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Government Contracts

The Ten Big Mistakes Made by Small Businesses and New Government Contractors

By Richard D. Lieberman

Every government contractor makes mistakes. So does every government Contracting Officer ("CO"), Contract Specialist, Contracting Officers Representative ("COR"), and the many other government officials who administer federal procurements. There are two groups of individuals who appear to make a large share of the many mistakes which are reported in the literature—small businesses and new government contractors.

The first part of this article tries to explain some of the reasons why these two groups make mistakes, without venturing into psychological or sociological reasons. Simply stated, it is the differences between commercial contracting and federal government contracting; and the lack of training in recognizing typical "mistakes" that are responsible for a substantial number of the mistakes.

Small businesses and new government contractors are not the only ones who make mistakes in government contracting. Large, experienced government contractors and federal officials frequently make many mistakes themselves, as demonstrated in my book, *The Worst Government Mistakes in Government Contracting* (National Contract Mgt. Assn. 2012). The solution for everyone working in the federal procurement system is to learn and apply the rules, particularly, the Federal Acquisition Regulation ("FAR"), and also learn the common mistakes and how to avoid them.

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A. The Differences Between Commercial and Federal Government Contracting are Significant. Americans receive limited education in High Schools and Colleges about contracts, how purchases and sales are made, and what the rights of consumers are. But schools concentrate on *commercial* contracting, and there are few, if any, college courses that address federal government contracting. This is beginning to change. For example, The George Washington University recently began to offer a unique Master of Science in Government Contracts program that blends the study of government procurement law and policy with a core business curriculum. But the uniqueness of that course demonstrates that it must be replicated at other universities if more Americans are to understand how government contracting works.

We begin by setting forth the significant differences between commercial and federal government contracting. These differences often account for the misunderstanding of new contractors or small contractors, who have never received formal training in government contracting.

1. Statutory and Regulatory Framework: In commercial contracting, most sales of articles are governed by Article 2 (Sales) of the Uniform Commercial Code

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(the ''UCC''), which is about 50 pages long, and common law (from case law); while government contracting is controlled by several hundred pages in the U.S. Code (titles 10, 40, 41), the FAR and its supplements (several thousand pages) and even the UCC in some situations (For example, the Federal Circuit has recognized the UCC as useful for determining the ordinary commercial meaning of terms. *Rumsfeld v. United Tech. Corp,* 315 F. 3d 1361 (Fed. Cir. 2003). Government contracting is far more statutory and regulation intensive, and requires knowledge and study of considerably more material.

2. Type of Contracts: In commercial contracting, almost all contracts are firm-fixed-price (you buy 5 of something at a unit price of $100, and you pay $500). In government contracting, there is a considerable amount of firm-fixed-price contracts, but there are also ''cost-reimbursement'' contracts where the final price is not known in advance, and contractors may recover their ''allowable'' costs to the extent they are reasonable, allowable and allocable as determined by the FAR. The amount of profit is set in the contract. Few people have ever heard of the complex rules of cost reimbursement contracting until they enter the world of government contracting.

3. Oral or written? Commercial contracts may be made orally or in writing—both are enforceable, unless the contract cannot be performed in one year, in which case it must be in writing. Government contracts must generally be in writing, and so must most of the important ancillary documents (e.g. change order means a ''written order,'' FAR 2.101; ''Claim'' means a written demand. . .*Id.*; contract modifications means any written change in a contract, FAR 43.103), any delay requires notification to the contracting officer in writing, FAR 52.212-4, 52.213-4). Individuals working in government contracting are always well advised to ''get everything in writing''

4. Competition requirements: Commercial contracts may be awarded in any manner the commercial entity chooses; while government contracts generally require award only after ''full and open competition.''

5. Authority of Agents: In commercial contracting, agents may act on behalf of their principal or company and their status, authority and ability to bind the company may be implied from words and conduct (e.g., a ''Sales Director'' appears to have authority to set prices of sales and bind the company). In government contracting, there is no implied authority, and individuals get their authority only in written delegations that come down to them as a result of authority in statute. The FAR says that ''contracting officers have authority to enter into, administer, or terminate contracts [and] may bind the government only to the extent of the authority delegated to them. FAR 1.602-1(a). Contracting Officers have a delegation known as a ''warrant'' which sets forth their authority to bind the government. Contract Specialists, CORs and other federal officials do not have such a warrant, and have no such authority to bind the government or give direction to contractors.

6. Audits: In commercial life, a contract is formed for a fixed price, performed, and is not typically audited by the purchasing party. In government contracting, routine audits of contractors are common.

7. Socioeconomic requirements: In commercial life, socioeconomic requirements (such as small business or minority set-asides) are minimal, while in government contracting they are specific and numerous, and set forth in the FAR.

8. Modifications/change orders: In commercial life, once a contract is formed, only a *mutual agreement* of the parties can be used to modify it. In government contracting, the government may issue a modification (known as ''change order'') even if the contractor does not want to make the change, and the contractor must make the change.

9. Consideration: In federal procurement contracts, the courts have said that be a valid contract, it ''must show a mutual intent to contract including an offer, an acceptance, *and consideration*. A contract with the United States also requires that the government representative ha[ve] actual authority to bind the United States. . . .'' (emphasis added). *Trauma Serv. Group v. United States,* 104 F.3d 1321, 1325 (Fed.Cir.1997). What if there's no consideration? The answer is simple: it's a ''nudum pactum'' and there is no valid contract. A nudum pactum is a bare agreement, a promise or undertaking without any consideration for it. *Blacks Law Dict, 5th Ed., 1979.* Where there is a nudum pactum, there is no consideration, and the contract is not valid and not enforceable. Government contractors must be wary of performing anything under a ''nudum pactum.'' The classic nudum pactum arises when the government includes in the contract ''availability of funds'' clauses, like those at FAR 52.232-18 or FAR 52.232-19. Both clauses state that ''no legal liability on the part of the government for any payment may arise until funds are made available to the Contracting Officer for this contract and until the Contractor receives notice of such available, to be confirmed in writing by the Contracting Officer.''

If either of these clauses is in your contract, you have a nudum pactum until the contracting officer receives funds, and the same contracting officer provides you with notice of the availability of funds. This means that you should not deliver any goods or perform any services until you receive that written notice of availability of funds. Without the notice, you probably will never receive payment**.**

10. Consideration for modifications: In commercial life, a contract may be modified by the parties without any consideration (the UCC says that an agreement modifying a contract needs no consideration to be binding, UCC 2-209(1)); while in government contracting, any modification requires some sort of consideration, or it is not binding and can't be enforced. See *Yardney Technical Products, Inc.*, ASBCA No. 53866, 09-2 BCA ¶ 34277.

11. Incorporation by Reference: In commercial contracting, while ''incorporation by reference'' is a technique, it is used sparingly. In government contracting, hundreds of important clauses are frequently incorporated by reference and not actually printed in the contract.

12. Termination for the Convenience of the Government: In commercial contracting, neither party may ''cancel'' or terminate a contract without the consent of the other party (unless the second party breaches the contract). In government contracting, the government may always terminate the contract ''for the convenience of the government'' whenever it is in the best interest of the government to do so (i.e., the supplies are no longer needed, the war ended, etc.)

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With the many differences between government and commercial contracts, it is imperative that anyone entering the field be given ''basic training'' so they do not immediately step on someone's toes—or on their own. Most new and small contractors have never read the FAR, and few if any have any idea that a COR or a Contract Specialist has no authority to direct them. These contractors also have a tendency to operate on oral promises—something that should never be done in government contracting.

B. The Ten Worst Mistakes With those differences discussed above in mind, the following are the top ''ten'' mistakes made by many contractors, but especially by new and small business government contractors. These were not developed from the cases in an empirical way—they just seem to occur over and over again, and should be covered in every basic training course for government contractors.

1. **You failed to read all parts of the solicitation or the contract (including all printed clauses as well as those incorporated by reference).**

Solicitations: Winning or performing a government contract is not like driving a new car or using a new piece of software on your computer. You cannot ''learn them as you go along.'' You must read the operating manual first, and that means reading the entire solicitation in order to win the contract award, and then reading the entire contract once again before you perform it.

The FAR requires that a solicitation include all of the anticipated terms and conditions that will apply to the contract. FAR 14.201 and FAR 15.203. So the actual contract will be familiar to you if you receive the award—but you still must read it carefully. The solicitation is the key to preparing and submitting a successful offer.

Many people will read only the Statement of Work (''SOW'') before preparing their offer, but if they do so, they miss other critical sections like Instructions, Conditions and Notices to Offerors (Section L), Evaluation Factors for Award (Section M) and Contract Clauses (Section I). In fact, every section of a solicitation or contract is important, and you must read it and understand it.

In a solicitation or contract, there are many vital clauses that are ''incorporated by reference.'' Black's Law Dictionary (5th Ed. 1979) defines ''incorporation by reference'' as the ''method of making one document . . .become a part of another separate document by referring to the former in the latter, and declaring that the former shall be taken and considered as a part of the latter the same as if it were fully set out therein.'' Agencies, which are the writers of government contracts, would be hard pressed to draft contracts without this artifice of language, and government contractors must be careful to understand its implications. The contract and solicitation will include FAR 52.252-2, Clauses Incorporated by Reference, which states that ''This contract includes one or more clauses by reference, with the same force and effect as if they were given in full text. . . .'' The government then merely lists the FAR provisions (perhaps 50, or 100 or several hundred), and the contractor is responsible for performing *all* of them, just as if they were printed in full text in the contract. A short contract of 30 pages might expand to well over 100 pages when all the incorporated clauses are fully printed.

Here are just a few examples of what happens to contractors who don't read solicitations or contracts carefully and completely:

■ A solicitation advised offerors that a one-ton truck would be needed. The offeror's failure to read or understand this provision of the solicitation did not provide a valid basis for protesting the agency's downgrading of its proposal. *Atl. Coast Contracting, Inc.*, B-259082, July 17, 1995, 95-2 CPD ¶ 21.

■ The agency set out a clear limitation of 150 pages in the solicitation. After submitting an offer exceeding 150 pages, the contractor sought to ''clarify'' its proposal by selecting which pages it wanted to be counted. In a bid protest, the Government Accountability Office (''GAO'') ruled that the agency had reasonably computed the 150 pages and properly declined to consider those portions of the proposal that exceeded the stated limits. *Techsys Corp.*, B-278904.3, April 13, 1998, 98-2 CPD ¶ 64.

■ An offeror should have realized that bid prices would be adjusted for prompt payment discounts of 20 days or more. Any failure to understand this fact was the result of a failure to read and apply all solicitation provisions. *Capitol Hill Blueprint Co.*, B-220354, November 13, 1985, 85-2 CPD ¶ 550.

■ A protester objected that the agency failed to test a sample item provided by the protester. The protester did not submit its sample within the time frame required by the solicitation. The problem was caused primarily by the protester's failure to read the solicitation carefully. *Hydraulic Design & Mfg.*, B-213756, June 5, 1984, 84-1 CPD ¶ 594.

■ A solicitation required that if a contractor had teammates or subcontractors who elected to provide their cost/price information to the agency independently from the prime offeror's proposal, the teammate or subcontractor was required to include ''Attachment 16,'' which contained certain information. The solicitation advised offerors that failure of any teammates or subcontractors to provide Attachment 16 would render the Offeror's proposal non-compliant and would not be considered for award. When an offeror failed to include Attachment 16 and was not considered for award, in the resulting protest, the GAO said that the requirement was a ''plain and unambiguous requirement set forth in the solicitation,'' and denied the offeror's protest. *URS Fed. Servs, Inc.*, B-411024.4, April 30, 2015, 2015 CPD ¶ 149.

When you receive your contract, you need to read it carefully again, and develop a plan for executing it properly. You may encounter the same problems in contract execution that are described above in the solicitation phase. You should retain every contractual document for reference (Solicitation, Contract, Modification, Correspondence, Audits etc.). You should also develop a written plan for full contract implementation from the outset of the contract. The plan must implement the requirements of every clause and every part of the contract.

2. **You failed to ask a written question about an ambiguity in a solicitation before you submitted your offer.**

Frequently, contractors do not understand solicitations, or they discover ambiguities when carefully read-

ing the solicitation. They should always seek clarification by submitting written questions to the Contracting Officer (oral questions have no status).

Patent ambiguity exists when any part of solicitation *on its face* does not have one plain meaning but has two *reasonable* interpretations. *Beacon Const. Co. v. United States,* 314 F. 2d 501 (Ct. Cl. 1963). In addition to something that is obvious on its face, there is also the possibility that a solicitation contains a ''latent ambiguity.'' A latent ambiguity has two reasonable interpretations, but the ambiguity is not obvious on the face of the solicitation. It usually becomes ambiguous later, during the execution of the contract.

A contractor has duty to submit questions to clarify all patent ambiguities *before* it submits its offer, otherwise the contractor assumes the risk for any additional costs. *P.R. Burke Corp. v. United States,* 277 F. 3d 1346 (Fed. Cir. 2002). Patent ambiguities can be serious, and can have important implications for the way a contractor prepares its cost or price and technical proposals. Sometimes contractors try to ''game'' the ambiguities (''If I don't raise it now, my competitors won't get the advantage that I think I may get''). Gaming is dangerous. During the execution of the contract, you will be responsible for the more expensive method of performing, if you failed to ask about a patent ambiguity.

For latent ambiguities, the courts and boards will adopt a contractor's reasonable interpretation of the ambiguity under the theory of *contra proferentem* (construing against drafter, the government). *Newsom v. United States*, 676 F.2d 647 (Ct. Cl. 1982). If the ambiguity is latent, the government normally pays for any higher costs.

Here's an example of a patent ambiguity. A Department of Homeland Security solicitation stated as follows:

> Page Limitation-excluding the cover page and past performance forms, the technical proposal is limited to twenty (12) pages in at least 11 pt font, 1'' margins.

Is the technical proposal limited to twenty pages or to twelve pages? You will never know unless you ask the CO in writing.

The message is clear, whenever something in a solicitation is unclear or ambiguous, always submit your questions in writing to the Contracting Officer. Many offerors discover an ambiguity close to the submission date but are reluctant to ask a question if there is a specific statement in the solicitation that identifies a date when ''the period for asking questions about this Solicitation is over.'' *But even if the question period is over, potential offerors may always ask a question about an ambiguity in a solicitation, right up to the due date and time for submission of offers.* This is very clear from the numerous GAO cases on solicitation ambiguities, and from the GAO Bid Protest Rules themselves, which state that protests based on alleged improprieties in a solicitation must be filed prior to the time set for receipt of initial proposals or bids. 4 C.F.R. § 21.2(a)(1). An email to the contracting officer alleging ambiguity in a solicitation submitted prior to the due date would be construed by the GAO as an informal agency level protest, and would be timely if the agency failed to correct the ambiguity.

3. **You failed to submit a required document, such as your offer, on time.**

Failing to submit documents on time —especially your offer—can often be the kiss of death. The FAR includes a ''late is late'' rule that states that any proposal, bid, modification, or withdrawal of a bid received at the government office designated in the solicitation after the exact time specified for receipt of bids is ''late'' and will not be considered, unless restrictive conditions are met. FAR 14.304, FAR 15.208. For example, a hand-carried proposal that arrives late may be considered if improper government action making it impossible for the offeror to deliver the proposal on time was the paramount cause for the late submission, and where consideration of the proposal would not compromise the integrity of the competitive procurement process. *Caddell Const. Co., Inc.,* B-280405, Aug. 24, 1998, 98-2 CPD ¶ 50.

Agencies are always very hard-nosed about the submission of offers on time. As an example, the U.S. Air Force conducted a competition for its next generation, KC-X Tanker, a solicitation involving more than $35 billion in aircraft buys. Proposals were due at Wright-Patterson Air Force Base at 2 PM. One offeror's messenger arrived at Wright-Patterson at 1:15 PM, and after being unable to find the location specified in the solicitation, called the COR. The COR took him to the building and upon arrival, gave him a receipt marked 2:05 PM. The Air Force refused to consider the offer. In a bid protest, the contractor alleged that his late offer was due to ''government misdirection'', but the GAO held that the paramount cause was simply that the contractor was ''late.'' *U.S. Aerospace,* B-403464, Oct. 6, 2010, 2010 CPD ¶ 225.

Preparing an offer in response to a solicitation requires three things: (1) a good technical proposal; (2) a good price proposal and (3) delivery of the offer on time. Contractors are advised to train their employees that there will be no excuse for a late submission—and the consequences may be termination of employment for the person responsible for submitting the late offer.

There are many other documents required by the FAR or by your specific contract. It is essential to be timely in every submission. Even where the government is late in its responses, the contractor will always be held to the specific contractual or regulatory deadline.

4. **You submitted a nonconforming bid or noncompliant proposal.**

It is essential that a contractor submit a conforming bid in response to the particular solicitation, which will be an Invitation for Bids (''IFB'') or a compliant proposal in response to a Request for Proposals (''RFP''). In sealed bidding, which is conducted pursuant to FAR Part 14, award may be made only to a responsible bidder whose bid conforms to the IFB and is lowest in price (including price related factors in the IFB such as transportation). FAR 14.408-1(a). Any bid that does not conform to the essential requirements of the IFB must be rejected and cannot form the basis of any award. FAR 14.404-2(a).

Examples of nonconforming bids are those which:

- Fail to conform to the delivery schedule in the IFB
- Fail to acknowledge a material amendment to an IFB
- Fail to conform to one or more specifications in the IFB
- Impose conditions that would modify the IFB or limit the bidder's liability to the government

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- Limit the government's rights under any clause

- Fail to state a specific price or states a qualified price

In a negotiated procurement, which is conducted pursuant to FAR Part 15, the government makes award to the offeror whose proposal represents the best value after evaluation in accordance with the evaluation factors provided in the solicitation. FAR 15.303(b)(4),(6). Price must be included as one of the evaluation factors. FAR 15.304(c)(1). Any proposal that fails to conform to the material terms and conditions of the solicitation is technically unacceptable and may not form the basis for an award. *Marshall-Putnam Soil and Water Conservation Dist.*, B-289949, May 29, 2002, 2002 CPD ¶ 90. Material terms of a solicitation are those which affect the price, quantity, quality or delivery of the goods or services offered. *IBM U.S. Fed., Presidio Networked Solutions, Inc.*, B–409806 *et. al*, Aug. 15, 2014, 2014 CPD ¶ 241 . Examples of technically unacceptable proposals which fail to conform to the material terms of a solicitation include those which:

- Take exception to any specific requirement in the RFP

- Alter delivery locations in the RFP or take exception to the delivery schedule

- Offer a quantity different from that required in the RFP

- Insist on a discount, where no discounts are specified in the RFP

- Fail to meet minimum education or skill requirements in the RFP

- Fail to meet minimum experience requirements in the RFP

- Fail to propose a product or service that meets the minimum specifications in the RFP

- Add or revise terms concerning government notification as required in the RFP

Be sure that your offer complies fully with all of the requirements in the solicitation.

5. **You failed to flow down the necessary clauses to all of your subcontractors.**

At some time in a government prime contractor's business, it will become necessary to obtain assistance from other contractors in order to fully perform the complex requirements in their contracts. The most common method is the use of subcontracts between a 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, and this begins with the drafting of a proper subcontract.

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 interests and to promote government policies. Some clauses explicitly mandate their inclusion in all subcontracts (e.g. the Audit and Records Clause, FAR 52.2152; the Cost Accounting Standards Clause, FAR 52.2302; the Equal Opportunity clause, FAR 52.22226), while other clauses implicitly require their flow down (e.g., the Davis-Bacon Act, FAR 52.2226 and the Service Contract Labor Standards clause, FAR 52.22241).

The government, however does not require, either implicitly or explicitly, the flow down of the Changes clause, FAR 52.2431 (which states, in part, ''the Contracting Officer may at any time. . . make changes within the general scope of this contract in any one or more of the following: drawings, designs, or specifications,. . .method of shipment. . .or place of delivery''). Nor does the government require flow down of the Termination for Convenience of the government clause, FAR 52.2492 (which states, in part, ''the government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the government's interest''). However, it is essential that these two clauses flow down in every subcontract that is awarded by a prime contractor. The concepts of a ''change'' or a ''termination for convenience'' are inconsistent with the common law governing commercial contracts, which would otherwise require mutual agreement by the parties in order to change any term of an existing contract. U.C.C. § 2-209. Failure to include these clauses in a subcontract is a significant mistake that introduces significant vulnerability to the prime contractor as discussed below.

Changes: The changes clause is a means by which the government retains flexibility to meet changing needs. When the government's requirements change, or there is a need to revise the contract, the government will issue a change order, thus unilaterally modifying a contract, provided the change is within the overall scope of the existing contract. Of course, contractors are entitled to an equitable adjustment in time and cost resulting from these change orders. It is essential that the Changes clause be included in all subcontracts. If the prime cannot change the subcontract, the prime could be forced to accept goods for which specifications have changed, or more likely, goods or services that are of no use whatsoever to the prime contractor or the government because of the government change order.

Termination for Convenience: A Termination for Convenience typically occurs where funds to continue a contract become unavailable or there is a change in the government's requirements, e.g. there is an advance in technology or an ongoing war ends. The clause provides the government with the ability to quickly adjust to changing needs without being burdened by unnecessary contracts or costs. It is crucial for government contractors to provide themselves with the same flexibility in their subcontracts. Prime contractors must preserve the right to terminate their subcontracts in the event of a government termination for convenience.

Quality Assurance and Quality Control clauses such as FAR 52.246-2, Inspection of Supplies, Fixed Price, or especially FAR 52.246-11, Higher Level Contract Quality Requirement, must be flowed down to ensure that subcontractors meet the quality standards of the prime contract.

Aside from the Termination for Convenience, Change and Quality clauses, prime contractors should examine their contracts carefully. If there is any doubt about the need to flow down a clause, it should be flowed down. The flow-down of FAR clauses is easily accomplished by incorporating them in the subcontract by reference, the same way the government incorporates them in the prime contract. For clarity, the subcontract should also

state that whenever the term ''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, like prime contracts, commonly include numerous FAR clauses incorporated by reference.

6. **You took direction and/or advice from officials who were not authorized to give it to you.**

One of the biggest mistakes made by small business and new government contractors is to follow direction they are given from individuals who ''appear'' to have authority to give them that direction. The fact is that *very few government* personnel have authority to direct a contractor, although contractors are contacted by many officials with different titles. It is imperative that a government contractor understand that only the contracting officer has actual authority over the contract, and can direct changes to it. FAR 1.602 says the following:

> 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. Contracting officers shall receive from the appointing authority . . . 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. Contracting officers have authority to enter into, administer, or terminate contracts and make related determinations and findings.[]

> Contracting officers shall authorize, in writing . . . a contracting officer's representative (COR) [who is sometimes called a ''Contracting Officer's Technical Representative or COTR] and [s]hall be qualified by training and experience [but who shall have] no authority to make any commitments or changes that affect price, quality, quantity, delivery, or other terms and conditions of the contract nor in any way direct the contractor or its subcontractors to operate in conflict with the contract terms and conditions. . . .

A COR, with whom a contractor often has day-to-day contact, has no authority to change a contract or direct a contractor in a way that conflicts with the terms of the contract. Also working for the contracting officer are ''contract specialists'' who are *not* contracting officers and whose job is merely to assist the CO by performing research, drafting documents, etc. A contract specialist also has no authority to make commitments or changes that affect contract price, quality, quantity, delivery or other terms of the contract. Another official whose authority is often confused is an ''administrative contracting officer'' (''ACO''), whose job function is described in FAR Subparts 42.2 (Contract Administration Services) and 42.3 (Contract Administration Office Functions). ACO's, although responsible for administering a contract, do not normally have a written delegation of authority (known as a ''Certificate of Appointment'' or a ''Warrant'') that permits them to award contracts or change them. Their authority is limited just like that of CORs and contract specialists. COTRs, CORs, Contracting Specialists and ACO's have no authority to award contracts or change quantity, specifications, delivery schedule or price (material aspects of contract). FAR 1.602-2; FAR 52.243-1, DFARS 201.602, HHSAR 352.202-1(h), others.

Contractors are well advised to take direction only from contracting officers where any deviation occurs from the written contract, and to confirm any direction given to them by an ACO, COR or a contract specialist with their CO. This applies to any questions regarding a solicitation, or any matters of contract administration and execution.

Here is an example of what happens when a contractor follows the advice or direction of a government official who lacks authority to give that direction. A solicitation said that a specific Contract Specialist was to be contacted if contractors had any questions. One bidder emailed the Contract Specialist to ask if a bid could be submitted by facsimile, and was told it could. The bidder was even advised of the agency facsimile number, and the bid was submitted by facsimile. However, facsimile bids were prohibited by written terms of Solicitation, and the Contract Specialist had no authority to amend it. The contractor's bid was rejected, and in a subsequent protest, the bid rejection was deemed to be a proper agency action. *Heath Construction, Inc,* B-403417, Sept. 1, 2010, 2010 CPD ¶ 2002.

What about ''swapping'' work or goods within a delivery order of a contract, provided the total price and delivery date are the same (e.g. swap cleaning a floor in the statement of work for cleaning the windows?) This is not proper without a formal written change order from your CO. A company received a task order contract for repair of security fences and construction of pavement in Korea. The Army Directorate of Public Works managed the CORs who supported the contracting officer. The CORs added numerous items which were not part of the original delivery orders, or substituted other items. The CORs admitted that they erroneously had never processed any modifications to reflect these changes. An audit requested by the CO showed there was $1.4 million paid for work in the original task orders that had never been performed. (The audit did not show how much ''extra'' work the contractor had performed). Even though the CORs had asked to delete this ''original'' work, the Armed Services Board noted that the CORs had no authority to make changes and the company should have refused to make the changes without direction from the CO. The contractor owed the government the cost of the unperformed work. *Sinil Co., Ltd.*, ASBCA No. 55819, 09-2 BCA ¶ 34213.

7. **You listened to verbal promises or direction even though they contradicted or were inconsistent with what was in the written solicitation or your signed contract.**

In government contracting, there are very few situations where oral information is binding. All contractors should obtain written, signed contracts (signed by a warranted contracting officer). Promises, direction, changes or modifications should also be obtained in writing from someone authorized to give or make them.

Oral methods may be used to solicit micropurchases and simplified acquisitions (up to $150,000), but even in these situations, there normally is a written record of the contract.

''Any prospective bidder desiring an explanation or interpretation of the solicitation, drawings, specifications, etc., must request it in writing . . . . Oral explanations or instructions given before the award of a contract are not binding.'' FAR 52.214-6. All questions should be submitted in writing to the contracting officer. Here's what can happen. The government was procuring a weapon storage system, and a contractor sought an oral change permitting it to supply high pressure laminate rather than the metal item required by

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the solicitation. When the contractor's offer was deemed unacceptable, a protest was sustained because the written solicitation required metal, and the written solicitation controlled the procurement. *Spacesaver Storage Sys., Inc.,* B-298881, 2006 CPD ¶ 196, Dec. 11, 2006. If a contracting officer wishes to make a change to a specification in a solicitation, he or she can issue a written amendment, and all bidders must then comply with the amended solicitation.

Another example is the page limitation mentioned previously, where a solicitation stated ''Page Limitation-excluding the cover page and past performance forms, the technical proposal is limited to twenty (12) pages in at least 11 pt font, 1'' margins.'' Don't attempt to obtain clarification with a phone call—submit a written question. The contracting officer is required to clarify this ambiguity in writing for all offerors.

In performing a contract, you should never follow oral promises and direction. Follow the written contract, and if a COR or contract specialist attempts to modify that contract orally, immediately write to the CO and request clarification, and the official position.

Once you have a written contract, you need to understand that the FAR defines a ''contract modification'' as any *written* change in the terms of a contract. FAR 2.101. A ''change order'' (where the agency seeks to change the contract, such as a specification) means a *written* order, signed by the contracting officer, directing the contractor to make a change. FAR 2.101. Sometimes changes are made by supplemental agreement agreed to by the government and the contractor. The FAR defines a ''supplemental agreement'' as a contract modification that is *signed* by the contractor and the contracting officer. FAR 43.103.

It's very simple: oral modifications may not be made to contracts where the FAR requires they be in writing. *Mil-Spec Contractors, Inc.,* 835 F. 2nd 865 (Fed. Cir. 1987). You should comply with your written contract until you get a written change or modification. If someone orally directs you otherwise, politely ignore them and email or otherwise contact the contracting officer for a written clarification.

8. **You failed to deliver on time, or when you discovered a delay and requested an extension in the delivery date, you failed to offer consideration to the government.**

One of the four material terms of a contract is delivery time, and the government may terminate a contract for default if you don't deliver on time. If you find you can't meet a delivery date, call or meet with your CO and request an extension—but always offer consideration. The price of the extension is always worth avoiding a default termination.

The government may, by written notice of default to the Contractor, 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 this contract or any extension. FAR 52.249-8. Although the government can do this immediately, and without notice, it usually waits a short period of time. For example, the following times were noted in default terminations:

■ 12 days after due date (notified ''considering default''). *Chester Morton Elec., Inc.* ASBCA 14904, 72-1 BCA ¶ 9185.

■ 8 days after due date (issued show cause). *Phoenix Elec., Inc.,* ASBCA 25872, 82-1 BCA ¶ 15729.

■ 6 days after due date (default). *Toran Corp.,* ENGBCA 2973, 69-1 BCA ¶ 7724.

■ 4 days after due date (issued show cause). *Auto. Pwr. Sys.,* DOTCAB 2678, 01-1 BCA ¶ 31259.

■ 3 days after due date (default). *Comspace Corp.,* DOTCAB 3095, 98-2 BCA ¶ 30037.

The consequences of a default termination can be severe. The government may assess you the ''excess costs of reprocurement,'' which are the additional costs the government must incur to re-acquire supplies or services similar to those terminated. These excess costs could be very substantial. The default could cause you to lose future contracts because any default will be seriously considered as contractors certify their offers with any defaults within the past three years. COs do not like to see defaults, because they fear this might happen to them.

If you believe your deliveries will be late, you should contact your CO and offer him or her consideration in exchange for a modification that extends the delivery date. It was previoiusly noted that the CO has no authority to extend a delivery date without some kind of consideration. But consideration takes many forms. You could offer $0.10 off on each delivered item, $1 off, a lump sump consideration of $750, or a non-monetary consideration *that has value.* An example might be a longer warranty on an item. As long as you are giving the CO something of value, it is consideration.

9. **You failed to invoice properly or when your invoices were not paid promptly, you failed to take proper and decisive action to get paid.**

Government contractors cannot expect to stay in business very long without receiving payment for their work. How can you pay employees and subcontractors if you're not paid? Good cash flow is essential, and to achieve that, you need to invoice properly and take decisive action when you're not paid.

The Prompt Payment Act, 31 U.S.C. § 3901 et seq, (''PPA'') requires that the government generally make payment on a ''proper invoice'' within 30 days of its submission, or pay interest penalties on the unpaid amount. The Act also an agency to return any ''defective'' (not proper) invoice within 7 days after receipt, with a statement identifying the defect. 31 U.S.C. § 3903(b)(2). You want to ensure that your first and every invoice is proper, and follow up if payment is not made within 30 days.

Most fixed price contracts contain the Prompt Payment clause, FAR 52.232-25, which defines a proper invoice as one that contains **all** of the following items, which are also stated in the PPA:

(i) Name and address of the Contractor.

(ii) Invoice date and invoice number.

(iii) Contract number or other authorization for supplies delivered or services performed (including order number and contract line item number).

(iv) Description, quantity, unit of measure, unit price, and extended price of supplies delivered or services performed.

(v) Shipping and payment terms

(vi) Name and address of Contractor official to whom payment is to be sent (must be the same as that in the contract or in a proper notice of assignment).

(vii) Name (where practicable), title, phone number, and mailing address of person to notify in the event of a defective invoice.

(viii) Taxpayer Identification Number (TIN).

(ix) Electronic funds transfer (EFT) banking information.

(x) Any other information or documentation required by the contract (e.g., evidence of shipment).

You must follow up on nonpayment of any proper invoice. Your accounts payable person should suspense all invoices, and flag those that haven't been paid in 30 days. If you fail to do this, you may face this type of nonpayment. A contractor had a Navy contract to perform services, and submitted routine progress payment requests. On one such request for $138,000 submitted in 1997, the contracting officer requested a new prompt payment certification on the invoice because she had received information that a surety had paid several subcontractors. The contractor replied, but never stated that the invoice was being converted to a claim under the Contract Disputes Act (''CDA''). The contract included a payment clause stating that the due date for making progress payment was 14 days after receipt of the invoice by the designated payment office. The company was not paid. Fourteen years later, the company submitted to the contracting officer an invoice for the original amount of the invoice plus $433,000 in interest on that amount. The invoice was not paid, and the Armed Services Board of Contract Appeals dismissed the appeal because the company had failed to follow the requirements of the Contract Disputes Act for a valid claim. *Environmental Safety Consultants, Inc.*, ASBCA No. 58221, 13 BCA ¶ 35329.

The company could have received payment if it had followed the requirements of the Contract Disputes Act, and thereby provided jurisdiction to the Armed Services Board. Here is the proper way to ensure payment of an unpaid proper invoice:

(1) When the Contracting Officer disputes the invoice (or simply when an invoice is not paid in 30 days as required by the Prompt Payment clause in the contract), the company should write a letter to the CO stating ''We are now in dispute over this invoice. You have refused to pay a lawful invoice. We are converting it to a claim and attaching a certified claim for the entire amount''

(2) The company should prepare a short claim with a proper CDA certification and submit it to the CO along with the above letter.

(3) If the CO denies the claim, the company should then notice the appeal of non-payment to the ASBCA or alternatively, if the CO makes no ruling in 60 days, the claim would be ''deemed denied'' and the company may immediately notice the appeal at the ASBCA.

It is essential that a contractor whose invoice is not paid raise the issue in writing with its CO, state that the invoice is in dispute because the government won't pay, and file a formal written claim of nonpayment. If the invoice or payment request is over $100,000, the claim must be certified. A routine invoice or progress payment is normally *not a claim*. Therefore you must file something separate from the invoice and follow the steps in the CDA. That is how you can get paid if your performance complied with the contract requirements. Even if the contracting officer denies your claim, you will still get your day in court or at a Board to prove why you should be paid.

10. **You were a volunteer and didn't get paid for your services.**

A volunteer is someone who embarks on duties of their own free will and without any expectation that they will be paid for their work. A contractor who elects to perform work not required by a contract without a formal change order is considered to be a volunteer who will not be paid for the services. *North Star Alaska Hous. Corp. v. United States*, 30 Fed. Cl. 259, 272 (1993), citing *Calfon Constr., Inc. v. United States*, 17 Cl. Ct. 171 (Cl. Ct. 1989). Contractors who start to work and incur costs before their contract is signed on the *promise* of award are also volunteers.

Letters of ''intent'' to sign an award, frequently sent by contracting officers, are not an award. Nor are unsigned contracts awards. Unfunded contracts, which lack consideration, are not binding. Those contracts are not valid and enforceable until the contracts are funded and the contracting officer so advises the contractor in writing.

Is it not only small businesses that fall into the trap of becoming an unpaid volunteer. Even one of the largest aerospace companies in the U.S. (Boeing) became a volunteer and failed to get paid for subcontractor work. In *The Boeing Co.,* ASBCA No. 57409, 14-1 BCA ¶ 35474, Boeing had a cost plus award fee contract to perform engineering assignments as ordered by the government. The contract included FAR 52.232-22, Limitation of Funds (''LOF''), which stated that ''Except as otherwise required by specific provisions of this contract] the government is not obligated to reimburse the contractor for costs incurred in excess of the total amount allotted by the government in this contract. Boeing asked for additional funding to cover project completion, but was told by the Contracting officer that the LOF Clause applied, there would be no additional funds requested, and ''the amount remaining in the contract is it.'' Even in the face of this specific denial of funds, Boeing and its subcontractor entered into an agreement settling the subcontract termination for a net payment of $11 million, and Boeing sought that amount from the government.

First the CO and then the Armed Services Board denied Boeing's entire claim. Even though Boeing asserted that the limitation of funding clause had been waived, the Board disagreed. The Board said that the contract:

> expressly provided that Boeing was not obligated to incur, and the government was not obligated to reimburse, any costs of performing the contract, including termination activities, that would exceed the allotted funding in the contract. **If Boeing did incur termination costs in excess of the allotted funding, it was a volunteer and did so for its own account.**

(Emphasis added.)

Whether the issue is incurring costs in excess of a contract ceiling, a limitation of funds amount, new items requested by the government but not in your contract or a formal modification, or *anything else where it is clear the government isnot obligated to pay you*, proceed at your own risk, or you may become a ''volunteer'' that is not entitled to payment.

Conclusion. These 10 mistakes are very frequently made by government contractors who are not familiar with government contracting, the details of the FAR, or have never seen the mistakes made before. It is always disheartening to read about the financial result of the mistake—usually a significant monetary loss for the contractor.

The mistakes can be avoided by training your personnel about the special rules in government contracting

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and the typical mistakes. By insisting that your personnel carefully follow the underlying rules, you can eliminate the problems. Whenever someone (whether an employee or a government official) proposes to violate or ''stretch'' the rules, remind them that you only play by the contract and the FAR, nothing else. Resist the entreaties of government officials to ''be a patriot and do it (break the rules) for your country'' if the action requested is inconsistent with the rules or your training. Politely refer the person seeking to violate the rules to the appropriate contract or FAR section, or the controlling case. And don't make the mistake.