

Chapter 1
**Introduction to
Government Contract Law**



2014 Contract Attorneys Deskbook

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CHAPTER 1

INTRODUCTION TO GOVERNMENT CONTRACT LAW

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CHAPTER 1

INTRODUCTION TO GOVERNMENT CONTRACT LAW

I. COURSE OVERVIEW

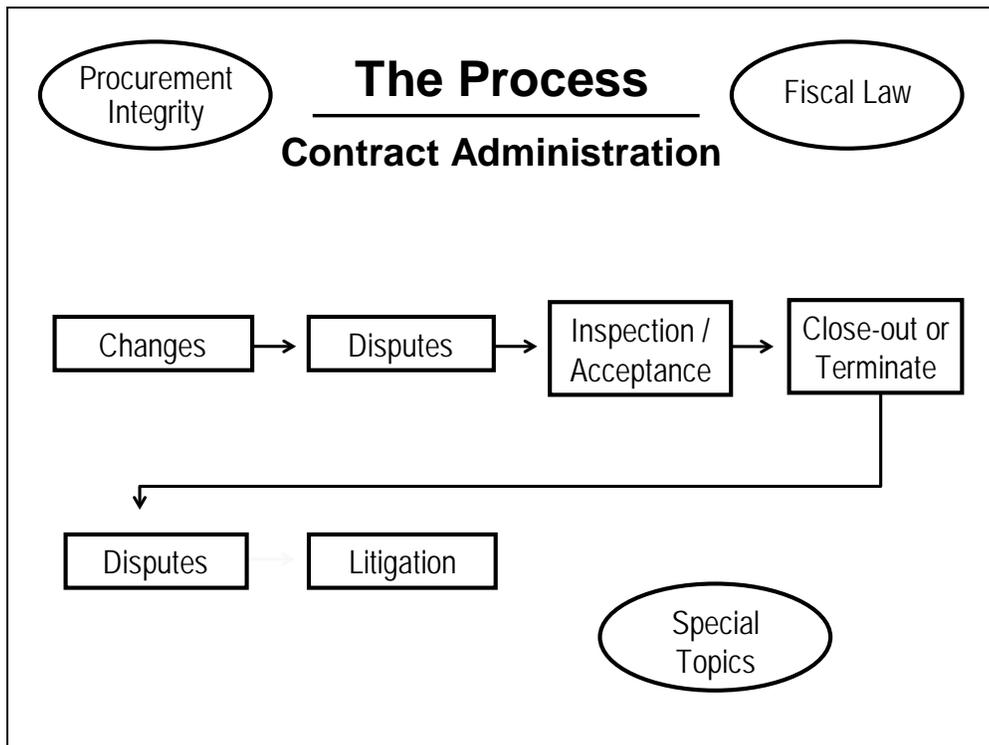
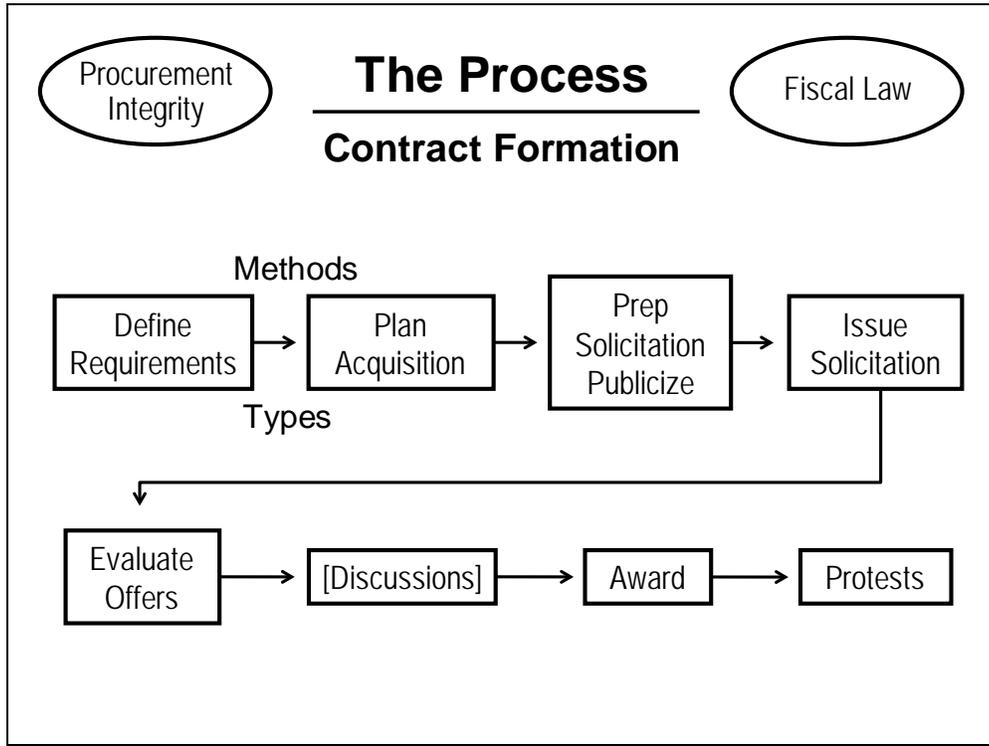
This course and deskbook are broken down into the two parts of Government Contracting - Contract Formation and Contract Administration. These phases are not necessarily distinct and are broken out separately only to aid understanding. Practitioners must realize that these steps often run together or are out of sequence. Early and frequent attorney involvement in any and all of these steps will often prevent problems from arising in subsequent steps. A graphic of these phases can be found at Section II below.

- A. Part I - Contract Formation. Contract Formation entails the process and requirements for procuring goods and services on behalf of the Government. The formation phase concerns issues that arise primarily when entering into a contract. It generally begins with the process of defining the Government's requirements.
 - 1. Major topics include:
 - a. Authority – what individuals have the authority to bind the Government in a contract action.
 - b. Competition – what are the minimum requirements to solicit competition among contractors to fill the Government's needs, and are there any applicable exceptions.
 - c. Methods of acquisition (e.g., simplified acquisition, sealed bidding, contracting by negotiation) – what contracting method will be used to solicit bids, quotes, or proposals, and how will those responses be evaluated against each other in order to select a winner.
 - d. Contract types – how will the contract be structured and what are the pricing mechanisms.
 - e. Socioeconomic policies – are there public policy concerns or requirements that apply.
 - f. Protests – has the Government followed all applicable regulations and its own procurement approach such that an award is both fair and prudent.
 - (1) Procurement fraud – has the procurement been tainted by unethical or illegal conduct.

- B. Part II - Contract Administration. Part II of the course, contract administration, concerns contract performance and other special topics. Once the contract is awarded, numerous oversight and management responsibilities continue to ensure the Government gets what it bargained for, and to protect the Contractor against unfair treatment. The administration phase concerns issues that arise primarily during performance of a contract.
1. Major topics include:
 - a. Contract changes – how do changed requirements affect an existing contract.
 - b. Inspection and acceptance – how does the Government ensure it gets the quality and quantity of goods and services it contracted for.
 - c. Terminations for default and for the convenience of the government – when can the Government terminate a contract.
 - d. Contract claims and disputes – how are disagreements between the contractor and the Government resolved.
 - e. Procurement integrity and ethics in government contracting – are contracts administered fairly, ethically, and legally.
 - f. Alternative Dispute Resolution (ADR) – are there alternate forums to resolve contractor/Government disputes.
- C. Deployment Contracting and Contingency Contractor Personnel –there are unique policies and procedures that apply to federal procurements in a contingency environment.
1. Government Contract Law Deskbook, Volume I and Volume II. Electronic versions are available on the TJAGLCS Contract and Fiscal Law Department’s webpage on JAGCNet and the Library of Congress’ website (http://www.loc.gov/rr/frd/Military_Law/military-legal-resources-home.html).
 2. Other Great Resources.
 - a. John Cibinic, Jr., and Ralph C. Nash, Formation of Government Contracts, published by Government Contracts Program, George Washington University, 3d edition, 1998.

- b. Cibinic, Nash, and Nagle, *Administration of Government Contracts*, published by The George Washington University, 4th edition, 2006.
3. A listing of some contract law terminology and common abbreviations is found at Appendix A of the *Government Contract Law Deskbook, Volume I*. For further information, definitions, and explanations, *see* Nash, Schooner, O'Brien-Debaeky, and Edwards, *The Government Contracts Reference Book*, published by The George Washington University, 3d edition, 2007.

II. OVERVIEW OF THE GOVERNMENT CONTRACTING PROCESS



III. COMMERCIAL/GOVERNMENT CONTRACT COMPARISON.

A. Interrelationship of Commercial and Government Contract Law. The government, when acting in its proprietary capacity, is bound by ordinary commercial law unless otherwise provided by statute or regulation.

“If [the government] comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there.” Cooke v. United States, 91 U.S. 389, 398 (1875).

B. Federal Statutes and Regulations Preempt Commercial Law. Government statutes and regulations preempt and predominate over commercial law in nearly every aspect.

“Our statute books are filled with acts authorizing the making of contracts with the government through its various officers and departments, but, in every instance, the person entering into such a contract must look to the statute under which it is made, and see for himself that his contract comes within the terms of the law.” The Floyd Acceptances, 74 U.S. 666, 680 (1868).

C. Agency Supplements. Numerous agency and command-level supplements provide additional direction and constraint over the public procurement process. *See* Chapter 2, Contract Format and the FAR.

IV. ROLE OF PUBLIC POLICY IN GOVERNMENT CONTRACT LAW

A. Objectives of Government Contracting (*See* Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 Public Procurement Law Review 103 (2002) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=304620). In a short but insightful article, Professor Schooner describes various objectives and principles of a public contracting system. These principles are sometimes difficult to harmonize and may create points of friction for practitioners. A few of the objectives and principles are highlighted below and are recurring themes throughout the Contract Attorney’s Deskbook and federal acquisition regulations.

1. Core Principles: Competition, Transparency, Integrity, Fairness.
2. Socioeconomic Policies: e.g., Labor Standards, FAR Part 22; Foreign Acquisition, FAR Part 25; Small Business Programs, FAR Part 19; Other Socioeconomic Programs, FAR Part 26.

3. Customer Satisfaction.
- B. The Procurement Environment: The Acquisition Workforce. The Government's ability to efficiently procure quality goods and services at reasonable prices is directly tied to the size and quality of the acquisition workforce. Numerous initiatives have been launched in recent years to establish specific education and training standards for civilian and military contracting professionals (*see, e.g.*, Defense Acquisition Workforce Development Fund (DAWDF) Sec. 852 of the 2008 National Defense Authorization Act, Public Law No. 110-181). Contract attorneys are not typically considered part of the acquisition workforce (but they are a recognized member of any acquisition team and bring a unique skill set that can help detect, avoid, and resolve problems. Contracts Attorneys must work with the various other participants in the acquisition process (*see* Section VII below for a listing of the various players typically involved in the procurement process).
- C. Public Policy and Contract Clauses
1. Clauses required by statute or regulation will be incorporated into a contract by operation of law. Voices R Us, ASBCA Nos. 51026, 51070, 98-1 BCA ¶ 29,660; G. L. Christian & Assoc. v. United States, 160 Ct. Cl. 1,312 F.2d 418, cert. denied, 375 U.S. 954 (1963) (regulations published in the Federal Register and issued under statutory authority have the force and effect of law).
 2. Clauses included in a contract in violation of statutory or regulatory criteria will be read out of a contract. Empresa de Viacao Terceireense, ASBCA No. 49827, 00-1 BCA ¶ 30,796; Charles Beseler Co., ASBCA No. 22669, 78-2 BCA ¶ 13,483 (where contracting officer acts beyond scope of actual authority, Government not bound by his acts).
 3. A clause incorporated erroneously will be replaced with the correct one. S.J. Amoroso Constr. Co. v. United States, 12 F.3d 1072 (Fed. Cir. 1993).
 4. Contracts tainted by fraud in the inducement may be void ab initio, cannot be ratified, and contractors may not recover costs incurred during performance. Schuepferling GmbH & Co., KG, ASBCA No. 45564, 98-1 BCA ¶ 29,659; Godley v. United States, 5 F.3d 1473 (Fed. Cir. 1993).

V. CONTRACT ATTORNEY ROLES

- A. Advisor to the Commander and the Contracting Officer.
1. Advise on formation and administration phase issues.

2. Advise on fiscal law issues.
- B. Litigator.
1. Protect the record (whether formation or administration).
 2. Litigate protests.
 3. Litigate disputes.
 4. Litigate collateral matters before federal bankruptcy, district, and circuit courts.
- C. Fraud Fighter.
1. Advise how to prevent, detect, and correct fraud, waste, and abuse.
 2. Provide litigation support for fraud cases.
- D. Business Counselor.
1. Ensure the commander and contracting officer exercise sound business judgment.
 2. Provide opinions on the exercise of sound business practices.
 3. Counsel is part of the contracting officer's team. FAR 1.603-2, 15.303(b)(1). Army policy requires counsel to participate fully in the entire acquisition process, from acquisition planning through contract completion or termination and close out. Army Federal Acquisition Regulation Supplement (AFARS) 5101.602-2.

VI. CONTINUING EDUCATION FOR CONTRACT LAW PROFESSIONALS

- A. Basic Courses.
1. Contract Attorneys Course (CAC).
 - a. Provides instruction on basic legal concepts pertaining to government contract law.
 - b. The course is offered annually and lasts two weeks.

2. Fiscal Law Course.
 - a. Provides training on the statutory and regulatory limitations governing the obligation and expenditure of appropriated funds, and an insight into current fiscal law issues within DOD and other federal agencies.
 - b. The course is offered annually and lasts 4 ½ days.

B. Advanced Courses.

1. Government Contract and Fiscal Law New Developments Course.
 - a. This course covers significant Government procurement law developments in legislation, case law, and policy, and provides advanced instruction on selected topics.
 - b. The course is offered annually and lasts 3 ½ days.
 - c. Course attendance is limited to senior-level contract law attorneys.
2. Procurement Fraud Course.
 - a. This course provides amplifying guidance and instruction on current policies and trends for procurement attorneys who serve as procurement fraud advisors.
 - b. The course is offered every other year (even years) and lasts 2.5 days.
 - c. Course is administered in conjunction with the Army's Procurement Fraud Branch.

VII. CONCLUSION.

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