

Workshop W7

Wednesday, November 4, 1:30–3:00 p.m. and 3:30–5:00 p.m.

A RISK MANAGER'S GUIDE TO FEDERAL CONTRACTING

Presented by



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Michael C. Loulakis
President/CEO
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The stimulus bill passed earlier this year is expected to generate demand for certain types of construction, much of it in the public sector and a significant portion in the federal market. With demand for residential and commercial building construction down, many contractors may find themselves venturing into the public sector for the first time and in need of an introduction to the ins and outs of working for the federal government. This workshop highlights key laws, rules, and other risks contractors must be aware of and incorporate into their risk management processes when working on a federal project. Learn about the unique ethics requirements with which federal contractors must comply, the impact of the Buy America Act, key differences in dispute resolution and subcontractor payment obligations, and more.



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Bennett D. Greenberg, Esq., DBIA
Partner
Seyfarth Shaw LLP

Mr. Greenberg is copresenting Workshop W7, "A Risk Manager's Guide to Federal Contracting," on Wednesday afternoon. He is a partner in Seyfarth Shaw, LLP, specializing in design and construction law in both public and private sectors. His work includes negotiating and drafting contracts, counseling clients on procurement-related issues, contract administration, risk management, and dispute avoidance, preparing claim documentation in support of, and defense of equitable adjustments to contracts, and mediating, litigating, and arbitrating large complex, multiparty construction disputes.

Mr. Greenberg represents design professionals, design-builders, contractors, and public sector owners. He has advised and educated clients on alternative project delivery systems and has extensive experience with design-build contracting, including preparing and responding to requests for proposals, negotiating and drafting design-build contracts structuring the relationships between the design-build participants, counseling clients on administering design-build contracts, and resolving design-build disputes.

Mr. Greenberg is active in the Design-Build Institute of America (DBIA) and presently serves as Special Legal Advisor to the DBIA's Board of Directors. Mr. Greenberg took the lead in drafting DBIA's model contracts documents and was the recipient of the 1998 DBIA Leadership Award for his work on the new model form documents. He presently chairs the DBIA committee that is revising the DBIA contract documents. Mr. Greenberg has authored numerous construction law articles, lectures throughout the country on construction law topics, and has structured training seminars for clients on risk management and other construction-related topics. He has also served as an arbitrator in numerous AAA cases. Mr. Greenberg has been recognized by Chambers USA as one of the nation's outstanding construction attorneys.

Michael C. Loulakis
President/CEO
Capital Project Strategies, LLC

Mr. Loulakis is copresenting Workshop W7, "A Risk Manager's Guide to Federal Contracting," on Wednesday afternoon. He has 30 years of experience in representing parties engaged in all aspects of the construction industry. Before starting Capital Project Strategies, Mr. Loulakis served as chairman and president of the national construction law firm of Wickwire Gavin, P.C., where he represented clients on matters involving procurement, risk management, contract drafting, and dispute resolution. He is well-known for his extensive background in design-build and other alternative project delivery systems, and has been one of the industry's most active writers and speakers on the subjects. Mr. Loulakis has been lead counsel on some of the country's most complex design-build projects and public-private partnership programs, where he has helped public agencies formulate effective procurement and contracting strategies. He has also represented contractors, design professionals, and others on construction business counseling, teaming, contracting, and conflict resolution, often serving as their outside general counsel for construction matters. In addition to his public sector work, Mr. Loulakis also has extensive experience in the representation of private sector owners on domestic and international capital projects in the power generation (coal-fired, gas-fired, and hydroelectric), petrochemical, and process industries. His role includes strategic assistance on EPC and EPCm

procurement, risk allocation, contracting, and conflict resolution, and he has worked on projects in over 10 countries around the world. Given his background, Mr. Loulakis is frequently asked to serve as a neutral in arbitrations, mediations, and DRBs and as a peer reviewer of contracting practices and claims management. He is also involved in several national research projects for design-build and P3 best practices. Mr. Loulakis holds a civil engineering degree from Tufts University and a law degree from Boston University School of Law.

He is widely published and has been ranked in *Chambers USA* as one of the country's best construction lawyers from 2005 to 2009. His most recent recognition includes: designated Design-Build Professional (DBIA): America's Leading Lawyers for Business for Virginia Construction. He is a recipient of the International Risk Management Institute, Inc. (IRMI), Words of Wisdom (WOW) Award.

His representative experience includes:

Public Sector

- Representation of Metropolitan Washington Airports Authority (MWAA) on the \$2.8 billion Dulles Metrorail project. Services include drafting and negotiating the design-build contract, creating project control specifications, developing risk mitigation strategies, and interfacing with other project participants.
- Representation of Virginia Department of Transportation in developing its standard procurement documents under the Virginia Public Private Transportation Act (PPTA) program, including RFQs, RFPs, design-build contracts, and concession agreements.
- Representation of Washington Metropolitan Area Transit Authority (WMATA) in conflict resolution with the design-builder on the Largo Metrorail project over claims for constructive acceleration, project delays, and unique design-build issues.
- Representation of the Transbay Joint Powers Authority in determining the project delivery system for the new Transbay Transit Center and associated facilities in downtown San Francisco.
- Representation of Washington State Department of Corrections on its first design-build project, a \$100 million expansion of its Walla Walla maximum security facility. Services included development of the RFQ, RFP, design-build contract, and design-build execution program.
- Representation of the Southern Nevada Water Authority on its largest design-build project, the Lake Mead Intake No. 3 project. The project includes an intake shaft and a 3-plus mile intake tunnel beneath the lake, with tunnel boring conditions never before used in the United States. Services include the development of all procurement documents and strategic advice on selection criteria and risk assessment.
- Representation of the World Bank and InterAmerican Development Bank in creating and modifying their standard form contracts.

Private Sector

- Representation of a Fortune 50 company on a multi-billion petrochemical project in Kuwait being delivered through multiple-prime EPC contracts. Services include counseling the project team on procurement, contracting, risk management, and claims.
- Representation of a Fortune 200 public utility on a domestic integrated gasification combined cycle (IGCC) power generation project. Services include drafting and negotiating the EPC contract.
- Representation of several international independent power producers in risk analysis, drafting EPC contracts, and assisting in the prosecution and defense of claims. Representative projects include facilities in China, Mexico, Nepal, and the United States.
- Representation of several owners in the petrochemical industry on international CAPEX strategies for contracting and procurement and contract execution.

His publications include: *Design-Build Lessons Learned*, AEC Training Technologies, 1995 to present (annual publication), author; *Construction Business Formbook*, Aspen Publishers, Inc., 2003, co-editor; *Design-Build for the Public Sector*, Aspen Publishers, Inc., 2003, editor; *Design-Build: Planning Through Development*, McGraw-Hill, 2001, co-author; *Design-Build Contracting Handbook*, 2nd Edition, Aspen Publishers, Inc., 2001, co-editor; *Project Delivery Systems: Evaluating the Owner's Alternatives (CD-ROM)*, A/E/C Training Technologies, 1999, author, producer, and developer; *Design-Build Contracting Guide*, Design-Build Institute of America, November 1997, author; *Construction Management: Law and Practice*, Wiley Law Publications, 1995, co-author. Other publications include: "The Law," monthly column in *Civil Engineering Magazine*, American Society of Civil Engineers, 1981 to present, co-author; "Design-Build Delivery for the Water and Wastewater Industry," *Construction Briefings*, West Publishing, Part I, Nov. 2003, Part II, Dec. 2003, co-author; "Power Generation Projects: Structuring the Design and Construction Process to Meet the Developer's Goals," Getting It Right: How to Structure Complex Projects to Allocate Risks and Minimize Disputes, American Bar Association Forum on the Construction Industry, 2001, author; "Creatively Avoiding and Resolving Design-Build Disputes," Ch. 10, *Design-Build: Risks and Litigation*, Aspen Publishers, 1999, co-author; "Claims and Disputes," Ch. 2, *Construction Controller's Manual*, Warren, Gorham & Lamont, 1998, author; "Trends in A/E and CM Liability for Jobsite Safety," *Construction Briefings*, West Publishing, September 1997, author; "Differing Site Conditions," Ch. 11, *Construction Claims Deskbook*, Wiley Law Publications, 1996, co-author.

Mr. Loulakis is a nationally recognized speaker before various state and federal agencies (transportation, defense, corrections), as well as the Design-Build Institute of America (DBIA), Construction Management Association of America (CMAA), International Risk Management Institute (IRMI), and other trade and professional associations on a variety of topics affecting the construction industry. Subjects have included risk allocation and management; innovative project delivery; public sector procurement issues; construction contract administration; contract claims and defense of claims; and alternative dispute resolution.


Mr. Loulakis's Bar admissions include 1979, Virginia; 1981, District of Columbia; and 1990, Maryland.

His professional memberships and activities include: active member of FHWA-AASHTO Construction Management Expert Task Force; Design-Build Institute of America, in which he was a former member of the Board of Directors (1995-2003) and chairman of the Manual of Practice Subcommittee (1997-2001) and primary drafter of both the DBIA Design-Build Contracting Guide and DBIA's family of contract docu-

ments; International Bar Association; Virginia Bar Association; American Arbitration Association's Commercial Panel (panelist); Construction Management Association of American (CMAA); and American Society of Civil Engineers (ASCE). His professional affiliations include A/E/C Training Technologies, LLC, founder and president, and Trident Partners, LLC (Member).

Mr. Loulakis previously served as Shareholder, Akerman Senterfitt Wickwire Gavin, P.C. (2006-2007); president and chairman (1995-2006) and Shareholder (1984-2006), Wickwire Gavin, P.C. (1979-2006); and also served at GEI Consultants, Inc., a geotechnical engineering consulting firm headquartered in the greater Boston, MA, area (1975-1976).

Mr. Loulakis earned a J.D. degree from Boston University School of Law, 1979; and a B.S.C.E., *magna cum laude*, from Tufts University, Tau Beta Pi, 1976.



The poster for the 29th IRMI Construction Risk Conference features a background image of two construction workers on a steel beam against a blue sky. The text on the poster includes: "29th IRMI CONSTRUCTION RISK CONFERENCE", "Learn and Exchange Construction Risk Management Strategies", "Recommended by:" with logos for CFMA and NASSB, and "November 1-5, 2009 Gaylord National (Washington, D.C.)".

Risk Manager's Guide to Federal Contracting

Presented By:
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The Current Federal Contracting Environment

American Recovery and Reinvestment Act of 2009

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American Recovery and Reinvestment Act

- \$787 Billion Total Allocation
 - Tax Relief -- \$288 Billion
 - Health Care -- \$148 Billion
 - Education -- \$91 Billion
 - Environment -- \$7 Billion
 - Aid to Low Income Workers -- \$82.5 Billion
 - Energy -- \$61.3 Billion
 - Infrastructure/Public Building Investment -- \$143 Billion

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Infrastructure and Public Building

- Transportation Infrastructure (\$49.3 Billion)
 - Highway and Bridge Construction (\$27.5 Billion)
 - Transit Capital Assistance (\$8.4 Billion)
 - High Speed Rail, Including Amtrak (\$9.3 Billion)
 - Airport Improvements (\$1.1 Billion)
 - USDOT Discretionary (\$1.5 Billion)

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Infrastructure and Public Building

- Building Infrastructure (\$29.5 Billion)
 - GSA Federal Buildings (\$5.6 Billion)
 - Military Construction (\$2.8 Billion)
 - DOD Facility Renovations (\$4.2 Billion)
 - School Construction (\$8.8 Billion Available to States)
 - Housing/HUD (\$9 Billion)
 - Various Other Agency specific, Including \$2 Billion for Community Health Centers

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Infrastructure and Public Building

- Water and Environmental Infrastructure (\$21.4 Billion)
 - Clean Water (\$7.4 Billion)
 - State Revolving Funds (\$6 Billion)
 - USDA Direct (\$1.4 Billion)
 - Water Resources (\$6.2 Billion)
 - Environmental Cleanup (\$7.8 Billion)
 - Nuclear Waste (\$6 Billion)

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Infrastructure and Public Building

- Energy and Technology (\$29.8 Billion)
 - Wireless and Broadband Grants (\$7.2 Billion)
 - Electricity Grid (\$11 Billion)
 - Home Weatherization Assistance (\$5 Billion)
 - State Energy Grants (\$6.3 Billion)

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Rules Applicable to Stimulus Projects

- Federal Acquisition Regulation (“FAR”) applies to Stimulus-funded contracts with a federal agency
 - Earlier versions of ARRA provided that all Stimulus-funded contracts were subject to the FAR; construction groups lobbied against application to state and local contracts
- Contracts with state and local governments are generally subject to state and local procurement laws
- However, contracts with state and local governments which are funded by the Stimulus Act may be subject to FAR requirements, depending on the terms the contract

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Oversight of Stimulus Projects

- Contractors should expect that all Stimulus-funded contracts will be closely scrutinized for fraud, waste and abuse
- The Recovery Accountability and Transparency Board “shall coordinate and conduct oversight of covered funds in order to prevent fraud, waste, and abuse.”

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Oversight of Stimulus Projects

- Recovery Accountability and Transparency Board
 - Comprised of Inspectors General from 10 federal agencies and a chairperson appointed by the President
 - Reviews compliance with competition requirements
 - Audits the use of Stimulus funds
 - Board may issue subpoenas and hold public hearings
 - Submits quarterly reports to the President and Congress

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Reporting Requirements

- Prime recipients of Federal Stimulus funds are required to complete quarterly reports identifying, among other things:
 - Amount of ARRA funds invoiced by the contractor during the reporting period
 - List of significant services performed for which the contractor has invoiced
 - Assessment of contractor's progress toward overall completion
 - Narrative of the employment impact of the ARRA-funded work (types and number of jobs created)
 - For subcontracts less than \$25,000, aggregate number of such contracts awarded and aggregate dollar amount
 - The information required for subcontracts over \$25,000 will be similar to what the prime contractor must report

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Reporting Requirements

- Executive Compensation
 - Quarterly reports are required to include names and total compensation of each of the five most highly compensated officers for the calendar year in which the contract is awarded, *but only if* in the preceding fiscal year the contractor received:
 - 80 percent or more of its annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements
 - \$25,000,000 or more in annual gross revenues from Federal contracts (and subcontracts), loans, grants (and subgrants) and cooperative agreements; and
 - the public does not have access to information about the compensation of the senior executives through periodic reports filed under the Securities Exchange Act of 1934 or the Internal Revenue Code

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Stimulus Act Requirements

- Buy American Requirements for “iron, steel and manufactured goods.”
 - Similar to provisions in Buy American Act and requirements in FAR Part 25.2
 - Exceptions include (a) finding that application would be inconsistent with the public interest, (b) materials are not produced in the U.S. in sufficient and reasonably available quantities and of a satisfactory quality, and (c) use of American-made materials would increase the cost of the overall project by more than 25%
 - If an agency determines that it is necessary to waive the Buy American requirements, a detailed written justification must be published in the Federal Register

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Stimulus Act Requirements

- Buy American Provisions:
 - Must “be applied in a manner consistent with United States obligations under international agreements”
 - If construction contract's estimated acquisition value is over \$7.443 million, and trade agreements apply, eligible construction material from designated countries will be treated the same as construction material produced in the United States
 - Focus is on location of assembly or manufacture, rather than origin of components
 - Includes contracts with state and local governments funded with Stimulus dollars

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Stimulus Act Requirements

- Additional whistleblower protections, which include anti-retaliation provisions
 - Creates a private right of action against an employer where whistleblower discloses gross mismanagement or waste of Stimulus Act funds or violations of laws or regulations related to a covered contract
 - Employee files initial complaint with Contracting Officer or Inspector General of the applicable agency. If CO or IG denies complaint or fails to act with certain time limits, employee may bring action in federal court

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Key Government Contracting Principles

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Federal Acquisition System: Goals

- Satisfy the Federal Agency customer:
 - cost, quality and timeliness
 - maximize the use of commercial products and services
 - using contractors who have a track record of successful past performance or who demonstrate a current superior ability to perform

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Federal Acquisition System: Goals

- Maximize competition
- Minimize administrative operating costs
- Conduct business with integrity, fairness and openness
- Fulfill public policy objectives

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The Federal Acquisition Regulations

- The Foundation Document
- Regulations Governing Federal Procurements
- Standard Contract Clauses
- Agency FARs
 - GSA
 - DoD

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Contracting Methods

- Sealed Bidding – IFB Part 14
- Contracting by Negotiation – RFP Part 15
- ARRA clear mandate for full and open competition

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Types of Contracts

- Firm fixed-price
- IDIQ contracts
- CMC contracts (GSA)
- Early Contractor Involvement contracts (ACOE/NAVFAC)

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Types of Contracts

- Fixed-price incentive contracts
- Cost reimbursement contracts
- Cost plus incentive fee contracts
- Cost plus award fee contracts

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Contracting Officer

- The one Government employee with the power to bind the Government and to exercise the rights, responsibilities, authorities and functions vested in him by the contract documents
- Has the power to designate others who have the authority to act for him – that designated authority may be limited

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Contracting Officer

- Contractor's responsibility to determine the extent of a designated representative's authority - usually there is a document specifying the extent of the representative's authority.
- Contractor is obligated to perform in accordance with any order of the CO or his representatives
- Contractor takes the risk if it obeys an order that exceeds a representative's authority.

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Contract Clauses

- Fundamental clauses are part of the contract even if omitted - know the FAR – Christian Doctrine
- Frequently, clauses are incorporated by reference to their FAR citations

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Contract Clauses

- Need to review the text of the incorporated clause
- Flowdown Clauses to subcontractors

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General Contracting Requirements

- Patent, Data and Copyrights (Part 27)
- Bonds and Insurance (Part 28)
- Cost Accounting Standards (Part 30)
- Contract Cost Principles and Procedures (Part 31)
- Contract Financing (Part 32)
- Protests, Disputes and Appeals (Part 33)

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Contract Management

- Contract Administration and Audit Services (Part 42)
- Contract Modifications (Part 43)
- Subcontracting Policies and Procedures (Part 44)
- Value Engineering (Part 48)
- Termination of Contracts (Part 49)

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Key Remedy Granting Clauses

- Changes Clause
 - Changes Directed by Contracting Officer
 - Constructive Changes
- Differing Site Conditions Clause
- Termination for Convenience Clause

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CHANGES

FAR 52-243-4 (AUG 1987)

- CO has the power to change the work at any time by written change order
- Other directions, interpretations, instructions or determinations (oral or written) can become a change order provided Contractor gives timely notice of a change
- Must comply with this clause
- CO must grant equitable adjustment if a change occurs which increases or decreases Contractor's time or cost of performance

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CHANGES

FAR 52.243-4 (AUG 1987) (cont'd)

- No adjustment for costs incurred more than 20 days before Contractor gives the required written notice
- Contractor must submit a written assertion to its right to an adjustment with general description of its costs within 30 days after receipt of written change order, or 30 days after Contractor's written notice of a change
- Unilateral CO's

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CHANGES: “Constructive Changes”

- Action by an authorized individual that has the effect of requiring the contractor to perform added work that is within the general scope of the contract.
- Government’s actions have the same effect as if the CO had issued a formal Change Order, even though the Government representative does not think he or she is “changing” the contract.

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Constructive Changes

- Government requires contractor to do more work than required by the contract
 - The contractor performs a greater *quantity* of work
 - The contractor performs the same work, but in a *different way*.
 - The contractor is *delayed* in performing the work
- These actions are treated as “constructive changes” and entitle the contractor to an “equitable adjustment” for the added costs and delays it experiences

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Constructive Changes: Five Basic Categories

- Government “constructively changes” the contract when it:
 - Makes an erroneous interpretation of the contract
 - Interferes with performance or fails to cooperate
 - Issues a defective specification
 - Fails to disclose its “superior knowledge”
 - Requires the contractor to “accelerate” completion of the work

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Constructive Changes: Erroneous Contract Interpretation

- Four fundamental questions
 - What did the contract really require?
 - Were you really “required” to do it?
 - Did the person have the “authority” to order you?
 - Did you give the required notice?

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Constructive Changes: Interference & Failure to Cooperate

- Basic theory – Government has the duty to cooperate
- Breach of the duty of cooperation
 - Active interference during performance
 - Failure to cooperate
 - Abuse of discretion in approval process
 - Substitution of contractors
 - Disapproval/untimely approval of drawings, schedules and methods of performance.

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Constructive Changes: Acceleration

- Basic theory – Contractor is entitled to the stipulated period of performance
- Existence of excusable delay
 - “Beyond the control and without the fault or negligence....”
 - Subcontractor delays as ‘excusable’
 - Concurrent delays
- Government knowledge of delay
- The acceleration directive
- Constructive acceleration

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Constructive Changes: Superior Knowledge

- Contractor undertakes performance without vital knowledge of a fact that affects cost or time of performance
- The Government was aware that the contractor did not have the knowledge and did not have a reason to get the information

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Constructive Changes: Superior Knowledge

- Contract specifications misled the contractor or did not put it on notice to inquire
- Government failed to provide relevant information

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Constructive Changes: Defective Specifications

- Under the Spearin Doctrine, Government warrants the adequacy of the design
- Spearin's applicability to design-build contracts

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DIFFERING SITE CONDITIONS (FAR 52.236-2)

- Contractor must give prompt written notice to the CO before the conditions are disturbed
- Subsurface or latent physical conditions at the site differing materially from those indicated in the contract
- Differ materially from those ordinarily encountered and generally recognized as inherent in the work of the character provided for in the contract
- Need for timely notice

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SITE INVESTIGATION CLAUSE (FAR 52.236-3)

- Companion to Differing Site Conditions Clause
- Contractor acknowledges that it investigated the site and investigated the conditions affecting the work including:
 - transport, handling and storage of materials
 - availability of labor, water, electric power and roads
 - weather, tides, river stages
 - topography and conditions of the ground
 - character of equipment and facilities needed

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SITE INVESTIGATION CLAUSE (FAR 52.236-3) (Cont'd)

- Contractor is bound to review geotechnical reports, soil boring logs and other information furnished by the government at the time of bid.
- Failure to take these steps will likely defeat the Contractor's claim.
- Government disclaims responsibility for conclusions or interpretations made by the Contractor or representations by the Government's officers or agents.
- Contractor generally has no responsibility for latent conditions.

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Payment

FAR 52.232-5 (APR 1989)

1. Request for progress payment must be certified

- That work for which the request is submitted has been completed in accordance with plans and specifications
- That subcontractors and suppliers have been paid from previous progress payments, and that timely payments will be made in accordance with the subcontracts.
- That the progress payment request does not include any amounts which the Contractor intends to withhold or retain from the subcontractor or supplier in accordance with the terms and conditions of the subcontract
- If Contractor discovers that all or part of the work for which it has been paid does not conform, it must notify the CO and repay the sum with interest

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Pricing Of Adjustments

- Each Agency may have its own contract clause
- Contractor must submit detailed breakdown of amounts claimed
- Contractor's pricing of adjustments is usually subject to the contract cost principles, and procedures in FAR Part 31 - a set of detailed rules governing the accounting procedures to be used and the types of recoverable costs
 - Cost or Pricing Data
 - Government Audit Rights

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TERMINATION FOR CONVENIENCE OF THE
GOVERNMENT 52.249-2 (SEP 1996)

- Government can terminate all or a portion of the work at its convenience
- Upon notice of termination Contractor must:
 - Stop work
 - Place no further subcontract or supply order
 - Terminate applicable subcontracts
 - Assign the subcontracts to the Government
 - With CO approval settle outstanding liabilities from the terminations

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TERMINATION FOR CONVENIENCE OF THE
GOVERNMENT
52-249-2 (SEP 1996) (cont'd)

- Contractor submits termination settlement proposal to include:
 - Profit on work completed
 - Cost of work completed
 - Cost of termination settlements with subcontractors and suppliers (includes legal costs)
 - Not to exceed contract price less amounts already paid
 - Generally must be submitted within one year of termination

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DEFAULT FAR 52.249-10

- Failure to prosecute the work with diligence
Failure to complete on time
- CO may terminate, take over and complete the work
- Contractor and sureties are liable to the Government for the damages resulting from the default

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DEFAULT FAR 52.249-10 (cont'd.)

- Not a default if:
 - The delay is beyond the control and without the fault or negligence of the Government
 - Contractor notifies the CO of the existence of the delay within 10 days from the beginning of the delay
 - CO grants a time extension
- Incorrect default termination is converted to convenience termination

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Public Policy Considerations

- Socioeconomic Programs
 - Small Business Programs (Part 19)
 - Application of Labor Laws (Part 22)
 - Environment, Conservation, Occupational Safety and Drug Free Workplace (Part 23)
 - Protection of Privacy and Freedom on Information (Part 24)

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Performance And Payment Bonds The Miller Act

- Requires Contractors to obtain performance and payment bonds
- Performance bond - equal to the amount of the original contract price
- Payment bond - equal to the amount of the original contract price

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Performance And Payment Bonds, (cont'd)

- Construction Industry Payment Protection Act
 - amended Miller Act
 - Payment bond - full amount of the contract unless CO makes a written finding that doing so would be impractical
 - updating means of providing notice of claim from registered mail to any means providing written, third-party verification
 - expressly prohibits contract from requiring subcontractors to waive their right to sue on the payment bond as a condition to getting the subcontract

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Contractor Compliance And Disclosure Obligations

- New Rule Effective December 12, 2008
- Changed Portions of Parts 2, 3, 9, 42 and 52 of the FAR
- Uncertainty Remains as to Scope and Implementation
- Mandated by Statute: Close the Contractor Fraud Loophole Act (Pub. L. 110-252)

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Contractor Compliance And Disclosure Obligations

- Detailed Contract Clause FAR 52.203-13 Contractor Code of Business Ethics and Conduct
 - included in contracts with a value greater than \$5 million and performance period greater than 120 days
 - substance of clause must be included in subcontracts that have a value of \$5 million and a performance period of more than 120 days

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Contractor Compliance And Disclosure Obligations

- Contractors required to establish and maintain internal controls to detect and prevent improper conduct in connection with the award or performance of any government contract or subcontract
- Timely disclose to the agency OIG (with a copy to CO) whenever the contractor has credible evidence of a violation of federal criminal law involving fraud, conflict of interest, bribery or gratuity violations under Title 18 US Code or a violation of the Civil False Claims Act (31 U.S.C. 3729-3733)
- Other statutes already have reporting requirements (e.g., Anti-Kickback Act)

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Contractor Compliance And Disclosure Obligations

- A knowing failure to report a violation or significant overpayments on any contract if the knowledge is acquired within three years of final payment on a contract is a ground for suspension or debarment
- Amplifies the requirements for a contractor code of business ethics and conduct
- Discusses contractor training requirements

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Contractor Compliance And Disclosure Obligations

- Duty arises upon the acquisition of credible evidence – which is not a concession of actual legal liability
- “Credible evidence” is a higher standard than
 - “reason to believe” and suggests that the contractor will have taken the time to examine the evidence to determine its credibility before deciding to disclose to the Government
- Government’s response to what it perceives to be contractors’ failures to voluntarily disclose violations in the past

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TRUTH IN NEGOTIATIONS ACT 10
U.S.C. 2306a U.S.C. 254B

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Cost or Pricing Data

- Contract or Modification exceeds \$650,000
- Contracting Officer cannot determine that prices are based on adequate price competition or that prices are set by law or regulation.
- \$650,000 threshold is determined as the aggregate value of the modification - increase for new work plus decrease for deleted work, if applicable.

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Cost or Pricing Data

- “Cost or pricing data” means all facts that, as of the date of the agreement on price, a prudent buyer or seller would reasonably expect to affect price negotiations significantly. The term does not include information that is judgmental, but includes the factual information from which a judgment was derived, and are verifiable.

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Cost or Pricing Data

- Contractor (or subcontractor) must certify that, to the best of its knowledge and belief, the cost or pricing data were accurate, complete and current as of the date of agreement on price (or such other date as agreed).

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Subcontractor Cost or Pricing Data

- Before awarding a subcontract or subcontract modification exceeding \$650,000, the prime shall require the subcontractor to submit cost or pricing data, unless:
 - Price is based on adequate competition
 - Price is based on established catalog or market prices
 - Price is set by law or regulation
 - Prime shall require the subcontractor to certify that its data is current, complete and accurate
 - Flowdown requirement for subcontracts exceeding \$650,000 that do not meet any of the exceptions

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Price Reduction For Defective Cost or Pricing Data

- The government is entitled to a downward price adjustment from the prime if the contract price was increased because
 - the prime or subcontractor furnished cost or pricing data that were not current, complete and accurate, as certified.
 - a subcontractor or prospective subcontractor furnished the prime with cost or pricing data that were not current, complete, and accurate, as certified.

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Price Reduction for Defective Cost or Pricing Data

- When the Contracting Officer determines that a price reduction should be made, the contractor agrees not to raise certain defenses:
 - superior bargaining position would have led to the same contract price
 - the government should have known that the data were defective
 - the pricing was based on an agreement on the total cost and not on individual elements
 - there were no certifications

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Price Reduction for Defective Cost or Pricing Data

- In addition to the actual price reduction, the repayment calculation includes:
 - interest from the date of overpayment
 - a penalty equal to the overpayment, if there was a knowing submission of inaccurate data

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Prohibited Conduct

- Independent Price Determination
- False Claims
- Gratuities
- Kickbacks

66

Independent Price Determination

- You must determine your price on a public contract independently of other bidders
- You will be required to certify that you did so

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Independent Price Determination

- Collusive Bidding
 - Bid Rotation
 - Complementary Bidding
 - Market Division

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Independent Price Determination

- Joint Ventures and Teaming Agreements are permitted
 - Must be disclosed
 - Must not violate the antitrust laws

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False Statements and Claims

- Criminal Fraud
- Civil Fraud

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False Statements

- Willfully made false statement or used a document knowing it contained false information
- Concerning a matter within the jurisdiction of an agency or department of the Government
- Statement was false
- You knew the statement was false when made

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False Statements

- Statement must be material
- Numerous Certifications
- Letters
- Meetings with the Contracting Officer

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Civil False Claims

- Knowingly presents a false or fraudulent claim
- Knowingly makes or uses a false record
- Conspires to get a false claim paid
- Knowingly makes or uses false record to conceal, avoid or decrease an obligation to the Government

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False Claims

- Claim – broadly defined
 - Any attempt to get money from the Government
 - Directly or indirectly

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Criminal False Statements and Claims Penalties

- 5 years in prison
- \$250,000 fine for individuals
- \$500,000 fine for companies

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Major Fraud Act

- Procurements in excess of \$1 million
- Penalties:
 - 10 years in prison
 - \$1 million fine
 - Maximum fine \$10 million
- Whistleblower Provisions

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Civil False Claims Penalties

- \$5,500 to \$11,000 for each false claim
- 3 times the damage caused to the Government
- Costs of prosecution
- Each false claim can mean every invoice

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Gratuities

- Offer or acceptance of anything of value
- For or because of an official act
- Anything of value
- Given, offered or promised to a public official
- Because of any official act performed or to be performed

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Gratuities

- Criminal Penalties
 - 2 years in prison
 - \$500,000 fine (organization)
 - \$250,000 fine (individual)
- FAR CONTRACT CLAUSE – 52.203-3
 - Termination for default
 - Breach of contract damages
 - Suspension/Debarment
 - Exemplary damages (10x the gratuity if DoD funds)

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Gratuities

- Gift broadly defined to include any gratuity, fraud, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value.
- Also includes services as well as gifts of training, transportation, local travel, lodgings and meals, whether provided in-kind, by purchase of ticket, payment in advance, or reimbursement after the expense has been incurred.

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Gratuities

- Gift does not include:
 - modest items of food and refreshments, such as soft drinks, coffee and donuts, offered other than as part of a meal;
 - greeting cards and items with little intrinsic value, such as plaques, certificates, and trophies, which are intended solely for presentation.
 - benefits offered to all members of the general public

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Kickbacks

- The Rule: You may not give something of value to a prime contractor or higher-tier subcontractor in exchange for:
 - A subcontract award
 - Other favorable treatment that could lead to a contract award
 - Continued contractual relations

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Kickbacks

- What is a kickback?
 - a thing of value
 - can include commission, credit, gift, gratuity or compensation of any kind
- Imputation of knowledge
 - a company can be liable for a kickback made by an employee even if company officials had no knowledge of the kickback

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Kickbacks

- The government must establish
 - you provided, attempted to provide, or offered to provide a kickback; or
 - you solicited, accepted, or attempted to accept a kickback; or
 - you included, directly or indirectly, the amount of the kickback in subcontract or prime contract price.

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How To Recognize A Kickback Problem

- Restricted number of vendors allowed to bid
- Certain bidders always bid against each other
- “broker” buying rather than direct purchases from suppliers/vendors
- Buyers socializing with vendors/salespeople
- All bidders represented by one or two brokers
- Inadequate or missing cost or price analyses

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How To Recognize A Kickback Problem

- Patterns where the last bidder to respond always receives the award
- No “separation of power” between originator of requirement; orderer; receiver; and payer
- Only one bid is at or below any fair cost estimation
- Potential bidders complain that they are not notified of pending solicitations or subcontracts

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Contractors' Obligation

- Kickback prevention programs (primes)
- Cooperation with investigations, i.e., reporting and access (primes)
- Report, in writing to IG or DOJ, when you have “reasonable grounds” to believe a violation has occurred (primes and subs)
- (N.B.: Reporting is “favorable evidence” of “present responsibility!”)

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Disputes

- Governed by the Contracts Disputes Act of 1978 (“CDA”)
 - Contract remedy granting clauses
 - Breach of contract
 - Request for Equitable Adjustment (REA) versus Claim

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Disputes

- Different from Request for Equitable Adjustment (REA)
 - REA must be analyzed by CO
 - No Interest
 - Legal fees may be recoverable

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Disputes

- Not Covered
 - Independent torts
 - Fraud
 - Labor Standards Statutes
 - Davis Bacon
 - Service Contract Act
 - Contract Award Issues
 - Subcontract claims - directly against Government

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DISPUTES CLAUSE FAR 52.233-1

CLAIM: Written demand or written
assertion for

- a sum certain
- adjustment or interpretation of contract terms
- other relief arising under or relating to the contract

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Disputes

Claim requires

- that there be a dispute
 - CO had previous knowledge of the matter
 - indicated disagreement or
 - unreasonably delayed in responding
 - need to reach an impasse

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Disputes

Claim should:

- Provide a clear statement of the facts and issues
- Provide a clear statement of a sum certain
- Request a contracting officer's final decision

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Disputes

Certification

- Claims greater than \$100,000
 - total of increases and decreases
 - aggregate v. separate
 - not needed for non-monetary claims (e.g., default termination)

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Disputes

Disputes Clause contains the certification language:

- “I certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of my knowledge and belief;
- that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable;
- and that I am duly authorized to certify the claim on behalf of the Contractor.”

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Disputes

- Certification by any person duly authorized to bind the contractor with respect to the claim
 - Must have knowledge of the basis of the claim, the accuracy and completeness of the supporting data.

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Disputes

LIMITATIONS PERIOD

Claim must be submitted within 6 years after accrual of the claim except claim by the Government for fraud.

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Disputes

CONTRACTING OFFICER'S FINAL DECISION

- Timing
 - Claims less than \$100,000 - 60 days of receipt
 - Claims greater than \$100,000 - within 60 days of receipt:
 - issue decision
 - notify the contractor of the time when decision will be issued, then do so within a reasonable time
 - Deemed denied

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Disputes

CONTRACTING OFFICER'S FINAL DECISION

- Must be a decision of the CO
 - independent and personal

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Disputes

APPEAL OF THE FINAL DECISION

- Final Decision provides guidance for appeal
- Timing
 - 90 days from date of receipt if appealed to a Board - mailed and delivered
 - 12 months from date of receipt if appealed to the Court of Federal Claims filed with the clerk

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Disputes

APPEAL OF THE FINAL DECISION

- Forum
 - Boards of Contract Appeals
 - Court of Federal Claims

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Flowdown Clauses for Subcontractors

- Mandatory Clauses
- Optional/Recommended Clauses

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Flowdown Clauses

- Mandatory Clauses
 - Socio-economic clauses
 - Environmental clauses
 - Cost or pricing data and audit clauses
 - Patents
 - Subcontractor/supplier payment clauses

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Flowdown Clauses

- Optional/Recommended Clauses
 - Changes and differing site conditions
 - Termination for default and convenience
 - Stop work and suspension of work
 - Certifications
 - Notice
 - Inspection and acceptance
 - Technical data rights
 - Disputes resolution procedures

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Flowdown Clauses

- Modify the Clauses to fit
- Time limits
- Avoid ambiguities
- Reconcile with standard contract language

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Notes

This file is set up for duplexed printing. Therefore, there are pages that are intentionally left blank. If you print this file, we suggest that you set your printer to duplex.