the language, the more limited the scope of permissible changes
 - To what degree, if any, did the contract anticipate changes from the beginning?
- ◆ Cumulative, fact-intensive analysis of the number of changes, their cost-impact, and any related delays
 - Would the modified contract have invoked a significantly different field of competition?

Contractor's Options When Faced with a Cardinal Change

- ◆ (1) Accept the change and perform under the contract as changed
 - Waives contractor's right to later challenge the modification as out of scope
 - But may still dispute the amount of the equitable adjustment due under the Changes clause
- ◆ **(2) Accept the change and perform while reserving the right to pursue damages for breach of contract**
- ◆ (3) Refuse to perform
 - Presents the greatest amount of risk for the contractor
 - Termination for Default
 - Negative past performance rating

The Contractor's Right to Seek an Equitable Adjustment

- ◆ Upon receipt of a change order, the contractor must generally continue performance of the contract as changed
- ◆ But the contractor also has the right to seek an equitable adjustment if the change causes an increase (or decrease) in the cost of, or the time required for, performance of any part of the work
 - Must assert right to equitable adjustment w/in 30 days
 - Contract to be modified to reflect equitable adjustment
 - Disagreements re: the availability or amount of an equitable adjustment are subject to the Disputes clause

Forms of Equitable Adjustment by Contract Type

<u>Contract Type (FAR Clause)</u>	<u>Forms of Potential Equitable Adjustment</u>
Fixed-Price (FAR 52.243-1)	<ul style="list-style-type: none">- Contract price- And/or delivery schedule
Cost-Reimbursement (FAR 52.243-2)	<ul style="list-style-type: none">- Estimated cost- Estimated delivery or completion schedule- Amount of any fixed fee- And/or any other impacted contract terms
Time and Materials or Labor Hours (FAR 52.243-3)	<ul style="list-style-type: none">- Ceiling price- Hourly rates- Delivery schedule- And/or any other impacted contract terms

Changes Under Commercial Item Contracts

- ◆ Under the standard changes clause, the government may make unilateral changes, subject to granting the contractor the right to an equitable adjustment
- ◆ But the changes clause that applies to commercial item contracts requires all changes to be **bilateral**
 - FAR 52.212-4(c): “Changes in the terms and conditions of this contract may be made only by written agreement of the parties.”
 - The clause assumes that pricing will be negotiated in a separate bilateral modification prior to implementation of the change

The Constructive Changes Doctrine

- ◆ A constructive change is an oral or written communication, act, or omission by the contracting officer that is construed as having the same effect as a written change order
- ◆ Necessary elements:
 - (1) Change – Contractor performs work beyond the minimum contract requirements
 - (2) Government causation/order/fault – The CO required the additional performance (or change in price/schedule)
 - (3) Duty to protest – Contractor generally must promptly put the government on written notice of what it considers to be a constructive change

Examples of Constructive Changes: Disagreements Over Contract Requirements

- ◆ Scenario: Government's incorrect interpretation of the contract requirements forces the contractor to perform more extensively or in a more expensive or difficult manner than a correct reading of the contract requires
- ◆ Result: Government has constructively changed the contract requirements by insisting on an erroneous interpretation that makes performance more burdensome
- ◆ Remedy: Continue performance, notify CO of constructive change, seek an equitable adjustment for additional costs incurred

Examples of Constructive Changes: Defective Specifications or Nondisclosure

- ◆ Scenario: Defective contract specifications or the government's nondisclosure of material information result in greater actual expenses than the contractor reasonably thought it was bidding on
- ◆ Result: Government has constructively changed the contract by misleading the contractor about the true nature and full extent of required performance
- ◆ Remedy: Continue performance, notify CO of constructive change, seek an equitable adjustment to recover costs of attempting performance pursuant to defective specifications and increased cost of performing under revised specifications

Examples of Constructive Changes: Acceleration

- ◆ Scenario: The contracting officer demands that performance be completed earlier than originally contracted for, which imposes additional costs on contractor to timely perform
- ◆ Result: Government has constructively changed the contract by accelerating performance
- ◆ Remedy: Continue performance, notify CO of constructive change, seek an equitable adjustment for additional costs incurred

Stop-Work Orders

- ◆ The government is permitted to unilaterally require the contractor to suspend all or any part of the work called for by the contract for 90 days
 - Must be by written notice
 - Prior to expiration of the stop-work order, the government must:
 - Terminate the contract (or suspended portion of work);
 - Cancel the stop-work order; or
 - Extend the period of time for the stop-work order (with contractor's agreement)

Impact of a Stop-Work Order

- ◆ FAR 52.242-15, Stop-Work Order
 - Contractor must immediately stop work upon receipt of notice and take steps to minimize costs
 - Contractor must resume work if the stop-work order is cancelled or the period of the order expires
 - Grants contractor the right to seek extension of time, price adjustment, or reasonable costs
 - As the contractor, you should not resume work until a contract modification is executed granting schedule and/or price relief

Contract Termination and Contract Close-Out

Terminations for Default

- ◆ FAR 49.401(a): “Termination for default is generally the exercise of the Government’s contractual right to completely or partially terminate a contract because of the contractor’s actual or anticipated failure to perform its contractual obligations.”
- ◆ FAR 49.401(b): “If the contractor can establish, or if it is otherwise determined that the contractor was not in default or that the failure to perform is excusable; *i.e.*, arose out of causes beyond the control and without the fault or negligence of the contractor, ...a termination for default will be considered to have been a termination for the convenience of the Government.”

Grounds for Termination for Default

◆ Performance failures

- Failure to deliver on time and in accordance with specifications
- Timely delivery of defective supplies or services
 - The “substantial compliance” doctrine allows reasonable time to cure under supply contracts, provided that:
 - Delivery was timely
 - Contractor had a reasonable belief that the goods conform
 - Defects are minor and readily correctable
 - The “substantial completion” doctrine allows reasonable time to cure under service contracts, provided that:
 - Contractor substantially (but not completely) performed in good faith
 - Deviations from contract requirements are minor

Grounds for Termination for Default, continued

- ◆ **Failure to make progress** so as to endanger timely performance
 - Grants government the right to terminate before the contract due date when there is a reasonable belief that the contractor cannot perform on time
 - *E.g.*, Progress reports indicating late delivery, on-site inspections revealing a lack of progress, failure to meet progress milestones or interim submission requirements
 - Requires a 10-day cure notice before termination
- ◆ **Breach** of other material contract provisions
 - Also requires a 10-day cure notice before termination

Additional Grounds for Termination for Default

◆ Failure to proceed

- Contractor fails or refuses to go forward with performance pending a dispute arising under the contract or in accordance with a change issued by the government

◆ Anticipatory repudiation

- Contractor clearly expresses (through words or conduct) a refusal or inability to complete the work on time
 - Standard usually stated as: “an unequivocal manifestation of the contractor’s intention not to perform”
 - *E.g.*, Express refusal to perform, express statement that contractor cannot perform, actions indicating inability to perform, failure to give adequate assurances of performance after receipt of cure notice

The Government's Discretion to Terminate

- ◆ Government has the discretion to decide whether to exercise its contractual right to proceed with a termination for default
 - Factors for consideration include:
 - The nature of the failure
 - Availability of supplies or services from other sources
 - Urgency of government's need for the supplies or services
 - Whether the failure is excusable
 - Alternatives to termination include:
 - Modification of delivery schedule
 - Permit substitute performance by subcontractor

Potential Defenses to Default Termination

- ◆ Excusable delay
 - Must be “beyond the control and without the fault or negligence” of the contractor
 - If construction contract, must also be “unforeseeable”
- ◆ Defective specifications
- ◆ Impossibility of performance (objective standard)
- ◆ Commercial impracticability (objective standard)
 - If performance is vastly different from what was contemplated by the parties and the change in performance results in significantly greater costs or time needed to perform
- ◆ Government fault

Termination for Default Procedures: Pre-Termination Notices

- ◆ To protect the contractor, specific procedures must be followed when exercising a termination for default
- ◆ **10-day cure notice** (or longer if authorized by CO)
 - Must be sent prior to termination based on a failure to make progress or a material breach of contract
 - Is not required when termination is based on failure to perform or deliver on time
- ◆ **Show cause notice** (optional)
 - Notifies the contractor of the possibility of a termination
 - Contractor requested to show cause why the contract should not be terminated

Termination for Default Procedures: The Termination Notice

- ◆ Must state:
 - The acts or omissions constituting the default
 - That the contractor's right to proceed is terminated
 - Contractor may be liable for any excess costs of reprocurring the supplies or services being terminated
 - Government reserves all rights and remedies provided by law or under the contract
 - Contractor's right to appeal under the Disputes clause

Consequences of a Default Termination

◆ Impact on contractor:

- Government not liable for costs of unaccepted work
- Return of progress, partial, or advance payments
- Liability for actual or liquidated damages
- Negative past performance rating
- Debarment risk

◆ Impact on government:

- Lost time in obtaining the goods or services sought
- Scrutiny of contract administration failures that led to the drastic remedy of seeking to terminate for default

Consequences of a Default Termination, continued

- ◆ One additional huge area of potential liability for a defaulted contractor: **Excess costs of reprocurement**
 - Costs incurred by the government in excess of the terminated contract price may be recovered from the defaulted contractor if the government repurchases the supplies or services or completes the work at a price exceeding the price under the terminated contract (!!!)
- ◆ For the contractor to be held liable:
 - (1) The reprocured supplies, services, or work must be the same as or similar to the original;
 - (2) The government must actually incur the costs; and
 - (3) The government must reasonably minimize the excess costs (e.g., by obtaining maximum feasible competition)

Tips for Avoiding Default Termination

◆ Before award:

- Never propose or agree to a contract schedule you know you cannot meet
- Closely review all contract specifications

◆ After award:

- Maintain a good working relationship with your customer!
- Provide timely performance in accordance with the specifications
- Formalize extensions for excusable delays
- Never refuse to perform
- Submit timely responses to any cure or show cause notices

Terminations for Convenience

- ◆ Grants the government a broad, unilateral right to terminate **without cause**
 - Whenever it is in the government's best interest to do so
- ◆ Contractor's recovery is generally limited to costs incurred, profit on work performed, and costs of preparing a termination settlement proposal
 - No right to recover lost anticipated profit
 - TFC clause in commercial item contracts limits recovery to a % of the contract price reflecting the % of work performed prior to the notice of termination, plus reasonable costs resulting from the termination

The Government's Discretion to Terminate

- ◆ Little guidance on the factors that should be considered in determining “the government’s interests” to terminate for convenience
- ◆ TFC typically occurs:
 - In the event of a successful post-award bid protest (termination of unlawfully awarded contract)
 - When government no longer needs the work performed
 - Upon deterioration of the parties’ relationship
- ◆ Limitations on the government’s right to terminate
 - Government bad faith or abuse of discretion (very high standard)

Termination for Convenience Procedures: The Termination Notice

- ◆ Must state:
 - That the contract is being terminated for the convenience of the government
 - Effective date of termination
 - Extent of the termination
 - Any special instructions
 - Steps contractor should take to minimize impact on personnel if the termination will result in a significant reduction of contractor's work force

Termination Settlements

- ◆ After receiving termination notice, contractor must:
 - Immediately stop work on terminated portion
 - Terminate all related subcontracts
 - Advise government of any special circumstances precluding the stoppage of work
 - Preserve and deliver any government property
 - Settle subcontractor termination claims
 - Submit a termination settlement proposal (within 1 year)
 - Contractor to be paid contract price for items completed and accepted
 - Different available accounting methods for handling work in progress
 - May recover termination settlement expenses
 - In the case of a partial termination, submit any necessary requests for equitable adjustment

Contract Close-Out

- ◆ A process to discharge all of the parties' continuing rights and obligations under the contract
- ◆ Forms of discharge:
 - Final payment
 - Government making final payment following the contractor's completion of performance and the government's acceptance
 - Mutual agreement and rescission
 - Parties mutually agree to release each other from unperformed obligations under the contract
 - Contract modification
 - In the form of an “accord and satisfaction”
 - General release (negotiated settlement)

Contract Close-Out: By Final Payment

- ◆ Final payment is made upon completion and acceptance of all work after the contractor presents a properly executed voucher or invoice
 - May be a delay in contract closeout until negotiated overhead rates are finalized
- ◆ Legal effect of final payment
 - Contractor's release of claims
 - The standard changes, suspension of work, and government delay of work clauses expressly bar claims not asserted prior to final payment

Contract Close-Out: Other Forms of Discharge Under the Contract

- ◆ Parties to a contract may discharge the contract by mutual agreement
- ◆ May also discharge the contract by contract modification
 - An accord is typically a bilateral agreement requiring some specific additional performance to satisfy a disputed claim
 - Satisfaction is accomplished upon completion of the specified performance
- ◆ May also execute a general release terminating rights under the contract

Handling Claims and Disputes

Claims and Disputes

- ◆ Disputes between contractors and the government are resolved under the Contract Disputes Act (41 U.S.C. §§ 7101-7109)
- ◆ Disputes “arising under” or “relating to” a contract
 - Examples of remedy-granting clauses:
 - Changes clause, Suspension of Work clause, Differing Site Conditions clause, Termination for Convenience clause
 - Breach of contract claims
- ◆ Subcontractors generally have no right to pursue a claim directly against the government because of lack of privity

The Disputes Clause

- ◆ FAR 52.233-1, Disputes
 - Incorporates disputes process under the Contract Disputes Act
 - 6-year statute of limitations
 - “The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.”

The Disputes Process Under the Contract Disputes Act

◆ (1) Submission of a claim to the contracting officer

- A written demand
- Submitted to the CO
- Requesting a final decision
- Seeking as a matter of right
- Non-routine payment in a sum certain (*i.e.*, state an exact amount), the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract
- Made with sufficient specificity
- And certified, if over \$100,000
 - *“I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.”*

The Disputes Process Under the Contract Disputes Act, continued

◆ (2) Final decision by the contracting officer

- Made in writing, stating that it is a final decision
 - Provide notice of available appeal rights
 - State the reasons for the decision
- CO must issue decision within 60 days
- Or for claims over \$100,000, within 60 days, must notify the contractor of a date certain when a decision will be issued
- Failure to issue a timely decision may result in “deemed denial” of the claim, triggering contractor’s right to appeal
- For claims under \$100,000, failure to issue decision w/in 60 days
 - For claims over \$100,000, failure to specify when a decision will be issued, specification of an unreasonable time for issuing decision, or failure to issue decision within a reasonable time
 - What is reasonable depends on complexity of issues

The Disputes Process Under the Contract Disputes Act, continued

- ◆ (3) **Appeal to agency Board of Contract Appeals or U.S. Court of Federal Claims**
 - 90-day statute of limitations for appeal to BCA
 - 12-month statute of limitations for appeal to COFC
- ◆ (4) **Further appeal to U.S. Court of Appeals for the Federal Circuit**
 - 120-day statute of limitations if appealing from BCA
 - 60-day statute of limitations if appealing from COFC
- ◆ Parties may negotiate a settlement at any point in the disputes process

Wrapping up ...

**Records Retention and
Past Performance Information**

Records Retention

- ◆ FAR 4.703(a): “contractors [and subcontractors] shall make available records, which includes 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, and supporting evidence to satisfy contract negotiations, administration, and audit requirements”
 - Generally for 3 years after final payment
 - 4 years for financial and cost accounting records
 - 4 years for certain payroll records
 - 2 years for time and attendance records
 - 6 years for records relating to demands for payment (keeping in mind the 6-year statute of limitations under the Disputes clause)

Past Performance Information

- ◆ **Why effective contract administration matters not just for the current contract, but also for your next one!**
- ◆ FAR 42.1501(a): “Past performance information ... is relevant information, for future source selection purposes, regarding a contractor’s actions under previously awarded contracts or orders,” including:
 - Record of conforming to specifications
 - Record of forecasting and controlling costs
 - Adherence to contract schedules
 - History of cooperative behavior and commitment to customer satisfaction
 - Record of integrity and business ethics

Past Performance Information as Source Selection Information

- ◆ www.cpars.gov, www.ppirs.gov, and www.fapiis.gov
- ◆ Government is required to check past performance information before awarding any contract in excess of \$150,000
 - 3-year look back (6 years for construction contracts)
- ◆ Agency evaluations of a contractor's past performance (positive and negative) must be provided to the contractor
 - Contractor has the opportunity to submit comments, rebuttal statements, or additional information for consideration by the agency (becomes part of record)

FAR Table 42-1, Evaluation Rating Definitions

<u>Rating</u>	<u>Definition</u>
Exceptional	Performance meets contractual requirements and exceeds many to the Government's benefit. The contractual performance of the element or sub-element being evaluated was accomplished with few minor problems for which corrective actions taken by the contractor were highly effective.
Very Good	Performance meets contractual requirements and exceeds some to the Government's benefit. The contractual performance of the element or sub-element being evaluated was accomplished with some minor problems for which corrective actions taken by the contractor were effective.
Satisfactory	Performance meets contractual requirements. The contractual performance of the element or sub-element contains some minor problems for which corrective actions taken by the contractor appear or were satisfactory.
Marginal	Performance does not meet some contractual requirements. The contractual performance of the element or sub-element being evaluated reflects a serious problem for which the contractor has not yet identified corrective actions. The contractor's proposed actions appear only marginally effective or were not fully implemented.
Unsatisfactory	Performance does not meet contractual requirements and recovery is not likely in a timely manner. The contractual performance of the element or sub-element contains a serious problem(s) for which the contractor's corrective actions appear or were ineffective.

Questions?

Bonnie A. Vanzler



265 Franklin Street

Boston, MA 02110

617.449.6501

bvanzler@mccarter.com