

Intricacies of Contracts

with the Federal Government
Compared to Civilian
Companies,

Part 1

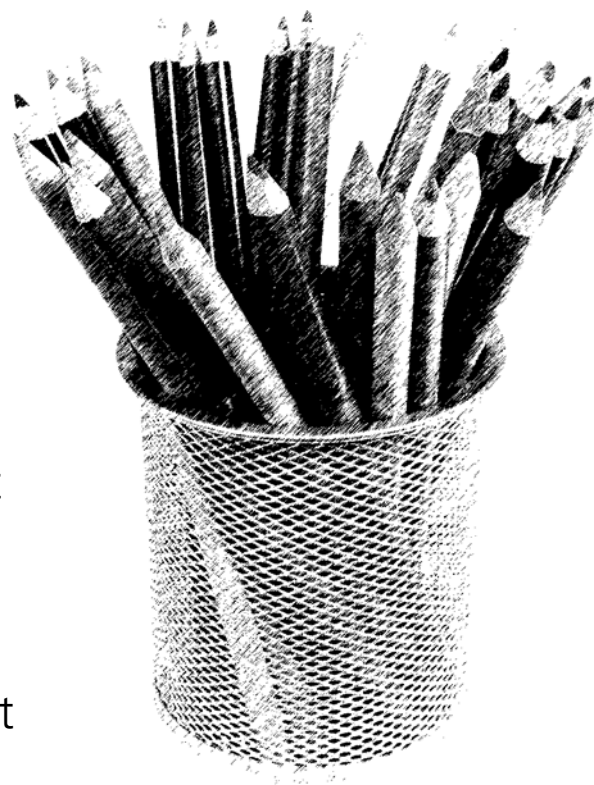


An analysis of the rules, regulations,
and precedents that apply specifically to
government contracts, as well as how
the specialized field of federal contract
law differs from its civilian counterpart.

By Jennifer Hastedt



The laws governing contracts between private companies and the U.S. federal government differ significantly from those commonly applicable to contract law. A lawyer who practices primarily in business-to-business (civilian) contracts must recognize and adhere to a different set of norms when working with private companies that have the potential to be awarded government contracts.¹



This article will explore the intricacies in the rules, regulations, and precedents that apply specifically to government contracts and will focus on how the specialized field of federal contract law differs from its civilian counterpart. The examination will compare civilian contracts for building an office (“Hypothetical 1”) and for accounting services (“Hypothetical 2”) with contracts between a private company and the Department of Defense (DOD).²

Civilian contracts can designate the “applicable law by which the contract will be interpreted.”³ If two Texas corporations enter into and perform a contract in Texas, logically Texas law will be applicable.⁴ A civilian contract that involves entities from different states or performance in a different state can specify the contract “shall be governed by the law of a particular state.”⁵ Civilian contracts are usually governed by state law and a lawyer would look to the state court system for precedent.⁶

Companies holding a prime contract with the federal government do not have a choice of law; all contracts are governed by

federal law.⁷ In addition, “[c]ertain general and permanent laws of the United States, related to public contracts, are revised, codified, and enacted”⁸ in Title 41 of the U.S. Code (U.S.C.). All federal government agencies must follow the same core contracting rules in the *Federal Acquisition Regulation (FAR)*, which is codified in Title 48 of the Code of Federal Regulations (C.F.R.), Chapter 1.⁹ Agency-specific supplemental rules, such as the *Defense FAR Supplement*,¹⁰ which is applicable to all contracts within DOD, must also be followed.

Sometimes the adjudicators make blanket statements like “the validity and construction of contracts to which the federal government is a party is controlled by federal law.” Such statements are largely true, because federal contracting power stems from the national constitutional authority. Nonetheless, these statements do not explain all the nuances of this legal doctrine. In general, when the United States is a contracting party and is acting in its proprietary capacity, and no federal statute or national policy requires otherwise, the courts and other adjudicatory bodies

will subject the federal government to the standard commercial law principles that control private contracting parties.¹¹

After discussing the relevant law, this article will review the types of individuals or agencies involved in both civilian and government contracts and how these differences affect the rights of the contractor. Unique to government contracting, the Defense Contract Audit Agency (DCAA) audits contractors’ accounting systems and businesses can protest the contract award through the Government Accountability Office¹² or request a copy of the contract under the Freedom of Information Act.¹³

This article will conclude by examining the differences regarding the number of agencies and authorities involved in civilian and government contracts. More agencies review and audit government contracts compared to civilian contracts. A general understanding of the topics is best gained through a hypothetical.

Hypothetical 1

Company A plans to build a new office building in San Antonio, Texas. Company A hires Company B, a general contractor, and enters into a civilian contract to construct the office building paying actual cost plus a fixed fee. Company B will then hire subcontractors, such as electricians, plumbers, etc. Company A will monitor the building progress, ensure the contract specifications are being met, and review invoices prior to payment. The city will issue permits and send inspectors to ensure the building is in accordance with building codes and environmental agencies may also monitor the building progress. Once the building is accepted, the final payment is made and the contract is closed pending any future warranty claims.

The federal government contract will follow a similar pattern of events. However, the opportunity will need to be advertised in accordance with federal procurement law, including the Competition in Contracting Act¹⁴ and FAR Part 5. The potential offeror's accounting system will be audited by DCAA to ensure the accounting system accumulates cost by individual contract and is adequate for a cost reimbursement contract.¹⁵ "FAR 15.404-3(b) requires contractors to conduct appropriate subcontract price or cost analysis and include those analyses with their proposal support."¹⁶ Additionally, the "contracting officer can request an audit...to analyze and evaluate the proposal of a subcontractor."¹⁷

Once Company B is awarded a contract with the government to construct a building, usually with the subcontractor team already identified, the government will monitor the building construction. The government contracting officer, or a representative appointed in writing, will monitor the building progress, ensure specifications are being met and approve invoices to be paid by the Defense Finance and Accounting Service. The government will withhold no more than the last 15 percent, or \$100,000, whichever is less, from Company B's fixed fee as a reserve set-aside to protect the government's interests.¹⁸

Invoices are interim, using billing rates agreed to by Company B and the



government.¹⁹ Company B is required to submit an annual incurred cost proposal to DCAA that corresponds to Company B's fiscal year.²⁰ DCAA will then audit Company B to ensure the accounting of the direct and indirect costs are properly computed and billed to the government.²¹ Upon completion of the audit, final indirect rates will be established²²; this process may take a couple of years. Company B must submit a final invoice within 60 days of settlement of final indirect cost rates.²³ The contract will not be closed until the final invoice and a release of claims is received by the government.²⁴

Regulations and Precedent

Fundamentals of Government Contracts

"As a sovereign entity, the United States government has implied authority under the Constitution to enter into contracts."²⁵ Further, "the Tucker Act waives sovereign immunity and provides subject matter jurisdiction for non-tort claims against the United States 'founded either upon

the Constitution, or any act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States.'"²⁶ The government contracting processes strive to ensure the tax dollars are used judiciously.²⁷

A number of high-profile incidents in recent years have seen contractors indicted or convicted of a host of charges, such as accepting kickbacks or bribes or overcharging a government agency. While many of these crimes are, in fact, serious offenses that result in fraud, waste, and abuse of our tax dollars, they often originate from a simple ignorance of a particular law or regulation.²⁸

Lawyers who advise contractors must understand these laws, which are not usually applicable in civilian contract law. Four examples of laws governing federal procurement that would not regularly be used in commercial contracts include:

- The Anti-Kickback Act,
- The False Claims Act,

- The False Statements Act, and
- The Sherman Antitrust Act.²⁹

The Anti-Kickback Act of 1986 defines a “kickback” as: any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to a prime contractor, prime contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract.³⁰

The United States in a civil action may recover twice the amount of each kickback involved in the violation and not more than \$10,000 for each occurrence of prohibited conduct.³¹

It is a violation of the False Claims Act if a person “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval”³² or “knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved”³³ to the federal government. The False Statements Act states:

[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the government of the United States, knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact...or makes or uses any false writing or document...shall be fined under this title, imprisoned not more than five years.³⁴

Major fraud against the United States is:

[The intentional falsification] in any procurement of property or services as a prime contractor with the United States or as a subcontractor or supplier on a contract in which there is a prime contract with the United States, if the value of the contract, subcontract, or any constituent part thereof, for such property or services is \$1,000,000 or more shall...be fined not more than \$1,000,000, or imprisoned not more than 10 years, or both.³⁵

An example of criminal penalties for major fraud is *United States v. Sain*.³⁶ Mr. Sain was the sole shareholder and president of AEC.³⁷ Sain was sentenced “to 37 months imprisonment and three years supervised release. The court sentenced AEC to five years probation and ordered it to pay a special assessment. In addition, the court ordered AEC to pay \$597,124 in restitution, with any amount not paid by AEC to be paid by Sain.”³⁸

Bid rigging and collusive pricing are covered under the Sherman Antitrust Act. Corporate officers and directors can be held personally liable for the awareness of contract compliance violations and the conscious failure to address and resolve such violations.³⁹

Contracts are entered into voluntarily and parties are bound by the agreement to include the contract terms.⁴⁰ A unique aspect to government contracts is “[t]he notion that certain legal mandates are treated as part of the contract,” even when not expressly written.⁴¹ This concept is known as the “Christian Doctrine.”⁴²

Verbal contracts are enforceable civilian contracts⁴³; some civilian contracts require “a writing” for enforcement under the “Statute of Frauds.”⁴⁴ For example, the Uniform Commercial Code (UCC), which “every state has adopted all or some part of,”⁴⁵ requires a writing for contracts involving the sale of goods for more than \$500.⁴⁶ Additionally:

The parol evidence rule assumes that parties will sometimes want to give special authority or significance to a written statement of some or all of their agreement and purports to carry out this desire by excluding evidence that would conflict with such a writing.⁴⁷

In contrast, an obligation between a government agency and another person/agency must have documentary evidence of the agreement’s purpose and be executed during the period the appropriation is available.⁴⁸

Under government contracts, prime contractors must abide by the contract terms and conditions and are subject to the FAR.⁴⁹ Frequently, the prime and subcontractor

“parties will designate ‘federal procurement law’ as the body of law used to interpret the subcontract”⁵⁰ for a government contract. The prime contractor then has the same law for both prime and subcontracts.⁵¹ Also, “it is common that federal contract clauses are ‘flowed down’ in the subcontract”⁵²; therefore, federal procurement law as the applicable law is logical.

“It is against the government’s policy to deal directly with subcontractors.”⁵³ In 2007, the government had prime contracts with approximately 169,000 different contractors.⁵⁴ With so many prime contractors and subcontractors, it is often difficult to manage them.⁵⁵ Also, there is no privity of contract between the government and the subcontractor.⁵⁶ Referring back to Hypothetical 1 for the government contract, a first-tier subcontract that was not paid has a remedy outside of court. The subcontractor can sue on the surety bond that the government required the prime contractor to purchase.⁵⁷

The Miller Act explicitly provides subcontractors with “the right to sue on the surety bond posted by the prime contractor”...but “does not expressly create a substantive right on behalf of a subcontractor to directly sue the United States for compensation owed to him by the prime contractor.”⁵⁸

Contract Clauses

It’s not uncommon for a typical government contract to contain 50–75 standard FAR clauses... Although some resemble counterparts found in the commercial arena, many government contract clauses have no commercial equivalents. Three of the more prominent clauses unique to standard government contracts are: 1) the “Termination for Convenience” clause, 2) the “Changes” clause, and 3) the “Default” clause.⁵⁹

The “Termination for Convenience” clause “permits the government to terminate the contract, at any time, without cause, when in ‘the government’s best interest.’”⁶⁰ The length and terms of a government contract for services contract is dependent upon whether the contract is released as a commercial service,⁶¹ if the contract value

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is under the simplified acquisition threshold of \$150,000,⁶² or a negotiated contract.⁶³

Hypothetical 2

Hypothetical 2 is a service contract for an accounting contract between companies. Under a civilian contract, Company C is purchasing the services of a full-time accounting clerk from Company D. A lawyer negotiating the civilian accounting clerk contract needs to ensure the cost is acceptable to both companies and the proposed rate appears to meet the Fair Labor Standards Act (FLSA) minimum wage.⁶⁴ A contract for full-time accounting services at a cost of \$260 per week may raise concerns that something untoward is occurring because that weekly rate amounts to \$6.50 per hour. A proposed rate for a government contract of \$260 per week for 40 hours of accounting clerk support from Company D cannot be found to be reasonable, which is required.⁶⁵

Such a low

price raises suspicion of either a mistake or the appearance of the company trying to buy-in.⁶⁶

In addition to the FLSA, the government contract is also subject to the McNamara-O'Hara Service Contract Act (SCA) of 1965, as amended, which is applicable to service contracts with the federal government valued over \$2,500.⁶⁷ The SCA applies to "every contract entered into by the United States or the District of Columbia, the principal purpose of which is to furnish services in the United States through the use of service employees."⁶⁸ The service contract "shall contain mandatory provisions regarding minimum wages and fringe benefits."⁶⁹

If the employment market is paying \$10 an hour for an "Accounting Clerk I" and the wage determination for San Antonio is \$13.82,⁷⁰ Company D must pay \$13.82 an hour to an Accounting Clerk I working on the government contract.⁷¹ Hourly wages for the same category of labor vary by county.⁷² Additionally, a prime contractor, as well as its subcontractors, must offer the right to first refusal to some employees working under a predecessor service contract.⁷³

The SCA is only applicable to service contracts. Under the construction contract of Hypothetical 1, the Davis-Bacon and related acts⁷⁴ would be applicable. The Davis-Bacon Act is applicable to all construction contracts over \$2,000.⁷⁵ If no wage determination is mandated for a contract or a labor category is not included, then the FLSA minimum wage applies.⁷⁶

Next month, the focus will be on the differences in subcontracts, advertisement of opportunities, and how the agencies are involved in contracts and authority. For continuity, Hypothetical 2 will continue to be used. **CM**

ABOUT THE AUTHOR

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ENDNOTES

- Throughout this article, contracts between two private companies will be referred to as "civilian contracts" and contracts between a private company and the U.S. federal government will be referred to as "government contracts."
- The federal government spent \$550 billion in fiscal year 2009, of which DOD obligated \$372 billion on contracts for goods and services, making DOD the largest issuer of contracts between private companies and the federal government.
- James F. Nagle and Jonathan A. DeMella, "A Primer on Prime Contractor-Subcontractor Disputes Under Federal Contracts," *Procurement Law* (Winter 2011): 12.
- Ibid.*
- Commercial Knowledge Module: Preparatory Study Manual* (Cengage Learning, eds., 2008): 111.
- Ibid.* If the contract dispute is brought in federal court under diversity jurisdiction, state law will still apply. "A federal court sitting in diversity must apply the choice of law rules of the state in which it sits." (*Cleveland Vending Company Co. v. Hercules Constr. Corp.*, 23 F. Supp. 2d 287, 291 (E.D.N.Y. 1998).)
- See Steven Feldman, *Government Contract Awards: Negotiation and Sealed Bidding* (2010): section 1, at 2.
- 41 U.S.C.A. (2011).
- 48 C.F.R. 1 (2010).
- 48 C.F.R. 2 (2010).
- Feldman, *see* note 7.
- 4 C.F.R. 21 (2010).
- 40 C.F.R. 1515 (2010).
- 41 U.S.C.A. 253 (West).
- FAR 9.106. *See also* DCAA, DCAAP 7641.90, "Information for Contractors" 5-3 (2005), available at www.dcaa.mil.
- DCAA, DCAAM 7640.1, DCAA Contract Audit Manual 914 (Chapter 9, 2012), available at www.dcaa.mil.
- Ibid.*
- FAR 52.216-9.
- FAR 52.216-7.
- DCAA, *see* note 16.
- Ibid.*
- Ibid.*
- FAR 52.216-7.
- Ibid.*
- Feldman, *see* note 7.
- Diversified Carting, Inc. v. City of New York*, 423 F. Supp. 2d 85, 90 (S.D.N.Y. 2005).
- See John Borer Jr., "Representing the Government Contractor," *American Jurisprudence Trials* (originally published in 1968).
- Samuel G. Davidson and Susan J. Moser, "Rules, Regulations, and Risks—Government vs. Commercial Contracting," *Contract Management Magazine* (April 2008): 34, 36.
- Ibid.*
- 41 U.S.C. 52 (West). *See* 41 U.S.C. 51-58 (West); and *Morse Diesel Int'l, Inc. v. United States*, 99-279C, 2005 WL 1682135 (Fed. Cl., July 15, 2005).
- 41 U.S.C. 55 (West).
- 31 U.S.C.A. 3729 (West). *See also* *U.S. ex rel. Bender v. N. Am. Telecommunications, Inc.*, 686 F. Supp. 2d 46, 49 (D.D.C. 2010).
- Ibid.*
- 18 U.S.C.A. 1001 (West).
- United States v. Brooks*, 111 F.3d 365, 368 (4th Cir., 1997) (citing 18 U.S.C. 1031(a)) (emphasis in original).
- United States v. Sain*, 141 F.3d 463 (3d Cir., 1998).
- Ibid.*, at 466.
- Ibid.*
- Samuel G. Davidson and Susan J. Moser, "Rules, Regulations, and Risks—Government vs. Commercial Contracting," *Contract Management Magazine* (April 2008): 34, 37.
- See Amy Kastely, et al., *Contracting Law*, fourth ed. (2006).
- Todd Constr., L.P. v. United States*, 07-324 C, 2010 WL 3022209 107 (Fed. Cl., July 30, 2010).
- "The Christian Doctrine exists because '[r]egulations reasonably adapted to the administration of a congressional act, and not inconsistent with any statute, have 'the force and effect of law.'" (*Christian*, 320 F.2d at 350); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 295, 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979) (finding federal regulations have the force and effect of law as long as they are properly promulgated and within statutory authority). Thus, a pertinent procurement regulation is "law which governs the award and interpretation of contracts as fully as if it were made a part thereof."
- See Kastely, note 41.
- Ibid.*, at 373-380.
- Ibid.*, at 17.
- UCC 2-201.
- See Kastely, note 41, at 562.
- 31 U.S.C.A. 1501 (West).
- 48 C.F.R. 1 (West).
- Nagle and DeMella, *see* note 3, at 12.
- Ibid.*
- Ibid.*, at 14.
- Ibid.* *See also* FAR 44.203.
- Ibid.*
- Ibid.*
- Ibid.*
- Diversified Carting, Inc. v. City of New York*, 423 F. Supp. 2d 85, 93 (S.D.N.Y., 2005) (emphasis in original).
- Carl L. Vacketta, "Federal Government Contract Overview" (November 21, 2011), available at <http://library.findlaw.com/1999/Jan/1/241470.html>.
- Ibid.*
- FAR Part 12.
- FAR Part 13.
- FAR Part 15.
- 29 U.S.C. 206 (2010). (Effective July 24, 2009, the minimum wage is \$7.25 per hour.)
- FAR 15.305.
- FAR 3.501.
- 41 U.S.C.A. 351 (West).
- Ibid.*
- FAR 22.10.
- WD 05-2521 (Rev.-12) (June 13, 2011), available at www.wdol.gov/sca.aspx#8.
- 41 U.S.C.A. 351 (West).
- Ibid.*
- 41 U.S.C.A. 6703 (West).
- 40 U.S.C.A. 3142 (West).
- Ibid.*
- 41 U.S.C.A. 351 (West).




INTRICACIES of **Contracts** with the **FEDERAL GOVERNMENT** Compared to **CIVILIAN COMPANIES,** Part 2

The final article in this two-part series featuring a focus on subcontracts, advertisement of opportunities, agencies that are involved in contracts, and authority.

By **JENNIFER HASTEDT**





Last month, the focus was on the fundamental differences between civilian and federal government contracts—specifically regulations and contract clauses.¹ This month, the focus will be on subcontracts, advertisement of opportunities, agencies that are involved in contracts, and authority. For continuity, “Hypothetical 2,” a service contract for an accounting contract, will continue to be used.

Subcontracts

Another unique aspect of federal contracting is the inclusion of socioeconomic goals for small businesses and the mandatory use of *Federal Acquisition Regulation (FAR)* 52.219-8, “Utilization of Small Business Concerns,” in all solicitations/contracts valued in excess of \$150,000.² “It is the policy of the United States that small business concerns...shall have the maximum practicable opportunity to participate in the performance of contracts let by any federal agency, including contracts and subcontracts.”³

All contracts over \$650,000 (\$1.5 million for construction)⁴ awarded to large contractors, as determined by the North American Industrial Classification System, assigned to the contract require a subcontracting plan if the work will be performed within the United States.⁵ The items required in the subcontracting plan are detailed in FAR 52.219-9, “Small Business Subcontracting Plan.” Providing subcontracting opportunities to small business is so important to the government that “[i]f the apparently successful offeror

fails to negotiate a subcontracting plan acceptable to the contracting officer within the time limit prescribed by the contracting officer, the offeror will be ineligible for award.”⁶ The government contracting officer is able to impose liquidated damages to a prime contractor that does not show a good faith effort to meet the subcontracting plan’s goals during contract performance.⁷ The subcontracting plan is usually submitted with the proposal to the government and details the percentage the large business plans to subcontract, to include the amount to each small business category, such as service-disabled-veteran-owned companies and disadvantaged companies.⁸

The federal government may include small business subcontract goals in the solicitation or use “the governmentwide small business goal of not less than 23 percent of the total value of all prime contracts awarded for the fiscal year.”⁹ During contract performance, a company must submit periodic subcontracting performance reports.¹⁰ If the actual subcontracted dollars are less

than the proposed subcontract dollars on a government contract, then it might affect future work.¹¹ In actuality, an offeror can lose a government contract based on an unfavorable rating for its inability to attain the negotiated subcontracting goals on prior government contracts.¹²

All potential government contractors need to register in the System for Award Management (SAM).¹³ When contemplating which subcontractors to utilize, the prime contractor may check the SAM to review what the subcontractor is disclosing to the federal government. Additionally, the prime contractor must check the SAM to ensure the potential subcontractor is not on the list of contractors barred from doing business with the federal government.¹⁴ As previously discussed, the process of initially vetting and providing oversight of small businesses working under a government contract is time-consuming and costly.



Opportunity Advertisement

The process to receive a contract from the federal government is usually much more complicated than entering into a civilian contract. Under Hypothetical 2,¹⁵ when Company C determines it needs accounting support, the company can call any company, negotiate a price, and sign a civilian contract in a short amount of time.¹⁶ The private company can call one company for a quote or multiple companies for competition to award a civilian contract.¹⁷ However, the government contracting officer needs to decide if the Javits-Wagner-O'Day Act or the Committee for Purchase from People Who Are Blind or Severely Disabled are required sources for accounting services,¹⁸ if the work should go to a small business,¹⁹ or to advertise the potential work to the public.²⁰

Government contracting personnel must follow a specific process to procure services, which includes advertising the potential work.²¹ The federal government advertises all actions at the “[o]ne-stop gateway to federal business opportunities over

\$25,000,”²² in order “to obtain supplies and services from the source whose offer is the most advantageous to the government.”²³ Prior to releasing a solicitation to the public, contracting personnel must conduct market research and create an acquisition strategy, which includes whether the solicitation will be set-aside for a specific category of business.²⁴ Eligible companies are invited to submit a proposal in accordance with the solicitation that utilizes a uniform contract format and details the proposal requirements and the evaluation criteria.²⁵

Upon receipt of proposals, government personnel review and rate the proposals in accordance with the stated evaluation criteria and select the successful offeror.²⁶ The selection process may include negotiations, best and final proposals after discussions, or simply an awarded contract.²⁷

An unsuccessful offeror may request a debriefing to learn why it did not win the contract.²⁸ If the unsuccessful offeror believes the procurement process was not

conducted appropriately or the contract was awarded improperly, the unsuccessful offeror can file a protest with the contracting office or at the Government Accountability Office (GAO).²⁹

An unsuccessful bidder for a civilian contract may or may not be told why the company did not receive the contract.³⁰ The unsuccessful company certainly cannot protest.³¹ The only legal option would be to file a lawsuit if detrimental reliance occurred due to statements or discussions made prior to award or due to discrimination, which can be very expensive and lengthy.³²

Who is Involved in Your Contract?

In addition to the contracting officer and the contracting specialist, the Defense Contract Management Agency may administer the contract after award and, as discussed in Hypothetical 1,³³ the Defense Contract Audit Agency (DCAA) audits contractors’ financials during performance of cost type contracts.

BUYER CHARACTERISTICS	GOVERNMENT	COMMERCIAL
Process Predictability	The buying process is published in the FAR and the solicitation—in other words, it’s transparent and predictable. Clear, published rules enforced by law. You know who is making the decisions and how. And, win or lose, you’re entitled to a debriefing to find out how you did.	Varied, unpredictable. Who knows how they pick the winners? And if you lost, too bad...or maybe a really expensive court case may be in your future.
Power of Repeat Business	Complacency will lose you the business, but do a good job and your success can keep on rolling. Government buyers are reluctant to change contractors if what they have is working well.	People do business with people they like and trust, but commercial companies can also be more willing to take a risk on a new vendor. Therefore, it can be easier to get in, but you have to work harder to stay in.
Reliability of Payment	If you did your job and the invoice is correct, they’re good for it. They print the money, and they have to pay you a penalty fee if they pay late.	What percentage of your commercial contracts do you allow for bad debt?
Reliability of Client— Will They Be in Business?	It’s been around for 238 years and counting.	They come; they go. Even giant car companies can go under.
Right of Appeal	Right and process of appeal guaranteed by law.	There is no guarantee of being heard, or of a consistent dispute resolution process.
Reputation Enhancement	Imagine telling a prospect, “The U.S. Navy is my customer!” Government contracts, even small ones, pack prestige.	Contracts with big-name companies get attention; less so for work with a client no one’s ever heard of.
Buying Cycle	The 12-month fiscal-year cycle means that you could face 18–24 months of marketing expense and time before a solid flow of profitable sales can begin. It can be harder to build friendships with your government buyers, since they have to be above reproach. Ethics rules dictate who you can and can’t talk to and when, and even whether you can buy them lunch.	Because businesses aren’t bogged down by that huge public buying process, they can make decisions fast if you have what they want. Long-term sales can build from long-term relationships, and vice versa.
Fast-Track Purchasing Ability	It’s possible, but you’ve got to be in a position to win. If a government buyer needs and wants what you have badly enough, there is usually a rule or contract type to let him or her get it. Risk-adverse buyers turn first to suppliers they trust, but the companies that win have to both have the right stuff <i>and</i> know how the rules work.	If they want it, they buy it, in accordance with their internal purchasing procedures.
Estimated Buying Power/ Market Size	The world’s biggest buyer: over \$550 billion at the federal level alone.	Some are big, some are small. However, nobody buys \$550 billion worth of anything.

Derived from Judy Bradt, *Government Contracts Made Easier* (2010).

FIGURE 1. A QUICK MARKET COMPARISON: GOVERNMENT AND COMMERCIAL CLIENTS



Protests

GAO's Office of General Counsel issues legal decisions, opinions, and reports on bid protests, appropriations law, and other issues of federal law.³⁴ A company that is contemplating bidding on a government contract will find pertinent information about federal contracting on the GAO website.³⁵ If a company is contemplating filing a bid protest with GAO, the findings from protests previously filed with GAO can be found on the GAO website. "A bid protest is a challenge to the award or proposed award of a contract for procurement of goods and services or a challenge to the terms of a solicitation for such a contract."³⁶

In general, a protest challenging the terms of a solicitation must be filed before the time for receipt of initial proposals. A protest challenging the award of a contract must be filed within 10 days of when a protester knows or should know of the basis of the protest (a special case applies where, under certain circumstances, the protester receives a required debriefing).³⁷

To translate, Company D is awarded a contract and then told a week later the

contract was protested. Depending on the reason for protest and the likely chances of the protest being sustained, the newly awarded Company D may be told it cannot start performance.³⁸ If a bid protest is filed, the apparent winner can intervene in the protest.³⁹ If it is determined the government made a mistake during the procurement, corrective action may need to be taken.⁴⁰

Using Hypothetical 2, Company D is awarded a contract for accounting clerk support. Company E files a protest with GAO. During the investigation, GAO may determine the proposal evaluation criteria listed in the solicitation was not strictly followed. Based on the investigation findings and the nature and urgency of the accounting support, the contracting office could cancel Company D's contract, reevaluate the proposals in accordance with the evaluation criteria described in the solicitation, and award a contract to the successful offeror, which may or may not be Company D.⁴¹ The government could award an additional contract to Company E and then Companies D and E would compete for task orders as accounting support needs arose. The government could also cancel

the procurement, including the contract to Company D, and start the procurement process from the beginning. If the accounting support was already occurring, the incumbent government contractor could be awarded a sole-source contract to continue the accounting support to provide enough time for the follow-on accounting support procurement process to occur again.⁴²

Contract Disputes

Just as in a civilian contract, a dispute between the federal government and a prime contractor regarding the accounting support can be handled either in court or out of court.⁴³ There is a formal dispute process for Department of Defense-issued contracts.⁴⁴ The jurisdiction of the Court of Federal Claims to hear a direct action suit is predicated on the issuance of a final decision by the contracting officer; in the absence of such a decision, the court has no jurisdiction.⁴⁵

Company D can decide to not appeal the contracting officer's decision, file in the U.S. Court of the Federal Claims (within 12 months of a contracting officer's decision),

or file with the Armed Services Board of Contract Appeals (within 90 days of a contracting officer's decision).⁴⁶

Other Federal Agencies

As discussed in Part 1 of this article,⁴⁷ DCAA may audit a contractor's finances prior to contract award to determine if the company's financial accounting system is adequate and then audit again during contract performance. A contractor may need to certify the cost and pricing data submitted to the government under the Truth In Negotiations Act.⁴⁸

When it is determined that defective cost or pricing data has been provided to the government, as of the date of final agreement on price, "the government is entitled to a price adjustment, including profit or fee, of any significant amount by which the price was increased because of the defective data."⁴⁹

There could be civil and criminal penalties for both the company and the person who signed the financial certification statement if it is falsified.⁵⁰

Authority

A manager tells Company D to send nine additional accountants next week. All accountants will work overtime to ensure a project is completed on time. Company D wants to please the customer and ensure the project is completed, so it sends the additional resources and the project is completed. Company D then sends an invoice for the overtime and nine additional accountants. Will the vendor receive compensation? There may be a different answer to this question for a commercial contract and a contract with the government.

"The usual commercial law rule, as between private parties, is that an agent with actual or apparent authority can bind his or her principal contractually."⁵¹ Further:

[The a]gency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an

"agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.⁵²

The federal government clearly and unequivocally expresses who is allowed to sign contracts on behalf of the federal government through an appointment as a contracting officer.⁵³ An unauthorized commitment is an agreement; "the Supreme Court has held, however, that only government agents with actual acquisition authority may properly commit the United States."⁵⁴

Equitable estoppel is defined as:

A defensive doctrine preventing one party from taking unfair advantage of another when, through false language or conduct, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way.⁵⁵

In a civilian contract, if Company D believed the manager had the authority, either actual or apparent, to order the additional support, Company D will probably be compensated either because of the authority or under the doctrine of estoppel.⁵⁶ However:

[T]he United States Supreme Court held in *Office of Personnel Management v. Richmond*⁵⁷ that equitable estoppel cannot form the basis for a monetary claim against the United States contrary to statute because of the constitutional rule requiring disbursements from the treasury only by congressional authorization.⁵⁸

Company D may be compensated by the government for the additional accountants "if the agent has implied authority to take action that is reasonably and naturally incidental to his express authority."⁵⁹ Further:

Even when the procuring agency refuses to ratify the commitment expressly under the FAR, a court or a board may hold the government legally bound nonetheless when the ratification occurred by implication under common law principles.⁶⁰

Conclusion

Many differences exist when comparing commercial and government contracts.

FIGURE 1 on page 37 provides a short comparison of a few areas that vendors to each type of client need to be aware of when working with both customers.

Civilian contracts are more streamlined in the initial procurement process and have less regulatory oversight. Therefore, the administrative burden of a civilian contract is less expensive relative to a contract with the federal government. **FIGURE 1** is a quick market comparison demonstrating several differences between civilian and federal government contracts. Attorneys providing legal advice to companies that provide services to both the federal government and other businesses need to understand the differences between the two types of contracts. **CM**

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ENDNOTES

1. See Jennifer Hastedt, "Intricacies of Contracts with the Federal Government Compared to Civilian Companies, Part 1," *Contract Management Magazine* (January 2013).
2. FAR 52.219-8.
3. 15 U.S.C.A. 637 (West).
4. FAR 19.702.
5. *Ibid.*
6. *Ibid.*
7. 15 U.S.C.A. 637 (West).
8. FAR 52.219-9.

9. Office of Federal Procurement Policy (OFPP) Letter 99-1.
10. FAR 52.219-9.
11. 15 U.S.C.A. 637 (West).
12. *Ibid.*
13. Formerly the Central Contractor Registry (CCR). See FAR 4.11. The SAM is located at www.sam.gov.
14. See FAR 9.405.
15. See Hastedt, note 1, for a full description of Hypothetical 2.
16. See Judy Bradt, *Government Contracts Made Easier* (2010).
17. *Ibid.*
18. FAR 8.7.
19. FAR 19.2.
20. FAR Part 5.
21. *Ibid.*
22. *Ibid.* The governmentwide point of entry for contract actions is www.fbo.gov.
23. FAR 13.104.
24. FAR Part 7.
25. FAR 15.204.
26. FAR 15.3.
27. *Ibid.*
28. FAR 15.5.
29. FAR 33.1.
30. Bradt, see note 16.
31. *Ibid.*
32. *Ibid.*
33. See Hastedt, note 1, for a full description of Hypothetical 1.
34. See "Legal Decisions," available at www.gao.gov/legal/index.html.
35. *Ibid.*
36. "Bid Protest FAQs," available at www.gao.gov/legal/bids/bidfaqs.html#1.
37. *Ibid.* See also 4 C.F.R. 21 (West).
38. *Ibid.* (The requirements for the withholding of award and the suspension of contract performance are set forth in 31 U.S.C. 3553(c) and (d); GAO does not administer the requirements to stay award or suspend contract performance under CICA at 31 U.S.C. 3553(c) and (d).)
39. *Ibid.*
40. *Ibid.*
41. *Ibid.*
42. 31 U.S.C.A. 3553 (West).
43. 41 U.S.C.A. 71 (West).
44. *Ibid.*
45. 10 Fed. Proc. Forms 34:301.
46. 41 U.S.C.A. 71 (West).
47. See Hastedt, note 1.
48. 10 U.S.C.A. 2306 (West).
49. *United States v. United Techs. Corp., Sikorsky Aircraft Div.*, 51 F. Supp. 2d 167, 193 (D. Conn. 1999).
50. 31 U.S.C.A. 3729 (West) (The False Claims Act) and 18 U.S.C.A. 1001 (West) (The False Statements Act).
51. Steven Feldman, *Government Contract Awards: Negotiation and Sealed Bidding* (2010).
52. "Restatement (Third) of Agency" (2006): 1.01.
53. FAR 1.603-3.
54. Feldman, see note 51.
55. *Black's Law Dictionary*, third pocket edition (2006).
56. See Russell J. Davis, et al., *2A New York Jurisprudence 2d Agency* (2011).
57. 496 US 414 (1990).
58. Feldman, see note 51. ("Because the Supreme Court in *Richmond* refused to shut the door to equitable estoppel, a few lower court cases hold that equitable estoppel might be the basis for monetary contractual recovery against the government.")
59. *Ibid.*
60. *Ibid.*



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