Government Contracts Settlements and Negotiations
Leading Lawyers on Analyzing and Discussing Contracts, Resolving Disputes, and Addressing the Unique Challenges of Negotiations with the Government
Negotiating Government Contracts That Fit Client Needs

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Introduction

There are two points in time and two sets of actors with whom you may be negotiating a government contract. The two points are (1) when you are negotiating for the original contract or to modify that contract, or (2) when you are engaged in a dispute you are trying to resolve, either before invoking a formal dispute resolution mechanism or through that mechanism. The two sets of actors are the government procurement and program officials in the case of a prime contract, or a contractor’s officials—sometimes with input from government employees—in the case of a subcontract.

I will deal mostly with pre-contractual negotiations with the government. Those negotiations allow for the greatest “value added” from the lawyer, as they set the terms under which the contract will operate. There is less room for maneuvering when negotiating a subcontract or the resolution of a dispute, as they are boxed in by the contractual and case standards, and the particular facts. I will deal with those circumstances as well, but in lesser detail.

Negotiations in Establishing a Government Contract

All contracts are subject to some negotiation in the broad sense. Prior to a solicitation, even one whose evaluation will be decided completely without discussion with the offerors, interested parties can usually meet with procurement or program managers to discuss the virtues of their products, how the specifications should be structured, and the weight that should be given in the circumstances to past performance, cost, and technical characteristics. Substantially more room for negotiation exists when award will be made after discussion with the potential awardee, where there is to be a research and development component to the contract, where the contract is sole source, or where a different form of agreement vehicle—a cooperative agreement, grant, or “other transaction”—is to be used.

As we begin discussing negotiation strategy and process, the headline is this: there is much more room for negotiation with the government than most contractors believe. This is true in both the formal and informal senses. First, formally, there simply are not that many mandatory federal acquisition
clauses that must be included in a contract, cooperative agreement, grant, or other transaction, particularly for commercial products and services. And those that are required tend to be the ones that won’t cause heartburn—no segregated facilities, no gratuities. Informally, the willingness of contracting officers to respond flexibly to the needs of the contractor (the general term I’ll use to include grantees, cooperators, and transactors), and to engage program managers in negotiations so the contract reflects what the government actually needs, has increased markedly over the last ten to fifteen years. The “take it or leave it” attitude that was pervasive even through the 1980s has changed substantially. With that empowering notion in place, let’s walk through the negotiation context.

What Does Your Client Want?

In virtually all of the agreement circumstances—contracting, grants, cooperative agreements, or other transactions—the contractor is presented with a boilerplate agreement from the government. Sometimes, a detailed statement of work or of deliverables is also included. Other times, the statement of work is more amorphous and will explicitly be subject to negotiation. This is especially the case where there is a large research and development component to what the government wants.

The first thing you need to do is find out what the client wants—it’s true in most negotiations, but that makes it no less true in government contracts. It’s easy, after years of working in the government contracts area, to presume what the issues are going to be. But I am always impressed again with the differing priorities different clients put on different issues. Most software companies are very concerned about how intellectual property will be used by the government and to whom it will be made available. But others feel their property is well enough protected and are far more interested in assuring they get license fees for all the usage. Most parties want to be reimbursed on a pay-as-you-go basis in cost reimbursement contracts, but a surprisingly large number don’t mind milestone payments. Many parties want to have a statement of work as precise as possible, so there is little question when the government is asking for a contract modification. Others think that in the particular circumstances, trying to achieve such precision will bog them down.
Of course, it’s the lawyer’s job to counsel the client on issues we see arising from various ways of framing the agreement, but the client’s view of what the utility and disutility would be of various results is something in which the client usually wants to have a strong say.

The Negotiations Themselves

Returning a Marked-Up Document

Once armed with an understanding of the client’s objectives, and a view as to how the proposed agreement varies from those, the negotiations can begin. I like to begin negotiations by returning a full mark-up of the document received from the government contracting officer. This mark-up contains everything we’d like to change, whether major or minor. This “kitchen sink” iteration is not one that has to clog the pipes. Since many of the proposed changes will not have major consequence, they can be treated that way. I do not believe the contract negotiations should be regarded as hand-to-hand combat, in which every proposal needs to be fought through. The reasons for suggesting all of the changes we would like are twofold. First, some of the changes may be accepted, creating a better agreement and establishing that the government personnel will be making concessions. Second, other changes will be rejected, and if they are minor, the client can retreat on those, suggesting to the government that we are willing to be reasonable too. This process of clearing the underbrush together (the underbrush created under the sink, by the clogged pipes) can help establish the give-and-take of the negotiation.

Of course, many of the more important proposals are unlikely to be accepted. The government may simply reject them, or propose a different resolution. These will be the subject of further negotiation, especially the personal negotiation that may take place for the larger items.

Who Should Negotiate?

The client has often worked with the government program manager before, and has developed a sense of what kind of person he or she is. Most of the time, it is worthwhile having the program manager participate in the negotiations. The program manager best knows what the government really
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needs, and since his or her “deliverable” is the actual outcome of the agreement, he or she is more anxious to get going than the contracting officer might be, whose “deliverable” is a contract that is not likely to get questioned by a higher-up in the review process or when it needs to be reexamined because of a dispute. Of course, the contracting officer needs to participate as well, since that person is usually the only one who has the authority to commit the government.

I generally want my client there as well. Most often, the best person is the counterpart to the government’s program manager, the person within the company who’ll be responsible for the contract. The program manager for the client best knows the actual risks and therefore what can be agreed upon. For example, often the government will be prepared to agree to keep confidential technical data developed during the course of an agreement for a period of five years from the time of development or from the close of the agreement. The client’s program manager will have a good sense of whether this is satisfactory. In the software industry, this may not be enough time, because disclosure may allow other parties to see underlying algorithms that are used. However, in the semiconductor industry, participants might expect that five years from the date of development they will already be on the next generation of the product and the item they are developing now will be yesterday’s business.

You frequently have little control over which government program person actually spends the time with you in the contract negotiations. If, through the informal relationship your program person has with a senior government person, he or she can suggest that the senior government person participate, this is all to the better. Normally, the senior person is less risk-averse, you get to make your case directly rather than it being interpreted by a more junior program person, and the resolution can come quicker because the senior person is right there rather than periodically stopping and awaiting their review.

*The Key Negotiation Strategy: Supplement, Don’t Replace*

One key factor that distinguishes negotiating a government agreement with negotiating one in the private sector is that the government contracting officer is simply far more insulated from the results of a negotiation that fails
to lead to an agreement and, as a corollary, is simply used to getting his or her way. Another key factor is that the government is the biggest exponent of the standard format of any contracting organization. The Federal Acquisition Regulation has a standard clause that is either required (in the minority of cases) or recommended (far more often) for virtually any issue that would be the subject of a contractual provision. The different departments and agencies supplement these with provisions somewhat customized to their circumstances, but, if anything, the fact that they are semi-customized makes it more difficult to move the contracting officer off them. As noted, contracting officers have become more flexible over the years. But that does not mean they are willing to simply drop recommended clauses covering important areas and improvise with new clauses covering those areas. First, many of them are not lawyers, and are concerned they would miss important consequences of contract phraseology. Even when they are lawyers, or when legal counsel is involved in the negotiations, their concern is that there could be some consequence to the clause that they are not considering at the time, but they would be called on to explain the absence of a provision in the event that its absence became critical in a dispute.

The sum is that it is extremely difficult to get the government to drop provisions. The crux of successful negotiation with the government is, instead, to ask the government’s representatives to supplement the provisions by clarifying what key phrases or key words mean. The mechanics of this can be accomplished through the section of the contract that allows for special provisions, or through exhibits that are referred to in the contract clauses and incorporated in them.

Here is an easy example from Federal Acquisition Regulation 52.227-11(j). This provision allows the government to “march in” and take patent rights to be used by another contractor in certain circumstances. In instances in which the government has contributed developmental funding, such as under some contracts, and cooperative agreements, other transactions, or grants, the government wants to obtain these rights where the contractor has not reasonably commercialized products resulting from developments under the agreement.

Contractors are almost always concerned about this provision, not only because they are afraid of being deprived of the ability to commercialize the
development, but even more so, because their preexisting intellectual property may be embedded in the new development, and therefore discoverable if someone else is given the right to commercialize the new development. Often, negotiations stop right on Mediterranean Avenue, when the contractor wants to delete this provision and the contracting officer refuses to do so.

The solution is to leave the provision in, but attach to it an exhibit that specifies what the commercialization schedule will be in this instance. Rather than leaving the words “reasonable time” to take “effective steps to achieve practical application” as the generic guidance, a schedule the contracting party either safely believes it can meet or, in the event that it may choose not to commercialize the product, safely believes will put its embedded intellectual property beyond its time of value, will suit the contractor’s purpose. It will also suit the contracting officer’s or lawyer’s purpose, so long as it has been passed on by the program manager, because neither the contracting officer nor the lawyer is likely to feel that it is within his or her bailiwick to gauge when an invention should be ready for market. Those judgments are left to the program manager. The program manager, in turn, is most concerned about having a deliverable for government purposes, and is usually willing to be more flexible with respect to a commercialization schedule. Thus, a commercialization plan is kept, but by supplementing the standard clause, the parties agree on a time period with which the contractor is comfortable.

Major Issues to Negotiate

Of course, the major issues can vary substantially depending upon the nature of the contract and the circumstances of the contractor. However, certain issues often arise and are difficult to resolve. The first is how intellectual property will be utilized, especially if the product has been developed partially or wholly at government expense or is not yet a commercial product. A second issue increasingly arises in the General Services Administration (GSA) federal supply schedule context, that of the administration of the price reduction clause. A third issue arises after contract signing, over whether an item has met specifications, or whether a government request is simply a specification or a contract modification.
Intellectual Property

Intellectual property ownership, use, and disclosure are almost always issues when there is going to be development or when a product is not yet commercial. Use and disclosure can also arise when the government wants to be able to modify or even maintain technical equipment and needs proprietary information to do so. This occurs in the acquisition of a large number of technologies.

For the most part, patent rights are now taken care of. The contractor obtains the ownership and rights to commercial use of the patent, and the government obtains a non-exclusive license to use the patent or have it practiced on behalf of the government. The issue of intellectual property disclosure and use most often arises in the context of technical data, data that is not included in the patent claim or is not itself patentable, but which can be enormously helpful in developing a product from what is patented or illuminates some element that is obscure in the patent.

When the government is paying for all or part of a development, the government will often want broad rights in the technical data surrounding it. Some years ago, government contracting officers would usually insist that if the government is fully paying for the development, the government should get “unlimited rights” in the data, which meant it could publicize technical information as it saw fit. Today the standard rights in data and patent rights clauses may still give the government unlimited rights to use, or have used on behalf of the government, both the patent and technical data that is provided to it. In many cases, however, the contractor will not want to provide the data to the government if they will be made public. Such data can provide substantial information to competitors, which puts the contractor at a disadvantage if used in the commercial market, or allow a competitor a much greater chance of capturing the government market. Thus the contractor is very often most interested in assuring the technical data are as closely held as possible.

But the government may want access to the technical data. It may simply want to do further research in the area. But often it is looking for an actual development. It wants to be sure a product comes from the work—especially if it plans to acquire such product—or that it can combine this
product with others that are being developed by other parties. The government therefore wants to retain broader rights to disclose the information.

I have found this tension about the use of data to be among the most substantial in negotiating contracts. Many negotiations immediately find themselves at a standstill. The contracting officer and perhaps the program manager want to use the standard clause when the government has paid the full cost, which gives the government “unlimited rights” to disclose and use data. The contractor does not want to give the government any of the data, at least as long as it feels it will be developing a product responsive to the government’s needs.

In these circumstances, I try to limit the data delivered to the government and its disclosure and utilization of the data to only those circumstances that it actually contemplates and needs. In addition, I try to create as much transparency as possible, in finding out to whom information has been given and having those parties sign a non-use and non-disclosure agreement. This heightens their awareness of the fact that they can’t use the information for private purposes, and it potentially creates a cause of action if they do.

By granulating the government’s needs and trying to limit the utilization of data to its specific needs, we can usually create the assurances the contractor needs that it will have an acceptably exclusive run in the use of the intellectual property.

Examples of Limiting Government Intellectual Property Rights

Here are two examples of the government being specific as to its needs so the intellectual property could be disclosable to those parties and in those conditions the government needed, but not more broadly.

The first involved software being developed for the government’s application. There would be broad application in private facilities that do the same thing as the government. The government wanted the source code for the application, and wanted to assure broad application in the industry, so it proposed to require licensing at a market royalty to other potential
software providers. My client did not want to provide source code, for fear that the underlying algorithms it had privately developed would be disclosed. It did not want to license potential competitors to build other software to license to industrial users.

First, the government agreed it would not need to force licensing if software containing the appropriate applications were reaching the industry. Therefore, it agreed there would be no obligation to license in a number of circumstances, including if the contractor is supplying the market reasonably, or if there is a commercially competitive alternative available from other sources. It also agreed that only object code needed to be provided in this circumstance. The government also agreed that it would only obtain the source code in the specific circumstances in which the government needed it. These would include the failure of the recipient to commercialize the software (but with an exhibit specifying the commercialization schedule and scope that would be necessary, which the contractor thought could be met) or in peculiar circumstances, such as litigation or a government investigation of the contractor.

In another negotiation, the client was being paid to develop a modification of its equipment for the government. The government wanted the technical data, both because it wanted to ensure a reasonable price for the large amount of equipment it would want, and therefore wanted competitive bidding, and because it wanted to have other parties meld their technology with the technology to be developed by my client. The client, of course, would have preferred to have the market to itself, but was willing to allow the government to achieve these two purposes, which were at the heart of the government’s priorities.

However, to preserve the substantial private market, the government and the client agreed to two important modifications. First, with respect to second sourcing on the equipment the government immediately needed, the government agreed to give the developer a right of first refusal on the price obtained from other offerors. It agreed not to provide developer proprietary information to any but the one party it chose, in the event that the contractor could not meet the proposed price. In that event, the government also agreed to obtain a non-use and non-disclosure agreement from the other party, which would therefore allow the contractor to
monitor developments of the other party closely, and create a contractual right of action against it.

Second, with respect to the government’s desire to meld the contractor’s equipment with those of others, the government agreed it would not disclose any of the developer’s proprietary information to the nineteen companies that were also in the business of developing similar underlying equipment nor to “any other contractor or consultant with the intent of developing any replacement or competing technology.” Thus we were able to focus the government on its intended purpose, that of using this equipment in conjunction with other equipment. We did not eliminate standard intellectual property clauses, but simply created a mechanism and a reservation, which was special to this agreement, creating further limits on the government.

Price Reduction Clauses

The GSA requires a price reduction clause for those who sign contracts to be on the federal supply schedule. Many blanket purchase agreements signed by individual federal departments are now requiring this as well. The clause establishes a price relationship between what a government purchaser pays and what a certain class of commercial customers pays for the same product. The government’s price is supposed to adjust down if the commercial price goes down.

One of the most difficult negotiations with the GSA contracting officers is in finding a workable price reduction formula. This is especially the case where there are many permutations of products that can be combined, such permutations can be priced in a bundle without component prices, or the company’s sales model leaves broad discretion to salespeople as to what discount to provide in any particular circumstance.

Contracting officers are most comfortable with a set number of offerings and a discount policy that does not change frequently. Then for each product or product bundle, it can ask for the best commercial discount minus an additional 2 percent. Many companies have been agreeing to such formulae, even when it doesn’t suit their model. They have been telling the commercial side of the business at the initiation of the contract that the
commercial side must inform federal sales of changes in commercial pricing. Commercial sales divisions did not report, and for many years there was no comeuppance because of it.

However, in the last few years, the GSA has increased the number of audits it has performed, and has gone back for repayment of payments claimed to be above the price reduction amounts. Therefore, it has become important that price reduction provisions become workable.

Thus, a major issue that has arisen is how to strike reasonable agreements. One way is to create a discount for the government from some average price used in a particular period, such as a quarter. While the government would not, of course, get the very lowest price offered to anybody during this period, it would know it was always getting a good price compared to the selected commercial market as a whole. Another solution is to tie the price directly to one being given to a sample of good commercial customers, cutting down on the volume of transactions the company has to follow.

Contracting officers still resist this notion. They believe it doesn’t achieve the very best prices. They also believe averaging or statistical sampling may be harder to administer. Hopefully, this is a transitional problem. Contracting officers should see that it is not harder to administer than the thousands or tens of thousands of individually priced sales in a quarter for which they are otherwise asking.

To help speed this understanding, it is often worthwhile to contact the primary parties who buy off the federal supply schedule. They can contact the GSA contracting officer to try to expedite the process for a new contract or a contract renewal. In addition, they have the ability to deprive the GSA of one of its few money-making operations. The GSA makes billions of dollars from the industrial funding fee. This is the payment of .75 percent that a supplier pays to the GSA for having the GSA administer the supply schedule. If it becomes too cumbersome to work through the supply schedule, the government agencies and the supplier always have the option of individual orders or signing a blanket purchase agreement, under which orders can be placed outside of the GSA context. When this is done, the GSA does not collect its industrial funding fee. A reminder from the
user agency of its continued need to get your client’s goods often serves to have the GSA think of innovative approaches to the price reduction clause.

**Negotiations on What the Contract Actually Requires**

A third likely area of negotiation should come before (but, unfortunately, often comes after) the contract has been signed. It revolves around what is required in the deliverables or in the statement of work. This arises in two contexts. One is whether the client is fully performing. The government will either withhold its acceptance because the product failed a test the client does not believe was within the parameters that needed to be met, or inform the client it is in danger of defaulting on the provision of services the client believes either it is providing or do not fall within its service or maintenance agreement.

The other circumstance arises when the client believes it is being asked to do more than the original contract promised—when it believes the government should be asking for a contract modification while the government believes the newly specified work is simply a “clarification” or enumeration of what has previously been agreed upon.

Therefore, when first entering the contract, it is usually in the contractor’s interest to be as specific as possible as to what is to be provided. If it is a product, the seller should attach all of the claimed attributes, such as by attaching the technical brochure. So, too, for any development work a general description will work against the contractor. That is because the standard dispute provision requires the contractor to perform if an activity is within the scope of the contract, even before it is resolved as to whether the contractor will get paid more. And, in pursuing the dispute resolution procedure, the government has the advantage that in any dispute the client will be paying for its lawyer, while the government’s lawyer is a fixed cost.

The negotiating approach to take when there is a dispute after the contract has been signed depends on a totality of circumstances, including the overall nature of the relationship between the parties, and whatever other work the contractor is doing for this branch of the government. It also depends, of course, on how costly the extra work is. The contractor needs to consider whether the newly ordered item or service might fall outside the
scope of the contract, and therefore whether the contractor need not perform until a price has been agreed upon. It needs to consider whether the government will threaten termination in this circumstance or whether the work is too far along or needed too quickly. These can be some of the ugliest negotiations.

*What Most Often Kills Government Contract Deals*

Government contract deals are most often killed when the contracting officer has a “take it or leave it” attitude and simply won’t explain what the government needs and adjust the contract language accordingly. When the deliverables are simply commercial items developed at private expense, if the price is reasonable, the client can take the deal. But where it is anything else—a non-commercial product, a product developed with some government funding, or a contract involving some further development—the government needs to spell out its real intellectual property needs, offer cost reimbursement or realistic milestones, and specify when and what stage of a product it really needs. If it does not do so, my clients have been more willing to walk away.

*Subcontract Negotiations*

*Responding to Flow-Down Clauses*

Subcontracts differ from prime contracts in that they are for the most part commercial engagements, with few mandatory flow-down clauses. As with prime contracts, the mandatory clauses are usually not controversial. For the most part, the other clauses simply divide risk between the prime contractor and the subcontractor. Of course, the prime contractor wants to be sure it is not stuck in the middle. If it has a termination for convenience or a stop work order clause in its prime contract, it will not want the subcontractor merrily proceeding to make goods the prime contractor can no longer use. But the subcontractor is best served if it limits the exculpatory clauses that flow down to it to the circumstances that are specific to a government action. For example, it will not want to give the prime contractor free rein to terminate it, but only allow such termination in the event that the government terminates the prime contractor for the goods and services the subcontractor is to provide. By explaining that these
limitations still allow the prime contractor to be responsive to changes in the needs of the government, but otherwise simply hold the prime contractor to standard contract making, the subcontractor can usually convince the prime contractor to add these modifications to the clauses to which they are applicable.

Many times, subcontractors get a list of every Federal Acquisition Regulation clause to which the prime contractor has ever been subject or may ever be subject. Many of these are plainly irrelevant to the subject of the specific contract. Contract administrators for prime contractors are often in the situation of government contracting officers—if a clause is there, they are either reluctant to take it out or claim they simply have no authority to do so. In these instances, where I am representing a subcontractor, I often suggest that we can leave clauses that will have no effect upon it. For example, a favorite clause has to do with the use of government-furnished property. But the subcontractor is not going to be using any government-furnished property, so take it out, right? Since the clause only triggers in the event that government-furnished property is going to be used, the subcontractor can leave it in and spare the prime contractor’s contract administrator from having to go back and get approval. Of course, as noted in the prior paragraph, other clauses would give rights to the prime contractor that it need not have. The subcontractor’s counsel or contract administrator needs to distinguish between these two, but needs only to fight for the ones that truly affect it.

**Issues in Subcontract Negotiations**

There are two issues that often arise in the negotiation of a subcontract, and one that ought to.

**Audit of Cost and Pricing Data**

The subcontractor may want to be very careful about any audit of its costs. If the prime contract is a cost reimbursement contract, the prime contractor may need to have the subcontractor provide cost and pricing data and be subject to an audit. Even if the prime contract is a fixed price, the prime contractor may want to be able to audit the costs of the subcontractor. The subcontractor is justifiably reluctant to allow this to happen, because, by
seeing all of the costs, the prime contractor gets to bargain harder the next time, or figure out that it would be cheaper to do it itself.

There is rarely any reason for the prime contractor itself to be able to conduct an audit. If there is an audit that needs to be done, there is no requirement for the prime contractor to do it and learn of the components. For example, the prime contractor may hire a third party to do the audit, which reports to the prime contractor or directly to the government.

**Disclosure and Use of Intellectual Property**

A second issue that frequently arises is with respect to disclosure or use of intellectual property. The concerns are those expressed with respect to providing the intellectual property to the government, except with an added concern: if the prime contractor has access to the technical data, could it expand into the area and eliminate the need for the subcontractor? The importance of this issue, of course, depends upon the subcontractor’s assessment of the likelihood that the prime contractor would move onto its field. If the chances are very small, the prime contractor’s access might be limited to those personnel who are working on the prime contract and who have a need to know from an administrative viewpoint. But frequently, the subcontractor is at least concerned that the work being done is close enough that the prime contractor would either like to do it itself or find another subcontractor to bid on the work. It is important, then, to remember that Federal Acquisition Regulation 27.304-3(c) forbids prime contractors from conditioning the award of a subcontract on obtaining intellectual property rights in the subcontractor’s inventions. Where the prime contractor does not need the technical data, the subcontractor can simply pass it to the government. This will require a negotiation with the program people, because the contract administrator will not forego access without an assurance from the program people that the prime does not need it.

If the prime contractor does need access to the subcontractor’s technical data, the subcontractor can condition providing it on its use only for the prime contract, limited to access by the personnel involved in the specific use of the product for the government. Many times, the names of these people can be specified in the subcontract. Subcontractors also often try to
have those people sign non-use and non-disclosure agreements. However, the prime contractor usually resists having its personnel sign any commitments that could make those personnel liable to another company, or that could create a liability for the prime contractor that extends beyond that which it contractually undertakes in limiting disclosure to those people. A limitation on who sees the data and how the prime contractor will use it is probably the best the subcontractor will get.

**Prime Contractor Representation of the Subcontractor in Disputes**

A final concern should be the subject of subcontractors negotiating with the prime contractor, but often it isn’t. The government almost always contends that it is in privity only with the prime contractor and not with any subcontractors. (There are exceptions to this rule, but it is a steep hill to climb.) When entering a contract, the subcontractor should require of the contractor that the prime contractor will present claims on behalf of the subcontractor in the prime contractor’s name, and allow the subcontractor to appoint (and usually pay for) the counsel who will handle the matter.

This is especially important where there is a cost reimbursement prime contract, and the government may disallow costs that arise from the subcontract, causing the prime contractor not to pay the subcontractor. However, it can arise more broadly—for example, if there is a change order that is passed down to the subcontractor, and the government disputes the amount to be paid. The subcontractor will want to bring a claim, but can usually only do so if it is bringing the claim through the prime contractor. Prime contractors are, of course, leery about antagonizing the government by bringing a claim, so they often will drag their heels on doing so if the subcontractor has no right to have the claim brought. While prime contractors are sometimes reluctant to include this clause, they will usually agree to do so in the context of the subcontractor’s accepting the changes clause that is almost always flowed down. That is the clause that requires the contractor to perform a change order even if there has not yet been an agreement on the price for the change. This is not a mandatory flow-down, and before it is accepted, many subcontractors will want to at least be assured they can themselves bring a claim with as much vigor as the subcontractor decides it is worth.
Negotiations and Settlements after Disputes Arise

This section is not intended to discuss how to litigate all of the issues that may arise from government contracting. Instead, I focus on some of the best ways of negotiating these issues to obtain a resolution prior to the litigation process, or early in the process. Thus, in each of these areas I will focus on the parties and the nature of the argument that is most likely to create a favorable atmosphere for a good settlement.

Most disputes arise in three ways. First, there can be bid protests your client will bring or which will protest an award to your client. Second, there can be claims when there has been a contract modification, or a termination, or where the government simply stops paying. Third, there can be disputes over the nature of a termination—whether it was appropriately for convenience or default.

Bid Protests

The key to a favorable settlement of a bid protest is to have the government party who is likely to have your interest actively informed about why you should prevail, to have the greatest influence on whether the government folds or opposes the protest.

Effectively, this means if there is a protest against an award to your client, you would talk with the agency to suggest why it should defend against a protest, if you believe the specifications are correct or the award is correct, depending upon where the procurement process stands. I frequently offer to show a draft of my response to the protest as well, and frequently counsel for the procuring agency asks to see it. Conversely, if I am making the protest, I’ll call to have a conversation with the government representative to see their initial response. They are frequently willing to discuss this, to sound out how solid their position is.

Protests can be brought at the agency itself, before the Government Accountability Office, or in the Court of Federal Claims. Some protesting lawyers like to go to the agency first. They believe agency personnel may be more receptive in this less formal forum. Also, if the agency denies the protest, you can then go to the Government Accountability Office for your
second bite at the protest. This is especially so when the protest is over the specifications in a procurement rather than the award. Normally, the pre-award protest allows more time for the agency to reconsider whether the specifications are appropriate.

Also, protestors frequently are concerned about how their protest will be perceived by the procuring agency, which either has been, is, or, they hope, will be their customer. Going to the agency first, they think, will take some of the sting out of the protest by making it appear as if the agency is being asked to reasonably reconsider, rather than the protestor going over its head to the Government Accountability Office.

However, in the pre-award phase and especially for a post-award protest, the protestor must first get an assurance that the agency will suspend making an award or performance under the award while it considers the protest. The protest can always be taken to the Government Accountability Office if the agency says no. But the requirement that the agency will suspend performance under the award generally only extends for five days after the award is made. If a post-award protest fails at the agency and you then go to the Government Accountability Office, the agency is not required to suspend performance of the award until a decision on the protest. By the time of decision, four real months into the protest, performance may have proceeded to the point that the award will not be overturned even if the Government Accountability Office believes it was initially wrong.

While some lawyers who file protests go to the agency first, I have generally found this to be a delay in resolution. Rarely have I seen the agency change its decision where it wouldn’t have done so after a Government Accountability Office protest, particularly in a post-award protest. In fact, it may have to more seriously consider the merits where it knows the Government Accountability Office will face up to the hard decision even if the agency avoids it. It is mostly for the psychodynamics of letting a customer feel you are appealing to its reasonability first that I feel creates some merit for an agency protest.

When deciding which party within the government to contact—wherever the protest has been brought—it is worth remembering, as noted above, that the government representatives can sometimes have more disparate
interests than the involved parties for a contractor. The lawyer for the contractor is mostly concerned about having the contractor obtain the business, or not to lose it, so long as he or she can make a plausible case. But the government’s lawyer reaps little of the benefit for successfully fending off a protest, because the legal and contracting departments are more insulated from the operating units in the government.

The most important effort in bringing either a pre- or post-award protest is to try to have the protest explain as simply as possible either that the award specifications are too narrow (in the pre-award context) or that the award fails in some material way to meet either the selection criteria or the required process (in the post-award context). The converse is true for the defending awardee.

Government procurement needs to follow a rigorous set of standards. The government attorney or contracting officer has little interest in fighting for the preservation of a procurement that is legally vulnerable. They bear the responsibility if the procurement goes forward and then a protest is sustained. They bear little of the responsibility for the effect on the program if the procurement is redone, since they are not responsible for meeting program deadlines. Thus, reaching counsel or the contracting officer can often result in a quicker and less costly resolution than is the case if counsel does not become convinced the protest is either probably going to prevail or, on the other hand, is frivolous.

There is sometimes reason to reach the program manager as well. This occurs in the event that there is an easy division of the procurement and one party can best provide some of the goods, while another party can best provide other goods. The program manager may feel that he or she can get the best of both worlds by eliminating a protest that suspends performance, and obtaining goods from two different sources, each of which is the best in its sphere. To do this, the program manager might suggest to the party that obtained the award that it could subcontract with the protesting party for some of the goods, in return for the protesting party withdrawing the protest. Legal counsel and the contracting officer are unlikely to engineer this resolution by themselves, because they do not know if such resolution would best serve programmatic interests. But if the program officer suggests it could, it is a way for the government to have a very satisfactory resolution.
Negotiating Government Contacts That Fit Client Needs

As noted above, issues often arise when the government treats new instructions as a specification while the contractor regards them as a modification, requiring a written amendment and adjusting the price. In general, negotiations should start on a program manager-to-program manager basis. Because many of these issues are technical, the government’s lawyer is very likely to defer to the program person on whether a direction is in fact a change. In addition, because the technical people know the components of the issue, they can more easily agree on pricing a modification. If the lawyers get involved too early, they each add their baggage to the negotiations. However, if the client believes the specification is a change, or even that it is beyond the scope of the contract, and cannot convince the government program manager of this, the lawyers will need to become involved. If there has been a well-written set of deliverables or a well-written statement of work, the lawyers may see there is a modification, and suggest fixing the price without the need to go to a board of contract appeals.

I am more keen to involve the contracting officer or the lawyer at an earlier stage, where relations have soured to the point that the government is considering a termination. The worst outcome for a contractor is if it is terminated for default. Contractors have to disclose that they have been so terminated when making new government offers, and it counts against them in the evaluation of their past performance. Moreover, they can be held liable for the extra costs the government incurs in obtaining the products or services upon which the contractor has defaulted. On the other hand, the government often does not want to terminate for convenience, because it will owe the contractor the costs the contractor has incurred to that point, plus a pro rata share of its profits. Sometimes, of course, a termination for convenience is clearly what is occurring. Funding for the contract may simply have ended. But often the threat of a termination comes after there has been some tension between the government and the contractor, or where the government’s project manager believes the government is not getting what it should be getting, or not getting it in a timely fashion.

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Claims in Contract Administration, Termination, or Government Default

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default, and it is contested by the contractor—something a contractor is likely to do, given the dire consequences of a termination for default determination—it is they who will have to defend the decision. Thus, they will want to carefully review the basis for it before a program manager proceeds. Often, in conjunction with counsel, the program manager and the contractor can agree on changes. For example, if there has been tension among personnel, the contractor may change its contract leadership. Sometimes the government does not care about the terminology so long as it’s not responsible for any additional costs. In that case, a “termination for convenience without costs” is often concluded. There is no default, but no additional payment to the contractor either.

Among the toughest negotiations are those where the government has simply stopped paying. Unfortunately, this happens more often than contractors at first can believe. It often happens in a licensing context, where there are periodic ongoing payments, such as when the government is licensing software. A user agency decides it no longer needs the software, but the agreement has been signed by some other command or some other agency. The user agency does not feel responsible because it is not the contractual party, and the contractual party doesn’t feel responsible because the user is perceived to have the obligation and it defaulted.

These are difficult situations to negotiate. The contracting agency is the one that contractually obligated itself, and should make good on it while then pursuing internal governmental remedies to be reimbursed. It is worth having a discussion with the contracting agency to see if it will do so. But often it is easier for that agency’s counsel to get a payment made after an order from an administrative law judge rather than having the agency make the payment on its own initiative and then seek redress from the user agency. Thus, in these situations, after an initial attempt at settlement, I move quickly to bring a claim and get the process started.

**Process for Bringing a Claim**

If informal discussions do not yield a resolution, and the contractor needs to bring a claim, the best process is to develop the claim as fully as if you are about to file it, but to provide it to the government counsel and contracting officer prior to filing it. Government counsel do not have the
same incentives as private counsel to resolve a claim before a decision. There is no client incentive to settle. Indeed, many times the program manager has become miffed at the contractor and does not want to settle, and the program is not paying the lawyer’s bills. It is sometimes easier for the government’s counsel to simply let a case drift to judgment than to affirmatively pick up cudgels for a settlement, which requires getting an early, complete understanding of the case, rather than putting off that understanding until a hearing; arguing that the government has vulnerabilities, when the program people are not feeling that way, and therefore potentially antagonizing the program people; and then potentially antagonizing both the program people and fiscal authority by recommending a settlement amount. If, on the other hand, there is a judgment by a board of contract appeals, the process for payment becomes much more automatic, and counsel need not fight for anything.

I have had a number of maddening experiences in which our claim was extremely likely to prevail, government counsel did not seem to have much of an argument in pre-hearing briefs or at the hearing, and we have prevailed, but only after spending far more money than a hard assessment by government attorneys would have warranted. With that said, it is still useful to provide the proposed claim to counsel and the contracting officer before filing it. A losing claim can sometimes put egg on the face of all the government parties involved. If the counsel sees a claim has both a solid basis and a solid claim for costs, it may be easier to resolve it as part of a contract modification that does not appear to the rest of the world to be a lost controversy, or a mismanaged contract. The modification takes account of the issue in the contract, and provides an additional payment for it. The claim is never filed, and the resolution is not scored as either a loss or something that needs approval from the program, legal superiors, and fiscal officers before being agreed upon.

Conclusion

In sum, there are two broad conclusions for increasing the chance of successfully dealing with the government in negotiations:

1. Don’t simplify…elaborate. It is extremely difficult to achieve a crisp, three-page document with the government that says
everything that needs to be said. The government has its clauses, many of them are exhaustive, and the government believes they are there for a reason—even if it is a reason extremely unlikely to occur in your situation. Contracting officers and counsel are unlikely to strip them out. Instead, you must add language that clarifies and narrows the standard language to apply to the particular concerns the contractor and the government have in your individual circumstance.

2. What’s decided at the table depends to some extent on who is sitting at the table. In any circumstance, consider which of the potential people who are involved on the government side are likely to be your best allies in coming to a resolution. Will it be the senior program person or a junior program person or neither? Will it be the contracting officer or the contracting officer’s technical representative? Will it be useful to have counsel there, or should the non-lawyers make a first attempt at resolution? Some of these people will have an institutional need to resolve the issues. For others, it is less important that issues be resolved and that the actors move forward.

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Mr. Urwitz has written and lectured extensively on government contract and public policy issues. His articles have been published in the New York Times, the Wall Street Journal, the Washington Post, and other publications such as Managing Intellectual Property, Aviation Week, and Defense News. He has lectured before organizations such as the New England Corporate Counsel Association, the Massachusetts Software Council, Massachusetts Continuing Legal Education, and the Washington Board of Trade.
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